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CASES DETERMINED

IN THE

Supreme Court of Arkansas

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JUDGES AND OFFICERS

OF THE

SUPREME COURT

OF ARKANSAS

DURING THE PERIOD OF THIS VOLUME

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CARROLL D. WOOD,	Associate Justice
FRANK G. SMITH,	Associate Justice
THOMAS H. HUMPHREYS,	Associate Justice
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CASES DETERMINED

IN THE

SUPREME COURT OF ARKANSAS

PHILLIPS *v.* PHILLIPS.

Opinion delivered March 7, 1927.

1. DEEDS—AGREEMENT TO SUPPORT AS CONSIDERATION.—Where a deed was executed in consideration of an agreement by the grantee to support the grantor and his wife, and this agreement is made by the grantee for the fraudulent purpose of securing the deed and without intending to carry out the condition of the deed, this constitutes a fraud avoiding the conveyance, and equity will set it aside.
2. CANCELLATION OF INSTRUMENT—FRAUD IN PROCUREMENT OF DEED. —Refusal of a son to support his mother, pursuant to his agreement to do so, made in consideration of a deed from the father, raises a presumption of abandonment of the contract and of a fraudulent intent in entering into it, justifying cancellation of the deed for fraud in its procurement.

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

STATEMENT OF FACTS.

Sarah Phillips, as administratrix of the estate of Abe Phillips, deceased, brought this suit in equity against Joe Phillips to cancel a deed to a certain forty-acre tract of land in Hot Spring County, Arkansas. The suit was defended upon the ground that the title to the land was in Joe Phillips.

Sarah Phillips was the principal witness for the plaintiff. According to her testimony, her husband, Abe Phillips, obtained title to the forty acres of land in controversy by deed from their son, Jim Phillips. The deed was not recorded, and was destroyed at the time that their dwelling-house was burned. Jim Phillips refused to execute another deed to his father, and the latter con-

sulted with an old friend, who was a justice of the peace, about the matter. The justice advised Abe Phillips to make a deed to his son, Joe Phillips, and then let Joe Phillips reconvey the land to him, and that, in this way, there would be a paper title to the land in Abe Phillips which might be filed for record. Pursuant to this plan Abe Phillips executed a deed to the land to his son, Joe Phillips. The matter ran along for about a year, and Abe Phillips and his wife, Sarah Phillips, continued to live upon the land. Abe Phillips then demanded a deed from Joe Phillips, which the latter refused to execute. Abe Phillips died in a few days thereafter, and Sarah Phillips became administratrix of his estate. Upon the refusal of her son, Joe Phillips, to execute a deed reconveying the land to the estate of Abe Phillips, deceased, she instituted suit in the chancery court to annul his deed. Her testimony was corroborated by that of other witnesses, and it was also shown by the evidence for the plaintiff that Joe Phillips failed and refused to contribute anything to the support of Sarah Phillips after the death of her husband.

Joe Phillips was the principal witness for himself. According to his testimony, the deed was executed to him by his father, Abe Phillips, to the forty acres in controversy on July 24, 1919, and the consideration recited in the deed was $500. The real consideration was that Joe Phillips would allow his father to continue to live on the land during his lifetime and would help support him. It was also a part of the consideration that, if the mother of Joe Phillips should outlive her husband, the son would see that she would not suffer. Joe Phillips promised his father, Abe Phillips, to do this, and that was the real consideration for the execution of the deed.

The chancellor found the issues in favor of the plaintiff, and it was decreed that the deed to the forty acres in controversy from Abe Phillips to Joe Phillips should be canceled. To reverse that decree Joe Phillips has duly prosecuted an appeal to this court.

John L. McClellan, for appellant.

D. D. Glover, for appellee.

HART, C. J., (after stating the facts). According to the evidence of Joe Phillips, the decision of the chancellor was correct. Accepting his testimony as representing the true facts in the case, Joe Phillips took the land upon a condition subsequent; the sole consideration for the conveyance to him by his father was the home comfort he was to give to his father and the support of his mother in her declining years, if she should outlive her husband. Thus, under the real consideration of the deed, a continuous and fixed duty rested upon the son to support his mother. He admitted in his own testimony that no amount of money was paid by him to his father as a consideration for the deed, and that the real consideration was the comfort and support he was to give his parents in their declining years. No part of the $500 recited as the consideration in the deed was ever paid or intended to be paid. The real consideration was to secure the means of support for his father and mother. According to the testimony for the plaintiff, the defendant failed and refused to support his mother after the death of his father. The defendant admits that he quit supporting his mother but attempts to justify his action on the ground that she refused to live with him any longer, and went to live with some of her other children.

The ground for equitable relief in cases of this sort, under our decisions, arises from the fraud which the circumstances of the case show would be perpetrated but for such interposition of the court upon the party asking such relief. Where a deed is executed in consideration of the agreement by the grantee to support the grantor or the grantor and his wife, and this agreement is made by the grantee for the fraudulent purpose of securing the deed and without intending to carry out the condition of the deed, this constitutes a fraud avoiding the conveyance, and equity will set it aside. *Salyers* v. *Smith,* 67 Ark. 526, 55 S. W. 936; *Whittaker* v. *Trammell,* 86 Ark. 251, 110 S. W. 1041; *Priest* v. *Murphy,* 103 Ark.

464, 149 S. W. 98; and *Goodwin* v. *Tyson,* 167 Ark. 396, 268 S. W. 15.

In the case at bar Abe Phillips, the grantor in the deed, continued to reside upon the land up to the time of his death, and Joe Phillips made no attempt to obtain possession of it. He admits that no part of the consideration named in the deed was paid and that it was never intended to be paid. He also admits that the real consideration was that he should support his mother if she outlived his father. He did not do so, and these circumstances give rise to the presumption of the abandonment of his contract to support his mother and of a fraudulent intent upon his part in entering into it. In other words, his refusal and neglect to carry out the promise of support to his mother raises the presumption that Joe Phillips did not intend to comply with his contract in the first instance, and that therefore the contract was fraudulent in its inception, and the chancery court was justified in canceling the deed for fraud in procuring it.

Therefore the decree will be affirmed.

DEAN v. STATE.

Opinion delivered March 7, 1927.

1. HUSBAND AND WIFE—ABANDONMENT OF WIFE.—Under Crawford & Moses' Dig., § 2596, as amended by Acts 1923, p. 265, making a husband's abandonment or desertion of his wife or children without cause punishable by jail sentence, or as felony in case he leaves the State, abandonment or desertion, as used in the statute, contemplates willful separation without justification, with intent not to return.
2. HUSBAND AND WIFE—ELEMENTS OF WIFE ABANDONMENT.—Under Crawford & Moses' Dig., § 2596, as amended by Acts 1923, p. 265, providing that if a husband, without cause, abandons or deserts his wife or child and leaves the State, he shall be guilty of a felony, abandonment or desertion of the wife or child in the State and departure therefrom by the husband or father must be shown.
3. HUSBAND AND WIFE—ABANDONMENT OF WIFE.—Where a husband and wife voluntarily separated in another State, the wife com-

ing to Arkansas, the husband, who later returned to his wife on the sickness of a child, but did not resume marital relation, was not guilty of abandonment or desertion on subsequently leaving the State, under Crawford & Moses' Dig., § 2596, as amended by Acts 1923, p. 265, § 1, as no abandonment took place in this State.

4. CRIMINAL LAW—SUFFICIENCY OF EVIDENCE.—In determining whether evidence was sufficient to support a verdict of conviction, the testimony is viewed in the light most favorable to the State.

Appeal from Yell Circuit Court, Dardanelle District; *J. T. Bullock,* Judge; reversed.

Hays, Priddy & Rorex, for appellant.

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

HART, C. J. George O. Dean was indicted for a felony charged to have been committed by abandoning his wife by leaving the State. The jury trying him found him guilty of a felony and fixed his punishment at nine months in the State Penitentiary. The case is here on appeal.

The indictment was returned under act 331 of the Acts of 1923, amending § 2596 of Crawford & Moses' Digest, General Acts of 1923, page 256. Section 1 of the act reads as follows:

"If any man shall, without good cause, abandon or desert his wife, or abandon his child or children under the age of fourteen years, born in or legitimatized by lawful wedlock, or shall fail, neglect or refuse to maintain or provide for such wife, child or children, he shall, upon conviction, be punished by imprisonment in the county jail for not more than one year, or by a fine not less than fifty nor more than one thousand dollars, or both such fine and imprisonment; provided, however, that if such person, after leaving his wife or child, or wife and child, or children, shall leave the State of Arkansas, said person shall be guilty of a felony, and punishable by imprisonment in the penitentiary for a time not to exceed one year; and provided, however, that in all cases the court may suspend sentence upon probation, employment and support of his wife or child, or wife and child, or children, as the case may be."

In the construction of the act this court has held that, in order for the State to convict the accused of such a felony, it is necessary for the State to prove that he left the State as a part of his act of desertion. The reason given was that the punishment is not for leaving the State but for the desertion of the wife or children, committed in this manner. *Dunham* v. *State,* 169 Ark. 257, 275 S. W. 325. Desertion or abandonment, as used in the statute, contemplates willful separation by one party from the other, without justification, with the intention of not returning. The elements of the felony offense are abandonment of the wife or child in this State and the going out of the State by the husband or father.

Tested by this principle, in our opinion, the conviction of the defendant should be set aside and he should be discharged. The wife of the defendant was the complaining witness, and the State relied entirely on her evidence for conviction.

According to the evidence of Mr. Dean, she married the defendant at Centerville, Yell County, Arkansas, on the 18th day of June, 1911. Seven children were born of their marriage, and four of them are now living and are with the defendant at his home in the State of Texas. The defendant and his wife first moved to the State of Oklahoma and lived at various places there. The defendant is a preacher. Finally they went to Texas. Mrs. Dean claimed that she could not live in the town where the defendant preached, because of her health. Finally, during the summer of 1924, the defendant fitted up a Ford truck and traveled with his wife in the State of Texas for her health. In November, 1924, the defendant was called to the pastorate of a Presbyterian church at Mule Shoe, Texas, which was a small town. Instead of locating in the town, at Mrs. Dean's suggestion they lived twelve miles out, in a tent. Mrs. Dean complained that the water there was not good for her and made up her mind that she was going to return to Sulphur Springs, in the Dardanelle District of Yell County, Arkansas. She had an aunt who had gone there, and thought the

water would help her. According to her testimony, her husband did not want her to return to Arkansas, but finally gave his consent. The defendant was not making much, and sent his wife all that he made over and above his living expenses. When the witness came back to Arkansas, she brought the children with her. Finally one of them got sick, and the defendant received a telegram from a friend at Sulphur Springs, Arkansas, notifying him that if he wished to see his child alive he had better return at once. He hurriedly returned to Arkansas and helped nurse the child back to health. He stayed at a neighbor's house most of the time while in Arkansas, and never resumed marital relations with his wife while there. Sometimes, while helping to nurse his child, he would sleep under the same roof with his wife, but they never slept in the same room or resumed their marital relations. After the children got well, the defendant moved them to his mother's home, and then carried them and his mother back to his home in Texas. According to his testimony, he returned to his pastorate in Texas and carried his children back with him. His wife refused to return with him. According to her testimony, she wanted to go back to Texas with him, and begged him to take her and not to separate her from her children.

Now, according to her own testimony, the separation occurred while they were in the State of Texas, and was a voluntary one on her part. She came back to Arkansas to regain her health, and brought her children with her. It is true that she says she intended to return to her husband at some indefinite time in the future, when she should regain her health. Giving her testimony its strongest probative force, there was no desertion or abandonment of her by her husband in the State of Texas. At most, there was nothing more than a voluntary separation between them. The defendant returned to Arkansas because he was informed that one of his children was about to die. He helped nurse the child back to health, and, while doing so, sometimes slept under the same roof

with his wife. They never occupied the same room and never resumed their marital relations at all. Hence it is apparent that, whatever separation there was between the parties or abandonment, occurred in the State of Texas; and, inasmuch as the marital relations were not resumed in the State of Arkansas, there was no abandonment there, and the defendant did not leave the State in consequence of such abandonment or desertion. According to the defendant's testimony, he merely returned to Texas to resume his work as the pastor of a Presbyterian Church which had been interrupted by his return to Arkansas for the purpose of visiting his sick child, who was about to die. In any event, according to the testimony of the wife, their separation occurred in Texas, and the defendant could not leave the State of Arkansas as a part of his act of deserting his wife unless he first deserted his wife in the State of Arkansas. Moreover, according to the testimony of the defendant, which is not contradicted, he always gave his wife one-half of his income, or at least all that was left after a bare support for himself. He only made a small amount of money, and spent all of it on his family except a bare living for himself. His testimony in this respect was not contradicted.

Hence, as far as the statute under consideration is concerned, no criminal act was committed by the defendant, when the testimony is viewed in the light most favorable to the State. The wife was the complaining witness, and her testimony is set out at length in the transcript. We have only copied the substance of it in this opinion, but deem it proper to say that the whole case has been thoroughly developed, and no useful purpose could be served by remanding the case for a new trial.

The judgment will be reversed because the evidence is not legally sufficient to support the verdict, the prosecution will be dismissed, and the defendant ordered discharged.

MUTUAL RELIEF ASSOCIATION *v.* RAY.

Opinion delivered March 7, 1927.

1. INSURANCE—LIABILITY OF MUTUAL RELIEF ASSOCIATION.—A mutual relief association, doing business on the assessment plan, *held* to be a *de facto* corporation and liable for damages for a violation of its contract to its policy or certificate holders the same as any life insurance corporation.

2. INSURANCE—AUTHORITY OF MUTUAL BENEFIT ASSOCIATION TO INCREASE ASSESSMENTS.—A by-law of a mutual assessment association authorizing the directors to raise or lower the incidental fee paid by an applicant for membership to defray expenses incurred in the completion of a company in the association *held* not to authorize the association to increase the assessments payable by members.

3. INSURANCE—AUTHORITY TO INCREASE ASSESSMENTS.—In the absence of any provision in a policy or in the by-laws of a mutual benefit association, authorizing such association to increase its assessments to conform to statutes subsequently enacted, such association had no authority to increase the assessments on policies issued before the enactment of such statutes.

4. INSURANCE—PAYMENT OF BENEFITS.—A provision of a policy of an assessment benefit association that, if the beneficiary dies before the insured, the benefits shall be paid to the insured's legal representative, defines the rights of the policyholders in such case, and does not apply where the association repudiates liability on the policy before the death of either beneficiary or member.

5. INSURANCE—RIGHTS OF BENEFICIARY.—A provision in a policy of a mutual benefit association making the benefits under the policy payable to insured's legal representative in case the beneficiary named dies before the insured shows that the beneficiary did not have an absolute and unrestricted vested interest.

6. INSURANCE—REPUDIATION OF CONTRACT—RIGHT OF ACTION.—Where a beneficiary's rights under a mutual assessment association's policy were not vested and the present value of the policy was uncertain, the beneficiary had no cause of action on the association's repudiation of the contract, but the insured did have a cause of action.

7. INSURANCE—BREACH OF CONTRACT—RIGHT OF ACTION.—The rule that, when one party to an executory contract prevents a performance of the contract or puts it out of his power to perform it, the other party may regard the contract as terminated and demand the damages sustained, applies to insurance contracts.

8. INSURANCE—LIABILITY ON BOND OF ASSESSMENT ASSOCIATION.—A bond given by an assessment benefit association under Crawford & Moses' Dig., § 6016, conditioned for the prompt payment of all assessments to parties or beneficiaries entitled to them and making such sureties liable for any violation of conditions or any loss which may accrue to policyholders or beneficiaries, *held* to bind the sureties merely to see that the insurer pays over all assessments to parties or beneficiaries entitled thereto, but not to make them liable for the association's repudiation of any liability.

9. INSURANCE—REPUDIATION OF CONTRACT—DAMAGES.—Where an assessment benefit association wrongfully repudiated its contract, the insured may treat the contract as rescinded and recover all assessments paid, with interest from the date of payment of each assessment.

Appeal from Logan Circuit Court, Southern District; *James Cochran,* Judge; reversed as to sureties; affirmed as to association.

John P. Roberts and *Carmichael & Hendricks,* for appellant.

Evans & Evans, for appellee.

WOOD, J. Three separate actions were instituted in the Logan Circuit Court by separate plaintiffs against the Mutual Relief Association and W. T. Roberts, John P. Roberts and Chas. X. Williams. It is alleged in the complaints that the defendant association was a mutual life insurance company which was authorized to do, and was doing, business in this State; that the other defendants were owners, directors and bondsmen of the association. It was alleged that, in consideration of the applications and the payment of the initial premiums, the association issued its policies insuring the lives of the respective plaintiffs in favor of the beneficiaries named therein, who were also plaintiffs in the actions. The policies provided, among other things, that, in consideration of the applications, which were made a part of the policies, and the payment of the premiums, the association would pay to the beneficiaries, in case of the death of the assured within six months, the sum of $100, and, if death occurred in the next calendar month, the sum of $112.50, the amount of the payment to increase thereafter in the

sum of $12.50 per calendar month for a period of seventy-eight months from the date of the policies, until the maximum amount of $1,000 was reached, which should thereafter remain the sum to be paid. The amounts due under the policies were to be paid from assessments of the members and to be paid only upon condition that the assessments were paid under the rules and by-laws of the company. Upon failure of the members to pay the assessments as provided in the contract, the policies became null and void. The policies contained a provision that no suit or proceeding shall be brought after a lapse of one year from the date of the death of a member. The assessments, upon the death of member, equaled the initial assessment plus one cent per month during the time the member had been connected with the association until the seventy-eighth month from the date of the policy, when the maximum assessment would be $1.32 in Mrs. Ray's policy, $1.25 in Mrs. Gray's and $1.11 in Mrs. Crawford's. The certificate or policy contained a provision that, in the event of the death of the beneficiary prior to the death of the member, the benefits accruing under the policy were to be paid to the legal representative of the member. Mrs. Ray's policy was issued November 18, 1913, Mrs. Gray's on January 31, 1914, and Mrs. Crawford's on September 5, 1914. It is alleged in the complaints that the plaintiffs had complied with the terms of the contract of insurance on their part; that, early in 1921, the association, in violation of their contract, increased their monthly assessments above the maximum assessments under the policies. They alleged that they refused to pay these increased sums, but tendered the amount which they were required to pay under the policies, which the association refused to accept and thereby breached the contract of insurance, to the damage of plaintiff, for which they prayed judgment.

The defendants moved to dismiss the complaints on the ground that the actions were premature, inasmuch as they were instituted before the death of the assured. This motion was overruled, and the defendants answered,

admitting the contracts of insurance, but denied that they had violated their contract, and admitted that the association, through its directors, had raised the premium rates as alleged in the complaint, but alleged that they had authority to do so under the constitution and by-laws of the association and terms of the insurance contracts. The defendants admitted that they were the bondsmen of the association, and alleged that, under the terms of the bond, they were only liable for the payment of all moneys collected by the assessment from the members, and that they had not violated the terms of the bond and were not indebted to the plaintiffs in any sum under the bond.

We deem it unnecessary to set out in detail the testimony. Suffice it to say there was testimony on the part of the appellees tending to sustain the allegations of their complaints. It was shown that an attempt was made to incorporate the association under the laws of the State of Arkansas, in the year 1913, its purpose being the mutual relief and insurance of the lives of its members and the protection of the beneficiaries named in the certificates or policies of insurance. The association was divided into one or more companies, composed of not exceeding 1,000 members to each company, and the amounts due under the policies were paid by assessments levied upon each of the members of the company to which the assured belonged, and no assessment could be made for the beneficiaries of any member who was not in good standing at the time of his death. The association had a president, vice president, secretary and treasurer, general manager, and superintendent of agents, with the customary duties of such officers. Its business affairs were managed by these officers, who were elected by the board of directors. The officers and directors were entitled to reasonable compensation for their services, to be paid out of the funds of the association after all death claims were paid which had then accrued. All questions of management were decided by a majority vote of the board of directors. The duties of the officers were

prescribed by by-laws of the association. There was a provision in the by-laws as follows: "Prompt and due payment of all assessments made by the association up to the time of the death of any member and policyholder shall be a condition precedent to the right to collect death benefits from this association."

Section 3 of the by-laws is as follows: "This association, upon receiving satisfactory proof of the death of a member and policyholder in good standing, will pay to the beneficiaries named in the policy the death benefit as provided for in the policy of such member and in the by-laws of this association, within thirty days after the production of such satisfactory proof. After the payment by this association of such death benefit, the secretary shall immediately levy an assessment upon each member of the particular company in which the said death benefit had been paid, and mail notice of such assessment to each member of said company. (Each member of said company shall, upon receipt of such notice, pay such assessment to this association at its home office)."

The parties who organized and constituted the association were W. T. Roberts, C. X. Williams, T. H. Ward and J. H. O'Brien. They also constituted its board of directors. The above parties attempted to organize themselves into a corporation under the provisions of § 1788-1797 of C. & M. Digest, but the record does not show that any certificate of incorporation was granted to them under the above provisions. The record shows, however, that they assumed to act as a board of directors of a business corporation known as the Mutual Relief Association. The causes were, by consent, consolidated and tried by the court sitting as a jury. The court rendered judgment in favor of the plaintiff Ray in the sum of $471.41, in favor of the plaintiffs Gray *et al.* in the sum of $397.51, and in favor of Crawford *et al.* in the sum of $205.40. From these judgments is this appeal.

1. The appellants first contend that the causes of action should be dismissed because they were prema-

ture. They insist that, under the provisions of the contract of insurance and the charter and by-laws of the association, as above set forth, an action cannot be maintained against the association and the individuals on the bond until the death of the certificate or policyholder; that such is the effect of contracts of mutual life insurance associations organized as was the appellant. But, after a careful consideration of the provisions of the certificate or policy issued by the appellant and the by-laws which constituted a part of the contract of insurance, we are convinced that the appellant is a business organization, carrying on the business of life insurance on the assessment plan, and that it is liable in damages for a violation of its contract to its policy or certificate holders the same as any other corporation or company doing a life insurance business would be liable for a breach of contract. The fact that the appellant is designated a "mutual relief association" does not exempt it from liability in damages to those who hold its contracts of insurance and who have been damaged by reason of the failure of the governing body of such association to comply with the provisions of the contract. While there are record recitals showing that the appellant was constituted a corporation under the provisions of §§ 937-948, inclusive, of Kirby's Digest, the same being §§ 1788-1797 of C. & M. Digest, yet the testimony in this record by the witnesses and the articles of association prove conclusively that the appellant was not, and could not have been, organized as an eleemosynary corporation for charitable and benevolent purposes, under the above provisions of our law. Under the statutes above mentioned it required nine persons to constitute a corporation, whereas the testimony here shows that this corporation was organized by only four persons. The record also shows that these four individuals elected three of their number as directors of the corporation and these in turn elected themselves as general officers of the corporation. This record nowhere discloses that this association is an

eleemosynary corporation organized for benevolent and charitable purposes. The name, Mutual Relief Association, does not accurately characterize the real purpose and business of the corporation, as shown by its organization, management, by-laws and certificates or policies evidencing its contract with its members.

After a careful examination of the record we are convinced that the appellant at most is a *de facto* corporation, not fraternal, as set forth in § 6068-6120 of C. & M. Digest, but a business *de facto* corporation doing a life insurance business in this State on the mutual or assessment plan, and is governed by the statutes pertaining to such corporations as set forth in § 6016-6018½ of C. & M. Digest.

In the case of *Springfield Mutual Assn.* v. *Atnip,* 169 Ark. 968, 279 S. W. 15, the policies were similar in all essential particulars to the policies in this action. The association in that case set up that it was not liable on the policies because they were mutual benefit certificates on the assessment plan. Among other things we said:

"It is not pretended that the appellant is not doing a life insurance business in this State. Its only contention is that it is doing an insurance business on the assessment plan. But that does not make it any the less a life insurance association doing a life insurance business in this State. The contracts it issues are life insurance contracts, and such companies come within the purview of the statute applying to all insurance companies unless they are expressly exempted by the later statute, as shown by the decisions *supra.* See also *Sovereign Camp W. O. W.* v. *Newsom,* 142 Ark. 132, where we held in effect that insurance certificates issued by benefit societies to their members must be regarded the same as any other ordinary policy or contract of insurance, so far as relates to the construction and enforcement of such contracts."

The case of *Southern Mutual Life Assn.* v. *Cocherell,* 166 Ark. 202-204, 265 S. W. 595, was likewise a case where the policy was similar to these now under review, and the action was against the company and the three individuals

who signed its bond filed with the Insurance Commissioner of the State in accordance with the statute. In that case we said: "The appellant is a life insurance company conducted on the mutual or assessment plan." According to the above and many other cases of our court, insurance companies conducting a business of life insurance on the mutual or assessment plan are treated precisely as any other life insurance company, so far as the construction of its contracts is concerned. If the appellant has violated its contracts in these cases, it is liable in damages, under the terms of the contracts, to the parties in interest at the time such violation of contracts occurred."

This brings us to the issue as to whether or not the appellant violated the contract of insurance. These contracts provided that, when the assured became a member or policyholder of the association, he should pay an initial assessment, which thereafter should increase and be payable at the rate of one cent per month during the membership until the 78th month from the date of the policy, when the maximum assessment would be reached. The policyholders in the association had been members more than 78 months and were paying their assessments or premiums according to the maximum rates, which, in one case, was $1.32, in another $1.25, and in another $1.11. On March 1, 1925, the appellant, by letter, notified the policyholders that its board of directors had decided that it was necessary, in order to comply with the law, to raise the assessment of policyholders, and that it therefore proceeded to raise the assessment of one of these policyholders from $1.32 to $6, and the other policyholders were likewise raised to an amount which exceeded the maximum rates fixed by the policies. The policyholders refused to pay this increased sum, and these actions resulted by the policyholders and beneficiaries against the appellant for a violation of the insurance contracts. The testimony of the appellant's secretary shows that the appellant attempted to justify this raise in the assessments on the ground that the Legislature had conferred upon assessment benefit associations the power to increase

the assessment of their members by act No. 139 of the Acts of 1925 and by authority of § 5 of the by-laws of the association. Act No. 139, *supra,* confers upon assessment benefit associations the power to provide for the calling for extra, increased, or additional assessments, or the readjustment of rates and benefits when the assessments and contributions from its members proved to be inadequate to meet all claims and expenses. Section 5 of the by-laws provides, in part, as follows: "The revenue of this association shall be derived from a policy or incidental fee, the amount of which shall be fixed by the board of directors, and may be raised or lowered at any time as necessity may require. This fee shall be paid when the application is made for membership, and shall be used in defraying expenses incurred in the completion of a company in this association."

A mere glance at this section shows that it has no reference whatever to the assessments or premiums which the members had to pay in order to keep alive the policies of insurance. There is no provision in the policy or in the by-laws of the association which binds the policyholder to any by-laws of the association that might thereafter be adopted or any rules or regulations that it might become necessary for the association to adopt thereafter in order to conform to any future laws enacted for the government of mutual assessment benefit associations. Therefore it is manifest that the appellant had no authority, under the contract and by-laws of the association in existence at the time the policies in controversy were issued, and the laws governing assessment associations at that time, to increase the premium rates beyond those specified in the contracts of insurance. In doing so the appellant violated its contract.

But learned counsel for the appellant contends that, under the terms of the policy, neither the policyholders nor the beneficiaries can maintain this action. They ground their argument upon the following provisions contained in the certificates or policies: "In the event of the death of the beneficiary prior to the death of the

within named member, the benefits accruing by virtue of this policy shall be paid to the legal representative of the within named member." Counsel assert that this provision means that "in no event shall a member be paid anything, and therefore the member cannot sue, and there can be no way to ascertain that the beneficiary named in the certificate will outlive the member." The above provision was only intended to define the rights of policyholders in the event of the death of beneficiaries prior to the death of members in policies that were in force at the time of the death of the beneficiary, and in policies that remained in force until the death of the member. This provision has no reference whatever to the rights accruing to policyholders or beneficiaries in policies that had been violated and thus repudiated by the association prior to the death of the beneficiary and the death of the policyholder.

In 14 R. C. L., at page 1014, § 193, it is said:

"There is authority to the effect that, where a life insurance company has wrongfully declared a forfeiture of a policy issued by it, the insured cannot maintain an action at law to recover damages for breach of the contract, as the policy is still in force, and the insured has no right to sue for damages before the arrival of the time for performance by the insurer, his only remedy being a suit in equity to compel the insurer to recognize the contract. The better rule, however, seems to be that an action will lie for damages for the wrongful repudiation of an insurance contract, the cause of action residing in the beneficiary where he has a vested interest in the policy, but, where he has no vested interest, he cannot sue for a repudiation. * * * The damages recoverable for the wrongful repudiation of a life policy have been held by some courts to be the amount of premiums paid, while others add interest to that amount. The doctrine that the premium paid is the measure of damages is repudiated by other courts. One view is that, on a wrongful repudiation, the insured may do one of three things: (1), he may elect to consider the policy at an end, and recover its just

value; (2), he may sue in equity to have the policy declared in force; (3), he may tender the premiums and treat the policy as in force, and recover the amount payable on it at maturity. That the beneficiary may recover the just value of the policy seems to be a proper view, and the just value ordinarily may be ascertained by reference to the mortality tables." Cases are cited in note as supporting the varying views expressed in the text.

In note to *Merrick* v. *Ins. Co.*, 124 Wis. 221, 102 N. W. 593, 109 A. S. R. 931, it is said: "The remedies which may be pursued against a life insurance company, when it wrongfully repudiates its contract of insurance, are disclosed in *Metropolitan Life Ins. Co.* v. *McCormick,* 19 Ind. App. 49, and several other cases."

The case is one of first impression in our State, and, from the contrariety of view expressed by the various courts, we are at liberty to adopt what seems to us to be the best rule. The provision in the policy last above quoted, making the benefits under the policies, in case of death of the beneficiary prior to the death of the assured, payable to the legal representatives of the assured, shows conclusively that the beneficiaries in policies containing such a provision do not have a vested interest which is absolute and unrestricted. The assured could change the beneficiary, and might do so. The beneficiary might die before the assured. There is a provision in the by-laws to the effect that no assessment for death benefits shall be made upon any member or policyholder of this association for the benefit of the beneficiaries of any member and policyholder who is not, at the time of his death, a member and policyholder in good standing with the particular company to which the assessed member belongs. There are other provisions in the by-laws making it the duty of the officers of the association to fill up any vacancies that may occur in any company of the association from new members and policyholders before another company shall be started or completed. It was the duty of the appellant's managing board to maintain the membership in each company to the

maximum number of one thousand. This was manifestly for the purpose of enabling the association, under the terms of its contract, to pay, in the event of the death of the assured, the maximum sum of $1,000 specified therein when the premiums had reached their maximum rate.

But the testimony shows that the companies were not kept up to the maximum number, and, even where the maximum number is maintained, the entire membership in such company, when assessments are called, may not respond with their payments. Therefore the amount to be paid under the terms of the policy, in the event of the death of the assured, cannot be definitely ascertained until there has been an assessment of the members of the circle or company to which the policyholder belonged and the payment by the members of such assessment has been made. In the case of the repudiation of such policies by the association before the death of the assured, the amount of its then present value would be still more indefinite and uncertain. Indeed, it would be impossible to determine with any accuracy the then cash value of such policies to the beneficiaries.

A consideration of all these contingencies has brought us to the conclusion that the beneficiaries in policies like those under review have no cause of action. The Supreme Court of Wisconsin, in *Slocum* v. *N. W. Nat. Life Ins. Co.*, which was a mutual relief association, 14 L. R. A. (N. S.) 1110, 115 N. W. 796, concerning the right of beneficiaries to maintain such actions, used the following language: "The uncertainty of the beneficiary's interests, growing out of the contingencies incident to the power of the insured to thus deal with the policy, renders the rights and interests of the beneficiaries too hypothetical to be made the ground for damages for a breach of the contract. It is a mere expectancy of an unascertainable value, and hence cannot be made the basis of a claim for damages."

But the court in that case also said: "Under the law of this State, the rights of the insured in such a contract are valuable property rights, and for a deprivation

thereof the insured is entitled to recover the damages as for other wrongful deprivations of valuable property rights." As we have already observed, there is nothing in these contracts of insurance to differentiate them in principle from contracts of insurance in old-line insurance companies, so far as liability for violation of the contracts is concerned. Insurance contracts come under the general doctrine applicable to all executory contracts, as declared by the Supreme Court of the United States through Mr. Justice Bradley in *Lovell* v. *St. Louis Mutual Life Ins. Co.,* 111 U. S. 264, as follows: "When one party to an executory contract prevents the performance of it, or puts it out of his own power to perform it, the other party may regard it as terminated, and demand whatever damages he has sustained thereby." See *Merrick* v. *Ins. Co., supra,* at page 932, on this point, and cases there cited. *Morton* v. *Supreme Council of Loyal League,* 100 Mo. App. 76, 73 S. W. 259; *Commonwealth* v. *Weatherbee,* 105 Mass. 149; *Supreme Council A. L. J.* v. *Daix,* 130 Fed. 101.

The case of *Mutual Reserve Fund L. Assn.* v. *Ferrenback,* 144 Fed. 342, 7 L. R. A. 1163, is one most thoroughly considered and exhaustively treated in the opinion. In that case the Circuit Court of Appeals, speaking through Judge Hook, holds that the assured had the right to maintain the action, and lays down two rules for the measure of damages, approving one of them, and cites many authorities. See in the opinion and foot-notes to case. We do not decide which of these rules for the measure of damages is proper under the peculiar facts of this record, because the amounts of the respective judgments have not been challenged by appellants. No issue has been raised or argued by counsel for appellants as to the rule for the measure of damages in such cases. Counsel for appellants have only insisted that the actions are premature, and that there is no liability on the bond.

It follows therefore that those of the appellees who were the policyholders had the right to maintain these

actions, and that the actions were not premature, since the appellant had violated and repudiated its contract with the appellees.

2. We come next to the contention that the appellants, W. T. Roberts, John P. Roberts and Chas. X. Williams, are not liable as bondsmen of the association. In this contention the appellants are correct. The bond is only a fidelity bond, given under § 6016 of Crawford & Moses' Digest, and was "conditioned for the prompt payment of all assessments to the parties or beneficiaries entitled thereto, and that the makers of such bond shall be liable thereon for any violation of the conditions thereof for any loss which may accrue to the policyholders or beneficiaries of such company."

This court, in *Ingle* v. *Batesville Grocery Co.*, 89 Ark. 378, held that the sureties on such bond are bound merely to see that the insurance company pays over all assessments to the parties or beneficiaries entitled thereto. Learned counsel for appellees ask that we reconsider and overrule that case. We decline to do so, for the reason that it was a thoroughly considered case, and we believe that the opinion of Mr. Special Justice BLACKWOOD, speaking for the majority of the court, states the correct doctrine applicable to such bonds. We therefore adhere to that decision.

The judgments are therefore affirmed except as against the appellants, W. T. Roberts, John P. Roberts and Chas. X. Williams, as bondsmen of the association. The judgments against them as such bondsmen are reversed and dismissed.

OPINION ON REHEARING.

WOOD, J. In the original opinion we said: "We do not decide which of these rules for the measure of damages is proper under the peculiar facts of this record, because the amounts of the respective judgments have not been challenged by the appellants. No issue has been raised or argued by counsel for appellants as to the rule for the measure of damages in such cases. Counsel for

appellants have only insisted that the actions are premature, and that there is no liability on the bond."

Counsel for appellants insist, on rehearing, that the issue as to the amount of recovery was necessarily raised by their allegations in the motion to dismiss the complaints, and also in their answer to the effect that they were not indebted to the appellees in any amount. We have concluded, on reconsideration, that we erred in holding that the issue as to the rule for the measure of damages was not raised. The contention of appellant, that the actions were premature and therefore that there was nothing due on the policies, necessarily raises the issue as to whether or not there can be a recovery on the policies in these actions, and, if so, what the amount of that recovery should be. It occurs to us therefore, upon a reconsideration of our original opinion, that it is proper to declare the rule for the measure of damages in such cases. As pointed out in the original opinion, because of the impossibility of determining with any accuracy the present cash value of the policies based upon the mortality tables, the only correct rule for the measure of damages growing out of a breach of such contract of insurance, where the assured elects to treat the contract as rescinded, is that announced in *Supreme Council A. L. H.* v. *Black,* 123 Fed. 650-653, as follows: "According to the clear weight of authority, if an insurance company wrongfully cancels a policy or otherwise wrongfully renounces the contract, the insured may, at his election, treat the contract as rescinded, and recover back all the premiums he has paid." It should be added that the insured in such cases is entitled to recovery of the premiums, with interest thereon at the legal rate, from the day of each payment until the date of the repudiation of the contract by the association refusing to accept the premiums which were actually due under the contract. Authorities to support this view are cited in the above case and in the case of *Mutual Reserve Fund Life Association* v. *Ferrenbach,* 144 Fed. 342, at page 344. See also 1 Bacon on Life and Accident Insurance, vol. 1, page 746, § 361.

The *rationale* of the rule finds expression in *Union Central Life Ins. Co.* v. *Pottker,* 33 Ohio St. Rep. 459, 31 Am. Rep. 555, as follows, quoting syllabus: "If, in such case, the company wrongfully declares the policy forfeited, and refuses to accept the premium when duly tendered, and to give the insured the customary renewal receipt evidencing the continued life of the policy, the assured is, in equity, entitled to demand a rescission of the contract and a return of the premiums paid thereon, with interest from the times of payment."

While the cases at bar are cases at law for damages, treating the contracts as rescinded, that can make no difference as to the above being the correct rule for the measure of damages growing out of breach of contract on the part of the association by refusing to accept premiums legally due thereunder and thus repudiating the contracts and treating the same as forfeited.

There is nothing in the record to show what rule was adopted by the trial court in ascertaining the measure of damages, and appellants do not bring into the record any testimony tending to prove that the amount of the judgments rendered by the trial court were excessive under the rule above announced. Indeed, the appellants, in their motions for a new trial, do not assign as error that the judgments of the court were excessive. The appellants did not, in the lower court, nor did they argue in their original brief, that the judgments of the trial court were excessive in amounts. They have, for the first time, in their briefs on motion for rehearing, argued that the court erred in the amount of the judgments, but they do not point out and demonstrate from the record wherein the judgments are excessive under the correct rule for measuring damages in such cases as above declared. Therefore the appellants do not show wherein the court erred in fixing the amounts of the several judgments.

For the reasons expressed in the original opinion we hold that the appellees had a cause of action against the appellants and that the actions were not prematurely instituted. The motion for rehearing is therefore denied.

JETER v. EVERETTE.

Opinion delivered March 7, 1927.

1. JUSTICE OF THE PEACE—OBJECTION TO STATEMENT—WAIVER.—Where defendant made no motion in the court of a justice of the peace to make the account filed more definite and certain, but appeared and the cause was heard on the merits, he could not complain, on appeal to the circuit court, that the written statement was too indefinite.
2. DAMAGES—ELEMENTS.—In an action for damages to an automobile in a collision, items for a telephone call and for washing and greasing the car are not recoverable when not shown to be necessary expenses in restoring the car to the condition in which it was before the collision.

Appeal from Craighead Circuit Court, Jonesboro District; *G. E. Keck,* Judge; modified.

Basil Baker, for appellant.

Hawthorne, Hawthorne & Wheatley, for appellee.

SMITH, J. Appellee filed the following account in the court of J. D. Reeves, a justice of the peace:

"Jonesboro, Ark., 1-9, 1925.

"Lon Everette,

"In account with E. O. Hogue Battery Co.

1-7 1 wheel	$15.00	For damage done on Essex Coach
1 rear fender	6.25	
Telephone call	.55	
Labor	7.00	
Washing car	1.50	
Trans. grease	1.00	
	$31.30	

Upon filing this account the justice of the peace made the following entry upon his docket: "The plaintiff filed before me a cause of action against the defendant for $31.30 as follows, to-wit: Repair on automobile as damages;" and issued a summons to appellant Will Jeter to appear and make answer in a cause of action filed against him. Jeter appeared, and prayed a change of venue, which was granted, and, upon trial, judgment was rendered in appellee's favor for the amount of the account.

Appellant duly prosecuted an appeal to the circuit court, where a more formal complaint was filed, but which left blank the amount of damages alleged to have been sustained. Appellant filed a motion to dismiss the complaint filed in the circuit court, and that motion was sustained, and the cause went to trial upon the transcript filed on the appeal from the justice court. There was a verdict and judgment for the amount of the account, from which is this appeal.

It is earnestly insisted that no sufficient statement of the cause of action was filed with the justice of the peace to confer jurisdiction upon that court, and that the circuit court acquired no jurisdiction on the appeal.

No motion to make the account filed with the justice more definite and certain was filed. A change of venue was asked and granted, and the cause was heard by the justice on its merits. This being true, the case of *Austin* v. *Hemphill,* 170 Ark. 945, 282 S. W. 1, applies, and the circuit court properly refused to dismiss the cause of action. In the case cited it was said:

"The court had jurisdiction of the subject-matter of the action, and the parties, by entering their appearance to the proceedings, gave the court jurisdiction over their persons. The facts recited in the judgment entry show that they were not misled in preparing their defense. * * * Actions may be commenced either by summons or by the voluntary appearance of the parties. Here the parties appeared in court and contested the claim of the plaintiff, and the circuit court properly overruled their motion to dismiss the appeal. The alleged defect in the issuance of the summons before filing the account or a short written statement of facts was waived by going to trial and judgment without at any stage of the cause bringing the matter to the attention of the justice."

See also *Fitch* v. *Walls,* 169 Ark. 745, 276 S. W. 578.

It appears from the testimony offered at the trial from which this appeal comes that the account filed with the justice covered the cost of repairs to appellee's auto-

mobile sustained in a collision with appellant's automobile.

The cause was submitted to the jury under instructions to which no objections were made. These instructions required the jury to find, before returning a verdict for the plaintiff, that appellant's car was being driven at a speed so great as to constitute negligence and that this negligence was the proximate cause of the injury. The testimony presented this issue, and was sufficient to support the finding of the jury that appellant was negligent in this respect.

As has been said, the jury returned a verdict for the full amount of the account sued on, and it is pointed out that the account included the following items:

Telephone call	$0.55
Washing car	1.50
Transmission grease	1.00

The appellee testified that he paid the battery company which repaired the car the amount of the bill, $31.30, and that it was necessary to repair the wheel and fender, but there was no testimony whatever tending to show that the telephone call, or washing the car, or greasing it, were necessary expenses in restoring the car to the condition it was in before the collision. For the lack of testimony to support the recovery of these items the judgment must be modified to exclude them, but, as no other error appears, the judgment as thus modified will be affirmed.

GATES v. PLUMMER.

Opinion delivered March 7, 1927.

1. HIGHWAYS—INJURY TO PEDESTRIAN—JURY QUESTIONS.—In an action for injury to an eleven-year-old boy struck by defendant's automobile while crossing the road, evidence *held* to take the questions of negligence and contributory negligence to the jury.
2. HIGHWAYS—CONTRIBUTORY NELIGENCE OF INFANT.—In determining the contributory negligence of a boy, eleven years old, who was struck by an automobile while crossing the road, he can be

held to exercise the care and prudence of a boy of that age, and cannot be expected to exercise the same care as an adult should exercise under the same circumstances.

3. TRIAL—INSTRUCTION—CONSTRUCTION AS A WHOLE.—In an action for injury to an eleven-year-old boy struck by defendant's automobile as he crossed the road, an instruction to find for the plaintiff if he was injured while exercising ordinary care for his own safety, by reason of defendant's negligence, was not erroneous in not requiring the verdict to be based on the testimony, in view of the charge as a whole, and the fact that the jury were sworn to render a verdict according to the law and evidence.

4. DAMAGES—PERSONAL INJURIES—WHEN NOT EXCESSIVE.—Where a boy sustained a compound fracture of the leg and a nervous shock followed by pneumonia, as a result of which he ceased to be normal, a verdict for $3,000 damages was not excessive.

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

T. D. Wynne, for appellant.

Sam T. & Tom Poe, for appellee.

SMITH, J. This suit was brought to recover damages to compensate an injury sustained by Dale Plummer, a boy eleven years old, as the result of being struck by an automobile driven by appellant Gates, the defendant below. The injury occurred on the Galloway Pike, east of Little Rock, about ten o'clock on the morning of February 10, 1925. It was a cold day, and a strong wind was blowing. The road where the boy was struck runs east and west, and was perfectly straight for a mile. Appellee's father and some other men were at work on a house on the north side of the road. On the south side of the road, opposite the house, two automobiles were parked in close proximity to each other. The boy had been sent from the house where the men were at work to get an oil-can out of one of the cars. He got the can, and was standing on the running-board of the automobile when appellant approached in his car. Appellant admitted that he was driving thirty miles an hour, but the jury may have found that he was driving much faster, as one of the men working at the house testified that his attention was attracted to the car by its high speed.

Appellant admitted seeing the boy on the running-board of the car, but he testified that he thought the boy was in a safe place, and he did not reduce his speed. He did blow his horn twice—the first time when he was about 150 yards from the parked cars and the second time when about half that distance. The boy testified that, when he got the oil-can for which he had been sent, he started walking across the road. He did not think any cars were coming. He took a "peep" in each direction as he started across the road, and did not see the approaching car. The boy had crossed the center line of the highway and was on the north side of the road when he was struck, and the testimony shows there was space enough between the parked cars and the boy for appellant to have passed between the cars and the boy had his car been under control. Appellant testified that he turned to the left in an attempt to pass in front of the boy, and thus avoid striking him. Appellant admitted that he did not reduce his speed after seeing the boy, but he testified that he did not have time to do so after discovering the boy's peril.

The testimony shows that the car dragged the boy about 75 or 80 feet after striking him before he was untangled from it, and the car ran twice that distance after striking the boy before it stopped. Appellant explained that fact by saying that he was so surprised and disconcerted by striking the boy that he did not immediately apply his brakes.

An automobile mechanic, who qualified as an expert, testified that appellant's car, running 30 miles an hour, could have been stopped within 60 or 65 feet; that, at 25 miles per hour, it could have been stopped within from 51 to 53 feet; at 35 miles per hour, within from 115 to 120 feet, and at 40 miles per hour it would probably require 200 feet to stop the car.

It is first insisted that the court erred in submitting the case to the jury, for the reason that the undisputed testimony shows either that the injury resulted from an

unavoidable accident or would not have happened but for the boy's contributory negligence.

While the case is a close one, we have concluded that, with the inferences reasonably deducible from the testimony, the case was properly one for the jury both on the question of the negligence of appellant and the contributory negligence of the boy. The jury no doubt found that appellant was negligent in running his car at a higher speed than an ordinarily careful and prudent man would have done under the circumstances stated. We are also of the opinion that the court did not err in refusing to declare, as a matter of law, that the boy was guilty of contributory negligence, and that this question was properly submitted to the jury.

An exception was saved to the instruction which submitted the question of contributory negligence to the jury, as well as to the other instructions given in the case. This instruction appears to have been drawn to conform to the law as declared by this court in the case of *St. L. I. M. & So. Ry. Co.* v. *Sparks,* 81 Ark. 187, 99 S. W. 73. In that case a boy ten years old was injured by being struck by a moving railroad car while walking across the railroad track, and it was insisted that the trial court should have told the jury as a matter of law that the child was guilty of contributory negligence The trial court had submitted that question to the jury, and it was held that this was not error. In so holding Mr. Justice RIDDICK said that "a child is not required to exercise the same capacity for self-preservation and the same prudence that an adult should exercise under like circumstances." He further said: "You can reasonably expect of a boy between nine and ten years of age only that degree of care and prudence that a boy of that age or of his degree of intelligence should exercise. What would be ordinary care for such a boy might be culpable negligence in an adult." The doctrine of that case has been several times since reaffirmed. *Garrison* v. *St. L. I. M. & So. Ry. Co.,* 92 Ark. 437, 123 S. W. 657; *St. L. S.*

W. Ry. Co. v. *Adams,* 98 Ark. 222, 135 S. W. 214; *Nashville Lumber Co.* v. *Busbee,* 100 Ark. 76, 139 S. W. 301, 38 L. R. A. N. S. 754; *Kansas City Sou. Ry. Co.* v. *Teater,* 124 Ark. 1, 186 S. W. 204.

The court gave, over appellant's objection, an instruction numbered 1, which reads as follows:

"If you find in this case that the defendant was negligent as alleged in the complaint, and by reason thereof plaintiff, while in the exercise of ordinary case for his own safety, was injured, then you will find for the plaintiff."

It is argued that this instruction did not require the jury to base the verdict upon the testimony offered at the trial. This objection is answered by the case of *St. L. I. M. & So. Ry. Co.* v. *Hydrick,* 109 Ark. 231, 160 S. W. 196, in which case a similar instruction had been given. It was there said:

"While it is always better form, and the better practice, for the court to tell the jury that its findings on every issue of fact in the case must be based upon the evidence, yet, where it is plain from the charge of the court, taken as a whole, that the jury were told that their findings must be based upon the evidence, the jury could not be misled nor feel authorized to make a finding that was not based upon the evidence because some separate or particular instruction omitted this precaution. The jury were sworn, in the first instance, to try the case and a true verdict render according to the law and the evidence. That being true, it is not likely that any man of sufficient intelligence to be a competent juror would feel authorized to wander beyond the evidence to find matters upon which to predicate his findings in the case. The conscientious juror would necessarily feel restrained by his oath to base his findings upon the evidence."

Objections were saved to certain other instructions because they did not require the jury to find that appellant's negligence was the proximate cause of the injury before returning a verdict against appellant. The instructions might well have been modified as requested, but

no prejudicial error was committed in refusing to do so under the facts of this case, for the reason that it is an undisputed fact that the boy was injured by being struck by appellant's car, and there was therefore no question as to the proximate cause of the injury. There was a question whether appellant was guilty of negligence, and also whether the boy was guilty of contributory negligence, but these questions were submitted to the jury under instructions which have been frequently approved by this court, and, for this reason, no useful purpose would be served in again discussing them. In this connection it may be said that the court gave all the instructions requested by appellant—six in number—except the first instruction requested by him, this being a peremptory instruction to find for the defendant. The instructions given at appellant's request fully presented his theory of the case.

It is finally insisted that the verdict, which was for $3,000, was excessive. On this subject the testimony was as follows: The boy was unconscious for more than half an hour after he was struck. He sustained a Potts or compound fracture of the right leg. Both bones of the right leg were broken just above the ankle, and the jagged edges of one of the bones protruded through the muscle, flesh and skin of the right leg. The boy was confined in the hospital for a period of six weeks, and wore a cast on his right leg for three weeks after leaving the hospital, and was required to use crutches for two weeks after the cast was removed. It is true the attending physician testified that the union of the bones was perfect and that the leg would be as strong as ever. But Dr. C. C. Kirk, who qualified as a nerve specialist, testified that the boy sustained a profound nervous shock, and had a raging fever, followed by pneumonia, as attending complications. Dr. Kirk further testified that the boy had ceased to be a normal child, as he had suffered a psychic shock which had changed his character, and that it was speculative as to how long that condition would

continue. Under the circumstances we are unable to say that the verdict is excessive.

Finding no prejudicial error, the judgment is affirmed.

WILKERSON v. POWELL.

Opinion delivered March 7, 1927.

1. HUSBAND AND WIFE—DEED FROM HUSBAND TO WIFE.—A deed from husband to wife conveys the equitable title to her, and the legal title retained by the husband as trustee merged, on the husband's death, with the equitable title, giving the wife full legal title with power of testamentary disposition.
2. HUSBAND AND WIFE—CONVEYANCE TO WIFE.—A husband making a conveyance of land to his wife retains legal title as trustee, having no other interest except a life estate as tenant by the curtesy in case of his survival.
3. HUSBAND AND WIFE—DEED FROM HUSBAND TO WIFE—EFFECT OF DEATH.—A deed from husband to wife vests in her the equitable title, into which the legal title merges on the death of either of the spouses.
4. WILLS—TESTAMENTARY POWER OF WIFE UNDER CONVEYANCE FROM HUSBAND.—A wife who received a conveyance from her husband had a right to devise her estate therein during her husband's lifetime, as either her death or her husband's would terminate his trust in the property.

Appeal from Saline Chancery Court; *M. H. Hollimon,* special Chancellor; affirmed.

Mehaffy & Mehaffy, for appellant.

W. H. Evans and *Brouse & McDaniel,* for appellee.

SMITH, J. Appellants filed a complaint in which they alleged that J. A. Wilkerson owned a certain tract of land, which he conveyed to his wife, Mrs. S. E. Wilkerson, their mother. That both J. A. Wilkerson and his wife were dead. It was not alleged which died first, although both died before 1920. That Mrs. Wilkerson died testate, and by her will devised the land to certain of her children, to the exclusion of appellant. All the plaintiffs and defendants are children of both J. A. Wilkerson and Mrs. S. E. Wilkerson.

It is argued that, upon the death of Mrs. Wilkerson, the equitable title which she took under the deed from her husband merged into the legal title which remained in him after his conveyance to her, and that she therefore had no title which could be devised. In other words, the argument is made that Mrs. Wilkerson acquired by the deed to her from her husband only an equitable life estate. A demurrer to this complaint was sustained, and the cause was dismissed, and this appeal is from that decree.

We think the demurrer was properly sustained. Counsel are mistaken as to the interest which Mrs. Wilkerson acquired through the deed to her from her husband.

In the case of *Ogden* v. *Ogden,* 60 Ark. 70, 28 S. W. 796, it was said that, while by the common law a husband could not make a grant of property to his wife, such conveyances were now held valid in the absence of fraud, and that the effect of such a deed is to convey an equitable estate to the wife, while the husband retains the legal title as trustee.

But the estate thus acquired by the wife is not an estate for life. In the case of *Ogden* v. *Ogden, supra,* the grantee wife was survived by her husband, the grantor, and it was held that, upon the death of the wife, the husband became entitled to an estate in the land conveyed for the residue of his life as tenant by curtesy, and that this was true although her estate was only an equitable one. It was there held that the children inherited the equitable estate of their mother, subject to the life estate of their father—the life estate of the father being, of course, the tenancy by curtesy. In this Ogden case the children could not have inherited the land from their mother had she acquired only a life estate under the deed to her from her husband.

A case similar on the facts to the instant case is that of *Stark* v. *Kirchgraber,* 186 Mo. 633, 85 S. W. 868, 105 A. S. R. 629. It was there said: "Sandy Jarrett, the husband of Hulda Jarrett, occupied the position in

respect to this land as trustee of his wife, by construction of the law, simply because he was her husband, and when the marriage relation was at an end the trust relation ceased, and this use was executed by operation of law. In *Robert* v. *Moseley,* 51 Mo. 282, this court said: 'Where a trustee is appointed to hold the estate of a married woman, to protect it from the husband, and the marriage relation comes to an end, his estate at once becomes executed in the person who is to take it, the wife, if living, or, if she is dead, her heirs at law.' ''.

The opinion further quoted from the earlier case of *Pitts* v. *Sheriff,* 108 Mo. 116, 18 S. W. 1072, as follows: "The rule is well settled, both in England and in this country, that, when an estate is devised to trustees for a particular purpose, the legal estate rests in them as long as the execution of the trust requires it, and no longer. *Steacy* v. *Rice,* 27 Pa. St. 75, 67 Am. Dec. 447; *Ross* v. *Parker,* 1 Barn. & C. 360; *Mark* v. *Mark,* 9 Watts, 410. Here the husband was by construction of law trustee of his wife, simply because he was her husband. When the marriage ceased, the trust ceased, and the use was executed."

After thus quoting from the Pitts case the court proceeded to say: "It is clear from the principles announced in this case (and it has never been departed from) that, upon the death of Hulda Jarrett, wife of 'Sandy,' the marriage relation was at an end, and it is equally apparent that, upon her death, the trusteeship of her husband ceased, and that the estate held in trust by the husband, upon the dissolution of the marriage relation, at once became executed in the persons who were to take it, who, in this case, were the children of Hulda Jarrett, deceased."

So here the husband, while a trustee, had no other interest in the land. Had he survived his wife, he would, under the authority of the case of *Ogden* v. *Ogden, supra,* have had a life estate as tenant by curtesy. But he would have had no other interest in the land.

Upon the death of the husband the trust ceased and the use was executed, and the legal title of the husband merged into the equitable title of the wife. So also would the trust have ceased had the wife died first, as the death of either spouse would have terminated the trust. *Cockrill* v. *Woodson,* 70 Fed. 752; *Miller* v. *Quick,* 158 Mo. 495, 59 S. W. 955.

Mrs. Wilkerson therefore had the right to devise her equitable estate, although her husband was living, because the will would not take effect until her death, and her death terminated the trust.

No reason is shown in the complaint why Mrs. Wilkerson might not have devised the land to certain of her children, to the exclusion of the others. The question presented for our decision is her right to devise the land at all, and, as we think she had this right, the demurrer to the complaint was properly sustained, and the decree is therefore affirmed.

MEHAFFY, J., disqualified, and not participating.

HURST v. DAVIES.

Opinion delivered March 7, 1927.

JUDGMENT—DEFAULT—PROOF OF CAUSE OF ACTION.—It was error to render judgment for plaintiff on an open account not sworn to, without proof of its correctness, though defendant refused to go to trial where his case was called.

Appeal from Washington Circuit Court; *W. A. Dickson,* Judge; modified.

W. N. Ivie, for appellant.

HUMPHREYS, J. Appellee instituted suit against appellant in the circuit court of Washington County for an alleged balance of $227.90 due on a note, and an alleged balance of $338.33 due on an open account. Neither the complaint nor the account was sworn to.

On the 26th day of October following, being the first day of the October term of said court, appellant was

given until November 2, 1925, to file an answer, on which date he filed a duly verified answer, admitting that he owed the alleged balance upon the note, and the balance of $84.22 upon the open account, but denying specifically that he was indebted for items charged on the open account up to January 26, 1925, totaling $215.11, and alleging that he was entitled to a total credit of $80 on the undenied part of the account for attorney's fees for representing appellee in three cases.

On the 13th day of November, 1925, the case was called for trial, whereupon appellant announced that he could not go to trial on account of the absence of his attorney, who had been excused by the court, and because his papers were locked up where he could not get them. The court refused to postpone the case until a later date, either at the regular or adjourned term of the court, and rendered judgment, over appellant's objection and exception, on the presentation of the note and without hearing any evidence on the disputed items of the account and credit claimed thereon.

On the 8th day of December, 1925, which was an adjourned date of the October term of court, appellant filed a motion to set the judgment aside on the ground that it was prematurely rendered. The court overruled the motion, whereupon an appeal was duly prosecuted to this court from the judgment.

The trial court committed reversible error in rendering judgment upon the open account without any proof being introduced of its correctness, even though appellant refused to go to trial when the case was called. The answer, however, admitted the alleged indebtedness on the note and a balance of $84.22 on the account. If appellee will enter a remittitur within 15 days so as to reduce the judgment to the amount of the admitted indebtedness, the judgment will be modified and affirmed as modified; otherwise it will be reversed, and the cause remanded for a new trial.

ROBERTS v. MILLER.

Opinion delivered March 7, 1927.

1. EXECUTORS AND ADMINISTRATORS—SETTLEMENT—COLLATERAL ATTACK.—The final settlement and discharge of an administratrix is a final accounting of decedent's estate, and is a judgment of a court of record, which is impervious to collateral attack, and, if not appealed from, can only be investigated for fraud or some ground of equitable jurisdiction.
2. DESCENT AND DISTRIBUTION—ACTIONS BY HEIRS.—Heirs of a decedent, whose estate has been settled, are the proper parties to bring a suit to subject certain land of a decedent to payment of a probate judgment obtained by the former decedent against the estate of the latter decedent, and, the latter's estate having been likewise settled, the action was properly brought against the wife and children of the latter, where the land had been the latter's homestead.
3. HOMESTEAD—LIABILITY TO DECEDENT'S DEBTS.—Chancery has jurisdiction to subject the homestead of a decedent to payment of a probated claim after death of his widow or her abandonment of the homestead, and after decedent's youngest child has attained the age of 21 years, but suit must be brought within three years thereafter.
4. TAXATION—PERSONS WHO MAY PURCHASE AT TAX SALE.—Where a mother residing with decedent's children on his homestead bought the homestead at tax sale, her title so obtained was a redemption from the tax forfeiture.
5. TAXATION—DUTY TO PAY TAXES.—Minor children of a decedent residing upon his homestead and his rightful widow have the duty to pay the taxes on the homestead.
6. TAXATION—TAX SALE—RIGHT TO PURCHASE.—One cannot occupy and enjoy the use of premises and at the same time acquire a valid tax title by permitting the lands to be sold for taxes and purchasing at the sale based upon a forfeiture during the time he was so occupying and enjoying the premises.

Appeal from Scott Chancery Court; *J. V. Bourland*, Chancellor; reversed on appeal; affirmed on cross-appeal.

Bates & Duncan and *Daniel Hon*, for appellant.

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

HUMPHREYS, J. The questions necessary to be determined on this appeal and cross-appeal, arising out of the pleadings filed and testimony adduced, are, whether appellants had a right to bring the suit, and, if so,

whether Lidmilla Miller's purchase of the lands involved in the action at tax sale, and from a purchaser at tax sale, amounted to a redemption of said lands from tax sale. The contention of appellees is that she was a stranger to the title and acquired the absolute ownership of the lands under tax deeds; whereas appellants contend that, on account of her fiduciary relationship to her children, with whom she resided on the lands, she could not acquire ownership of them by purchase at tax sales, or from purchasers at tax sales, based upon tax forfeitures during the period of their occupancy and enjoyment of said lands.

The purpose of the suit was to subject the lands in question to the payment of a probate judgment in the sum of $2,599.35 obtained by M. C. Miller on July 13, 1914, against the estate of Frank Miller, deceased. After securing the judgment, M. C. Miller died intestate on February 26, 1916, leaving him surviving his widow, Arizona Miller, now Arizona Roberts, and his children, Joseph Miller, Margie Miller, Antone Miller, Louie Miller, and Carroll Miller, all being minors except Joseph. Prior to the institution of this suit J. M. Roberts purchased Joseph Miller's interest in the judgment made the basis of the action. The minors are represented in the suit by their guardian and next friend. Joseph Miller was subsequently made a party plaintiff in the action. All of the appellants, plaintiffs below, are the sole and only heirs of M. C. Miller, deceased. Frank Miller, Jr., was an older son of M. C. Miller, and administered upon his father's estate. Pending the administration he died, and Arizona Roberts was appointed administratrix in succession, on November 21, 1916, made final settlement and was discharged on April 15, 1920. In her final settlement she mentioned the fact that the bondsmen of Frank Miller, Jr., claimed her husband's estate was indebteded to him in the sum of $424.69, and that there was no money to pay it. The administrator of the estate of Frank Miller, Jr., did not present a claim and obtain a judgment for it. Rudolph Shiel, claiming to be the adminis-

trator of the estate of Frank Miller, Jr., procured an execution against the estate of M. C. Miller, deceased, after the institution of this suit, in an effort to collect said claim. The record is silent as to what became of the execution.

Appellees contend that, under these circumstances, the proper and only remedy of appellant was to move in the probate court to set aside the order closing the estate and to request the appointment of an administrator to further administer same. This is not correct. The final settlement and discharge of the administratrix was a final accounting of the estate. It was the judgment of a court of record, and, no appeal having been taken from it, it was impervious to collateral attack, and can only be investigated for fraud, or some other ground of equitable jurisdiction, in a court of equity. *Stokes* v. *Pillow,* 64 Ark. 1, 40 S. W. 580; *Beckett* v. *Whittington,* 92 Ark. 230, 122 S. W. 623; *Day* v. *Johnston,* 158 Ark. 478, 250 S. W. 532. The appellants herein are the proper parties to bring the suit. Chancery has jurisdiction to subject the homestead lands of a decedent to the payment of probate judgments, after the death of the widow or the abandonment of the homestead by her and after the youngest child of the decedent has attained to the age of twenty-one. *Parks* v. *Murphy,* 166 Ark. 564, 266 S. W. 673. The statutory bar had not attached when the suit was instituted. It was brought within three years after the youngest child of Frank Miller became of age.

Preliminary to determining the second question it will be appropriate to state some of the salient facts revealed by the record. On April 11, 1911, Frank Miller died seized and possessed of the lands sought to be subjected to the payment of the judgment aforesaid, obtained by M. C. Miller's estate against Frank Miller's estate. It was Frank Miller's homestead. At the time of his death he and his supposed wife, Lidmilla Miller, had separated, and she and her children were residing on forty acres of land owned by her a short distance from her husband's homestead. Many years ago Frank Miller married Annie,

an older sister of Lidmilla Miller, and a son named Antone Frank Miller was born to them. Shortly after the birth of Antone, Frank Miller deserted Annie, and married her sister Lidmilla, representing to the latter that he had obtained a divorce from Annie. They immediately left Texas, remained in Oklahoma awhile, and later settled in Scott County, Arkansas, where they lived as man and wife until the separation. There were born to the latter marriage Mamie Trotter (*née* Mamie Miller), Flora Miller, Frances Miller, George Roy Miller. Both of Frank Miller's families constitute the appellees herein and are the defendants in this action. The instant case, in the language of distinguished counsel for appellees, is, in a sense, a sequel to the case of *Evatt* v. *Miller*, 114 Ark. 84, 169 S. W. 817, L. R. A. 1916C, 759, wherein this court ruled that the children of Lidmilla Miller were legitimate and entitled to share in their father's estate, but that Lidmilla Miller herself had no interest therein, Annie Miller being his lawful wife. The next year after the death of Frank Miller Lidmilla Miller and her children moved back to the homestead from the forty-acre tract, where the girls have continuously resided, and where Lidmilla Miller resided with her children until February, 1917, when she and Roy moved back to the forty-acre tract, where they lived until September, 1918, at which time they returned to the Miller homestead. During the entire occupancy of the homestead Lidmilla Miller utilized the homestead for farming purposes, and her children received one-half the rents and Annie Miller, the rightful widow, received the other half of them. On December 24, 1920, Annie Miller conveyed her interest in the homestead to John P. Roberts, who, in turn, conveyed same to Flora and Frances. Since that time Lidmilla Miller, Flora and Frances have occupied and used the homestead for farming purposes. In 1913, and again in 1917, they permitted the homestead lands to forfeit for taxes, and Lidmilla Miller bought a part of same directly at the tax sales and a part of them from C. E. Forrester, who had purchased some of them at the tax

sales. Prior to the institution of this suit all of Frank Miller's children had reached the age of twenty-one years. The estate of Frank Miller was administered upon in the probate court of Scott County, and closed on July 11, 1918. The administrator made final settlement, and was discharged at that time.

It was the duty of the minors residing upon the property and the rightful widow to pay the taxes upon the homestead lands of Frank Miller. Even if the rightful widow neglected her duty to pay the taxes, Frank Miller's children, who resided upon the homestead and enjoyed the rents and the privilege of farming thereon, should have paid the taxes and collected the one-half due from the rightful widow out of her part of the rents. There was ample income or rents to pay the taxes and keep up the improvements. Lidmilla Miller was the natural guardian of these children, residing with them upon the property, farmed it herself, and was therefore not a stranger to the title in the sense that she could buy tax titles in her individual name for the purpose of depriving her children of their rights, or for the purpose of preventing creditors from collecting their just claims against the estate. If permitted to circumvent creditors by purchasing outstanding tax titles of the land, she could subsequently use the same tax title to prevent her own children from claiming an interest in the estate. One cannot occupy and enjoy the use of premises and at the same time acquire a valid tax title by permitting the lands to be sold for taxes, purchasing at the sale, or purchasing from one who has purchased at the tax sale based upon a tax forfeiture, during the time he was so occupying and enjoying the premises. *Sanders* v. *Ellis*, 42 Ark. 215; *Patterson* v. *Miller*, 154 Ark. 124, 241 S. W. 875; *Lefevers* v. *Dierks Lumber & Coal Co.*, 161 Ark. 67, 255 S. W. 554; *Inman* v. *Quirey*, 128 Ark. 605, 194 S. W. 858; *Hunt* v. *Gaines*, 33 Ark. 267; *Cotton* v. *White*, 131 Ark. 273, 199 S. W. 116.

We think it clear, under the circumstances in this case, that it was the duty of Lidmilla Miller to have paid

the taxes out of the profits she received in farming the homestead and out of the rents which her children received while they resided thereon. Under the authorities cited above, even a stranger in possession of land and receiving rents and profits cannot acquire a title to it by a purchase for taxes, and such purchase would operate only as a payment of the taxes. We think the tax deeds she obtained amounted to a redemption on her part from the tax forfeitures and tax sales.

We have refrained from setting out the tax forfeitures, tax sales or the tax deeds relied upon by Lidmilla Miller to prevent appellants from subjecting the lands to the payment of the judgment obtained by the estate of M. C. Miller, deceased, against the estate of Frank Miller, deceased, or from deciding the validity or the invalidity of the tax titles, because we regard her tax titles as redemptions from the tax forfeitures and tax sales.

On account of the error indicated the decree of the court is reversed, and the cause is remanded with directions to enter a decree for the sale of the lands set out in the complaint of appellants for the payment of the judgment, and to cancel the deeds held by Lidmilla Miller under sales for taxes as a cloud on the title to said lands.

HENRY QUELLMALZ LUMBER & MANUFACTURING COMPANY v. HAYS.

Opinion delivered March 14, 1927.

1. MASTER AND SERVANT—SERVANT EMPLOYING BYSTANDER.—Where an employee had no authority, express or implied, to call on a bystander to help in discharging a service which he can reasonably perform, a third person undertaking at his request to help him in performing his duties, when no emergency or pressing necessity exists, was a volunteer, to whom the employer owed no higher duty than to refrain from injuring him after discovering his peril.
2. MASTER AND SERVANT—EMERGENCY EMPLOYMENT.—If an unforeseen emergency arises rendering it necessary in the employer's

interest that his employee have temporary assistance, the law implies authority to procure such necessary help, and an assistant so procured is entitled to the same protection as any other employee.

3. MASTER AND SERVANT—EMERGENCY EMPLOYMENT.—Whether circumstances constitute an emergency authorizing an employee to procure temporary assistance, so as to entitle the assistant to the same measure of protection as other employees, is generally a jury question.

4. MASTER AND SERVANT—EMERGENCY EMPLOYMENT—BURDEN OF PROOF.—To recover from an employer for injuries to plaintiff assisting an employee at the latter's request, plaintiff must establish the relation of master and servant between himself and defendant by showing the employee's authority to call for assistance.

5. MASTER AND SERVANT—EMERGENCY EMPLOYMENT.—The mere fact that the employment of an assistant would facilitate the master's business would not give an employee authority, in absence of an emergency, to employ an assistant.

Appeal from Randolph Circuit Court; *John C. Ashley,* Judge; reversed.

STATEMENT BY THE COURT.

William Hays, a minor, by his next friend, John Hays, and John Hays instituted this action against the Henry Quellmalz Lumber & Manufacturing Company to recover damages on account of personal injuries which are alleged to have been received by William Hays while in the employment of the defendant. The suit was defended on the ground that William Hays was a volunteer at the time that he received his injuries, and that the defendant was not liable for damages therefor.

According to the evidence of the plaintiff, William Hays was eighteen years of age at the time he received the injuries sued for. On the morning in question he had been working for the railroad, loading cotton, at Datto, in Clay County, Arkansas. During the afternoon he went to the gin of the defendant. His uncle, Luther Denton, was running one of the gin stands, and asked William Hays to unchoke it. William Hays helped him lift the breast and then began to help unchoke the gin stand. He pulled out two or three little bunches of cot-

ton, and reached back to pull out another one, and, while doing so, one of his hands was caught in the machinery and injured so that it had to be amputated. William Hays had never had any experience in operating a gin and did not know whether the saws were running or not when he began to assist his uncle in removing the cotton from the gin stand.

According to the evidence for the defendant, Earl Day was the manager of the defendant's gin at Datto and employed Luther Denton and the other employees. Luther Denton was a ginner, and did not have authority to employ any one for any purpose. The defendant operated two gin stands, which were about three feet apart. If one of the gin stands became choked the ginner could call on the operator of the other gin stand to help him unchoke it. There was another employee who worked at the press who might have been called on to help unchoke either of the gin stands. On the day that William Hays was injured, the ginners were running damp cotton through the gin stands, and this had a tendency to cause them to choke. The capacity of the gin was twenty to twenty-five bales a day. When the gin stand became choked, the ginner might call one of the other employees to help him unchoke it. The breast weighed about 130 pounds, and was very bulky. While one man could lift it up, two could perform that service much easier and better. On the day in question the defendant did not have enough cotton to keep it going all day. It had been running all day, and the cotton that was ginned was wet. The defendant only ginned four bales the day that William Hays was injured, and this was all wet cotton. The other gin stand was not choked at the time William Hays was injured, and E. E. Hawkins, who operated it, could have helped unchoke the gin stand operated by Luther Denton if he had been called upon to do so.

From a verdict and judgment in favor of the plaintiff, William Hays, the defendant has duly prosecuted an appeal to this court.

Oliver & Oliver, for appellant.

Walter L. Pope and *T. W. Campbell,* for appellee.

HART, C. J., (after stating the facts). It is not claimed that Luther Denton had any authority, express or implied, to call upon bystanders to help him in the discharge of any service which he could reasonably perform. If a third person undertook, at his request, to help him in performing his duties as ginner, when no emergency or pressing necessity existed, such third person would, in the eyes of the law, be deemed a volunteer, and the defendant would owe him no higher duty than to refrain from injuring him after he discovered his peril. It is claimed, however, by counsel for the plaintiff, that, under the evidence adduced by the plaintiff, he was what is called an emergency helper or employee at the time he was injured.

The law on the question in 18 R. C. L. § 85, page 58, is stated as follows: "If an unforeseen contingency or emergency arises, rendering it necessary in the employer's interest that his employee have temporary assistance, the law implies authority to procure such necessary help; and a substitute or assistant procured under these circumstances is entitled to the same measure of protection as any other employee in the service. It is the emergency that gives rise to the implied authority, and if it does not in fact exist then neither does the implication of authority arise. Whether the circumstances of any particular case constitute what may be deemed an emergency is generally a question for the jury's determination." To the same effect see 39 C. J., page 554, § 662(bb).

This view of the law has been substantially sanctioned and followed by this court. *Railroad Co.* v. *Dial,* 58 Ark. 318, 24 S. W. 500; *St. L. I. M. & S. Ry. Co.* v. *Jones,* 96 Ark. 558, 132 S. W. 626, 37 L. R. A. N. S. 418; and *Yazoo & Mississippi Valley Rd. Co.* v. *Kern,* 99 Ark. 584, 138 S. W. 938. In these cases the court recognized that the fact that no real emergency and no actual necessity for extra help existed may be taken into considera-

tion by the court in deciding whether or not the person injured was in the position of a servant.

Tested by these principles of law, it was necessary for William Hays to establish as a basis of his recovery the existence of the relation of master and servant between himself and the defendant company; and this, in turn, depended upon the authority of the ginner, under the circumstances, to call him to assist in lifting up the breast of the gin stand and unchoking it. It was wholly immaterial whether or not the assistance of the plaintiff would tend to facilitate the business of the defendant or to make it easier for the ginner to unchoke the gin stand. Such facts would not give the ginner authority to employ additional help. There must be a sudden or unexpected emergency which would imperil the ginner or threaten harm to the gin stand in order to give implied authority to the ginner to employ temporary assistance.

The undisputed evidence shows that there was no sudden or unexpected emergency which would give the ginner the implied authority to employ a temporary assistant to help him unchoke the gin stand. If he thought that the breast of the gin stand was too heavy and bulky to lift up, he might have called to his assistance the other ginner, who was not more than three feet from him, or another employee who was working near by. The servant who had general control and management of the gin had not directed him to speed up his work. On the other hand, the undisputed evidence shows that there was no necessity to do that. The defendant was up with its ginning, and there was no necessity whatever to speed up the work. The evidence does not show that the gin stand had been choked to an extent where it was dangerous to operate it or where it was liable to break. The power might have been cut off at any time, and the ginner might have proceeded at his leisure to unchoke the gin stand. Hence there was no sudden or unexpected emergency calling for outside assistance, and the plaintiff, in helping in the work, was in law a volunteer and not entitled to recover damages against the defendant for

injuries received, under the circumstances detailed by him in his testimony.

It is true that the plaintiff's hand was injured to such an extent that it had to be amputated. This of itself makes it a very hard case. The plaintiff, however, had arrived at the years of discretion, and knew what he was about. Our sympathy for him cannot cause us to override settled rules of law and to deviate from fixed legal principles, which those engaged in business have a right to rely upon in conducting it.

The result of our views is that the court erred in not directing a verdict in favor of the defendant, as requested by its counsel, and, for that error, the judgment must be reversed. Inasmuch as the plaintiff seems to have fully developed his case, his cause of action will be dismissed.

FOSTER v. POLLACK COMPANY.

Opinion delivered March 14, 1927.

1. JUSTICES OF THE PEACE—JURISDICTION IN GARNISHMENT.—Under Crawford & Moses' Dig., §§ 4906, 6401, justices of the peace have jurisdiction coextensive with the county in garnishment proceedings.
2. GARNISHMENT—NATURE OF PROCEEDING.—A garnishment proceeding is *in rem*, analogous to an attachment, and is a provisional remedy within the meaning of Crawford & Moses' Dig., § 6401.
3. COURTS—PRIORITY OF GARNISHMENTS.—Under Crawford & Moses' Dig., § 6401, a garnishment issuing from a justice of the peace in a township other than that in which the defendant or garnishee resided was superior to a garnishment issued from a similar court in the township in which defendant and the garnishee resided.

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

STATEMENT OF FACTS.

This appeal involves the question of whether or not a justice of the peace has jurisdiction coextensive with the county in garnishment proceedings. Pollack Com-

pany sued Prince Thomas, in the municipal court of the city of North Little Rock and obtained judgment against him and the Buckeye Cotton Oil Company as garnishee. J. B. Foster sued Prince Thomas, and at the same time caused a writ of garnishment to be issued against the Buckeye Cotton Oil Company in a justice court of Eastman Township. The garnishment in the Foster case was issued and served before the garnishment in the Pollack Company case. Judgment was rendered in each case against the garnishee, Buckeye Cotton Oil Company, and it appealed each case to the circuit court.

In the circuit court both cases were consolidated and tried together. The facts as stated above were agreed to between the parties in the trial in the circuit court. It was further agreed that neither the defendant, Prince Thomas, nor the garnishee, Buckeye Cotton Oil Company, were served with summons in Eastman Township. They were residents of another township in Pulaski County, and never entered their appearance to the action. Judgment was rendered against the defendant by default by the justice of the peace in Eastman Township. The circuit court rendered a judgment in favor of Pollack Company and against the Buckeye Cotton Oil Company as garnishee in that case. It also rendered judgment against J. B. Foster and in favor of the Buckeye Cotton Oil Company as garnishee in that case.

The consolidated case is here on appeal.

Joe H. Thompson, for appellant.

Mitchell Cockrill, E. R. Parham and *Owens & Ehrman,* for appellee.

HART, C. J., (after stating the facts). The issues raised by the appeal depend upon the construction to be given to § 6401 and § 4906 of Crawford & Moses' Digest. Section 6401 reads as follows: "Actions cognizable before a justice of the peace, instituted by summons or warrant, shall be brought before some justice of the peace of the township wherein the defendant resides, or is

found, or, if there be one or more defendants in different townships, then in the township where one of them resides or is found. Provided, action by attachment, actions for the recovery of personal property, actions for provisional remedies, and all criminal actions and proceedings, may be brought before any justice of the peace in the county."

Subsequently the Legislature of 1895 amended our garnishment statute so as to provide that an action may be commenced by garnishment process by giving the bond and otherwise complying with provisions of the statute. Crawford & Moses' Digest, § 4906.

It is sought to uphold the judgment of the circuit court on the ground that a garnishment such as was resorted to in this case is not a provisional remedy within the meaning of § 6401 referred to. In *Ferguson* v. *Glidewell,* 48 Ark. 195, 2 S. W. 711, it was expressly held that, under the Code, attachment is a provisional remedy and merely ancillary to the action in which it is sued out. In addition, the court said that its object, as expressly defined by the Code, is to secure the satisfaction of such judgment as may be recovered by the plaintiff. Again, in *Ribelin* v. *Wilks,* 135 Ark. 599, 205 S. W. 977, the court recognized that an attachment was a provisional remedy and that the jurisdiction of a justice of the peace in such cases is coextensive with the county and not limited to the township in which the defendant resides or is found. Thus we have an express holding of this court that an attachment is a provisional remedy under this section of the statute and that the jurisdiction of the justice of the peace is coextensive with the county in attachment cases.

In Rood on Garnishment, § 1, it is said that garnishment is a mode of attachment differing in no material respect from an attachment by actual levy and seizure, except in the mode of enforcement. Again, the same author says that garnishment is a mode of attachment, and that the specific right to a lien acquired by its issuance and service is substantially analogous to that acquired by an attachment of tangible property. Rood on Garnishment, §§ 192 and 193.

In *Teague* v. *LeGrand,* 85 Ala. 493, 5 So. 287, 7 Am. St. 64, the Supreme Court of Alabama held that garnishment, such as was resorted to in this case, is a species of statutory attachment, whose object is to reach debts owed the defendant and apply the proceeds in the discharge of the principal debt.

In *American Life Ins. Co.* v. *Hettler,* 37 Neb. 849, 56 S. W. 711, 40 Am. St. Rep. 522, the court said that garnishment is an attachment by means of which money or property of a debtor in the hands of third persons, which cannot be levied upon, may be subjected to the payment of the creditor's claim. This case is cited with approval in 12 R. C. L., page 775, where it is said that the remedy of attachment is similar in many respects to garnishment.

In the Cyclopedic Law Dictionary it is said that preliminary injunction, attachment, arrest on mesne process, garnishment, etc., are provisional remedies. We think this definition is in accord with the holding of our own court on the subject. The effect of the decision in *St. Louis Southwestern Ry. Co.* v. *Vanderberg,* 91 Ark. 252, 120 S. W. 993, is that a garnishment is in the nature of a proceeding *in rem* and that the service of process on the garnishee creates a lien in favor of the plaintiff on the money due from the garnishee to the defendant. The decision in *Hartford Fire Ins. Co.* v. *Citizens' Bank of Booneville,* 166 Ark. 551, 266 S. W. 675, 39 A. L. R. 1458, proceeds upon the theory that garnishment is a proceeding *in rem.*

The primary object of the garnishment statute under consideration is to reach money and choses in action in the hands of third persons and to subject them to the payment of the plaintiff's claim by means of a delivery or payment by compulsion of law. The remedy is so nearly analogous to that of attachment that it would seem that garnishment of the sort resorted to in this action would be a provisional remedy, if attachment should be held to be a provisional remedy. The two remedies are so nearly alike that it would seem that there would be no

reason for holding attachment to be a provisional remedy and garnishment of the sort resorted to in this case not a provisional remedy.

The argument that this holding would result in hardship in certain cases is no valid reason for departing from settled principles of law. It has been often said that hard cases make shipwreck of the symmetry of the law, and it is always better for the Legislature to relieve from such hardships than for the courts to do it by judicial interpretation.

The result of our views is that the court erred in not holding that garnishment is a provisional remedy within the meaning of § 6401 of Crawford & Moses' Digest, and it should have held that the claim of J. B. Foster in the garnishment proceeding was superior to that of Pollack Company. The judgment will therefore be reversed, and the case remanded with directions to enter a judgment in accordance with this opinion, and for further proceedings according to law.

OUACHITA VALLEY BANK v. DEMOTTE.

Opinion delivered March 14, 1927.

1. GUARANTY—CONSTRUCTION.—In ascertaining the meaning of a contract of guaranty, the same rules control as apply in other contracts, and the important question is to determine and give effect to the intention of the parties, as ascertained by a reasonable interpretation of the terms used when read in the light of the attendant circumstances and the purposes for which the guaranty was made.
2. GUARANTY—NOTICE OF ACCEPTANCE.—Where a bank, pursuant to request, telegraphed that it would honor a draft for a shipment, this was not a mere offer of guaranty, but an absolute undertaking, and no notice of acceptance was necessary.
3. GUARANTY—ACCEPTANCE AND CONSIDERATION.—Where a bank guaranteed to honor a broker's draft for goods shipped to the bank's customer, the shipper's act in shipping goods according to the terms of the guaranty was itself an acceptance, and furnished a consideration making the guaranty binding.

4. GUARANTY—RIGHT TO CANCEL.—Where a bank guaranteed to honor a draft in payment of a shipment of goods, it could not cancel the guaranty after the goods were shipped and the draft drawn in payment therefor.
5. GUARANTY—WAIVER.—After a bank had breached its guaranty to honor a draft for goods shipped, the shipper did not waive his rights under the guaranty by stopping the shipment *in transitu,* nor by subsequently allowing the goods to go forward after assurance of payment by the bank.

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

Gaughan & Sifford, for appellant.

J. Bruce Streett and *W. Garland Streett,* for appellee.

WOOD, J. The facts are correctly stated by counsel for appellee as follows: About May 26, 1923, the Camden Tool & Supply Company applied to one C. O. Gillman, a broker in Texas, for quotations on two carloads of 15½-inch iron pipe, approximately 1,200 feet, f.o.b. cars at point of shipment. Gillman applied to the Acme Supply Company to purchase such pipe, and they agreed to sell it to him at $3.15 per foot, taking his draft on the Camden Tool & Supply Company in payment, provided he secured a guaranty from a Camden bank that the draft would be paid.

Gillman thereupon quoted the pipe to his customer at $3.40 per foot, allowing him 25 cents for his profit. A. C. Page, doing business under the trade name of Camden Tool & Supply Company, hereafter called Page, accepted this offer, and, at his request, the Ouachita Valley Bank sent to the Commercial State Bank of Cisco, near where the pipe was to be shipped, the following telegram: "Commercial State Bank, Cisco, Texas. Will honor C. O. Gillman draft bill of lading attached on Camden Tool & Supply Company for two cars of approximately twelve hundred feet fifteen half seventy-pound three dollars forty cents per foot f. o. b. cars, subject to C. O. Gillman inspection and indorsement of shipper's order bill of lading. (Signed) Ouachita Valley Bank."

Upon receipt and inspection of this telegram, plaintiff agreed to sell and have shipped the amount and kind of pipe required. The carload in controversy was loaded and shipped out of Gorman, Texas, on June 12. Page wrote Gillman, on June 11, to hurry up the shipment, and received a reply about that time notifying him that one car had been shipped. About this time Page and the Ouachita Valley Bank had gotten into a lawsuit involving a car shipped to Page from Pioneer, Texas, and the defendant bank decided to cancel all guaranties on pipe shipments from Texas points, and, on June 15, 1923, wired the Commercial State Bank canceling its guaranty of May 26. About three days before this notice of cancellation was sent one carload of 600 feet of pipe had been shipped and a draft was drawn by C. O. Gillman in favor of the Commercial State Bank, with shipper's order bill of lading attached. This draft was forwarded by the Commercial State Bank to the Ouachita Valley Bank for collection, for account of the Acme Supply Company. Payment was refused, and the draft and bill of lading returned to the Cisco Bank and by it turned over to the plaintiff.

Thereupon, on June 16, plaintiff, as holder of the bill of lading, stopped the car at Fort Worth, and notified Gillman of the refusal of the defendant to honor his draft and of plaintiff's action in stopping the shipment. The guaranty having been canceled, the second car was not shipped out. After stopping the car, plaintiff called the defendant bank over the telephone and asked for an explanation of its refusal to pay the draft, and Mr. Brown, president of the said bank, told him that it had had trouble over the title to another car shipped by Gillman, and had canceled all guaranties in consequence. Plaintiff told him that this shipment had been made before such cancellation, and Brown then told him to let the shipment come forward and bank would pay the draft on arrival of car. Plaintiff then explained to the bank, since the draft had been turned down, he was already out

the freight from Gorman to Fort Worth, and loading charges, and that he stood on his original contract. Gillman then had a conversation with Brown, pursuant to which the bank wired him a guaranty that it would pay $600 to cover freight from Gorman to Camden and return if he would have plaintiff permit the car to come forward. Thereafter, on June 25, the car was released, and reached Camden July 6. When the car reached Camden, Mr. Sayles, for the plaintiff, presented the original draft with bill of lading attached, to the defendant, and W. W. Brown, the president, refused payment upon the ground that the bank's guaranty was canceled before the shipment. Payment of the $600 to cover freight to return the car to Gorman was then demanded and refused. Effort was then made to sell the pipe in the Camden territory, and, failing in this, it was reshipped to El Dorado, and finally sold there for $1,410.30, entailing a loss to plaintiff of the amount alleged in its complaint as amended on the trial.

Thereafter Paul DeMotte, doing business under the firm name of Acme Supply Company, instituted this suit. The cause was submitted to the court, and judgment rendered for plaintiff, and defendant appealed.

The rights of the parties to this action depend primarily upon the construction of the telegram above set forth. In 28 C. J., at page 930, Mr. Skyles, the author of the article on "Guaranty," lays down the following rule for the construction of such contracts: "In ascertaining the meaning of the language of a contract of guaranty, the same rules of construction control as apply in the case of other contracts. In accordance with such rules the important question is, if possible, to determine and give effect to the intention of the parties, as ascertained by a fair and reasonable interpretation of the terms used and the language employed in the contract of guaranty, as read, when necessary, in the light of the attendant circumstances and the purposes for which the guaranty was made." Numerous authorities are collated in the footnotes to the text.

The telegram under review, though addressed to the Commercial State Bank of Cisco, Texas, is in the nature of a general guaranty that appellant will pay the draft of C. O. Gillman on the Camden Tool & Supply Company to any one who will furnish or sell to C. O. Gillman for the Camden Tool & Supply Company the goods therein mentioned, after the same had been inspected by Gillman under the terms therein expressed. It is in the nature of a letter of credit by which the appellant proposes to stand as surety or guarantor for Gillman for the purchase price of two cars of approximately 1,200 feet of 15½-inch seventy-pound iron pipe at $3.40 per foot f.o.b. cars, after Gillman had inspected the same and indorsed the shipper's order bill of lading attached. As we view the telegram, appellant undertakes to honor or pay Gillman's draft to any one who will furnish Gillman the goods specified for the Camden Tool & Supply Company. The manifest purpose of the telegram was to enable Gillman to procure and have shipped to the Camden Tool & Supply Company, the appellant's customer, the goods mentioned in the telegram. Doubtless the appellant had in mind to enable Gillman to refer the dealers with whom he was negotiating for the purchase of the iron pipe to the Commercial State Bank of Cisco, Texas, as to his reliability and solvency. This is evidenced by the original undertaking of the appellant to pay Gillman's draft for the iron piping purchased by him to any one who might furnish him such piping for the Camden Tool & Supply Company, for whom Gillman, the broker, was negotiating the purchase. The telegram was not in the nature of a special guaranty addressed only to the Commercial State Bank of Cisco, for that bank was not engaged in the business of buying and selling iron pipe, and the telegram was not couched in language which indicated that the appellant would honor the draft only if drawn in favor of the Bank of Cisco. Appellant evidently did not expect the Cisco bank to furnish the money to Gillman to pay for the piping, nor was the telegram

couched in language that indicated that Gillman was expected to buy the piping from any particular dealer, but it was an original undertaking to pay any shipper or dealer who, as we have already stated, would furnish the goods to Gillman upon the terms mentioned in the telegram. There is nothing in the telegram to indicate that appellant intended to repose any special confidence or trust in the Commercial State Bank of Cisco in connection with the negotiations and that it intended to be responsible alone to that bank. It follows from what we have said that the appellant, by reason of this telegram, rendered itself liable to appellee, who, as the proof shows, acted upon the telegram and complied strictly with the conditions in selling and shipping the piping.

In *Falls City Construction Co.* v. *Boardman,* 111 Ark. 415, 163 S. W. 1134, we quoted from 20 Cyc. p. 1407 (3) in parts as follows: "Where the transaction is not merely an offer to guarantee the payment of debts and amounts to a direct promise of guaranty, all that is necessary to make the promise binding is that the promisee should act upon it; he need not notify the promisor of his acceptance." And further, at page 1409, "where there has been a precedent request for the guaranty, notice of its acceptance need not be given to the guarantor." Here the promisee, under this instrument, as we have seen, was any one who acted upon the instrument and sold the goods in reliance upon the good faith of the promise. The promise on the part of the appellant was not a mere proposal, but an absolute guaranty to pay, and the draft for the amount of the purchase price of the piping was drawn in favor of the Commercial State Bank of Cisco with shipper's order bill of lading attached, and forwarded to appellant bank for collection. No further notice therefore to the appellant was necessary of the acceptance of the promise by the appellee. Appellee's act in selling and delivering the piping, according to the terms of the guaranty, was itself an acceptance, and furnished the consideration on

appellee's part essential to make the promise binding on the part of appellant to pay the purchase price. See *Beeson* v. *La Vasque,* 144 Ark. 522, 223 S. W. 355; *York* v. *Powell,* 125 Ark. 597, 187 S. W. 628; *McCarroll* v. *Red Diamond Clothing Co.,* 105 Ark. 443, 151 S. W. 1012, 43 L. R. A. N. S. 475; *American National Bank of Macon, Ga.,* v. *Pillman,* 176 Mo. App. 430, 158 S. W. 433, 2 Cyc. 1405.

The appellant had no right to cancel the guaranty after the appellee had shipped the goods and the draft had been drawn in payment therefor and sent to appellant. The guaranty took effect and became enforceable and complete after it was acted upon by the appellee in selling and shipping the goods specified according to the terms as therein expressed. After the appellee had thus accepted the guaranty on his part, the appellant could not cancel and revoke the same. This was not a continuing guaranty, but one that was fully consummated by the acceptance and shipment of the goods by appellee. We are convinced that the appellee did not waive his right to recover on the guaranty by stopping the car *in transitu* after he ascertained that the draft for the purchase price would not be honored by the appellant. After the appellant had thus breached its contract with the appellee, the latter was justified in stopping the car *in transitu* in order to minimize, as far as possible, the damages that had accrued to him by reason of the violation of the contract on the part of appellant. Neither did appellee waive his right of action on the original guaranty by permitting the car to go forward after he had been advised by the appellant to let the shipment proceed and that the appellant would honor the draft when the shipment reached its destination. The appellee testified on this issue as follows: "After payment of the draft was refused, I stopped the car about June 16. We had notice verbally from the Ouachita Valley Bank, in a conversation with Mr. Brown, that he was not paying the draft, and, acting upon that, I stopped the car. I told Mr. Brown that he could not cancel the guaranty, as there was no time limit.

He stated that it was due to a misunderstanding with Mr. Gillman on another shipment, which had been attached by some other firm. He stated that they were not going to make any more bank guaranties, but he said if we would allow our shipment to come forward he would pay on arrival. We stopped the car at Fort Worth to minimize our prospective loss. Under the contract of sale we delivered the pipe f.o.b. cars, Gorman, Texas. Mr. Gillman was in receipt of a wire sent to Dallas guaranteeing the freight to and from Camden from Gorman, Texas, dated June 21, 1923. I received that telegram, and then allowed the shipment to go forward. After we received notice that the car was in Camden, we sent a representative, who presented the original draft to Mr. Brown of the Ouachita Valley Bank, and the draft was not paid on this presentation, nor was the freight paid by the bank."

This testimony by the appellee was clearly sufficient to warrant a finding that he had not waived his right of action for damages for breach of the original warranty. The right of the appellee against the appellant, under the contract of guaranty as we construe it, became complete after he had sold and delivered the piping free on board the cars at Gorman, Texas, consigned to the Camden Tool & Supply Company at Camden, Arkansas, the same being inspected by Gillman and a draft drawn on the Camden Tool & Supply Company for the purchase price with shipper's order bill of lading attached to the draft, the bill of lading being indorsed by Gillman, evidencing the fact that he had inspected and accepted the piping. The appellee had then complied with the contract of guaranty on his part, and the appellant, by refusing payment of the draft, violated its contract, and was liable to the appellee, the only party in interest, for the resultant damages. The amount of the judgment for such damages, as entered by the court, is warranted by the evidence adduced.

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

McELHANNON v. COFFMAN.

Opinion delivered March 14, 1927.

1. SUNDAY—AFFIRMANCE OF SUNDAY CONTRACT.—While a contract of sale made on Sunday is void, the parties may affirm or adopt the terms thereof on a subsequent week day, and so become bound to perform them.
2. SUNDAY—AFFIRMANCE OF SUNDAY CONTRACT.—One who purchased an automobile on a Sunday, and retained possession and used it constantly until it was taken from him by the sheriff, cannot subsequently repudiate the contract on the ground that it was executed on Sunday.
3. SUNDAY—DISAFFIRMANCE OF CONTRACT.—The fact that the vendors of an automobile sold on Sunday transferred the purchase notes to an innocent purchaser for value did not excuse or exonerate the buyer for failure promptly to notify the vendors and the purchaser of the note that the contract was void because executed on a Sunday nor for his failure to offer to return the car before he used it.

Appeal from Montgomery Chancery Court; *W. R. Duffie,* Chancellor; reversed.

John H. Crawford, Dwight H. Crawford and *D. F. McElhannon,* for appellant.

Appellee, *pro se.*

WOOD, J. On December 15, 1924, Jack Coffman purchased from Fleming & McElhannon an automobile for which he paid the sum of $522.25 and executed his note in the sum of $1,045.34, to be paid in equal installments of $87.12 on the 15th day of each month thereafter. Coffman and Fleming also on that day entered into a written contract of sale, by the terms of which the title to the car was retained in the vendors until the purchase price was paid in full. The note provided that, if any installment was not paid when due, the remaining installments would then become due at the option of the holder. The notes and written contract evidenced the contract of sale. This note and contract were transferred to the Commercial Credit Company, a Louisiana corporation, for valuable consideration before maturity. Nothing was paid on the note by Coffman, Fleming & McElhannon, and this action was instituted by the credit company against

the appellants to recover the balance due on the note, and the plaintiff prayed that a vendor's lien be declared on the automobile and that same be held subject to the orders of the court, and that plaintiffs have judgment against the defendants in the sum of $1,045.34, and that the automobile be sold to satisfy such judgment if same were not paid. Appellant Fleming died before the institution of the action, and the action proceeded against Mrs. Fleming, as the executor of Fleming's estate, and McElhannon.

Jack Coffman, in a separate answer, denied the execution of the note and contract, and that same had been assigned to the credit company, and denied liability. He alleged that the car in controversy was purchased by him from Fleming & McElhannon on December 14, 1924, and that the note and contract upon which the action is predicated were executed on that day, which was Sunday. He therefore alleged that the contract was void. He alleged that he paid to Fleming & McElhannon the sum of $600 on that day on the purchase price of the automobile, and he prayed that the note and contract be declared void and that he have judgment against Fleming & McElhannon in that sum.

The answer of the appellants admitted the execution of the notes and contract by the appellee and that the credit company was the holder thereof for value. They alleged that Coffman was primarily liable on the note, and prayed that, if judgment be rendered against them and their codefendant, Jack Coffman, that the automobile be sold and the proceeds applied to the payment of the judgment, and that they have judgment against Coffman for any balance which they might be compelled to pay, after the proceeds of the sale were applied to the satisfaction of the judgment.

In answer to the cross-complaint of Jack Coffman they denied that the automobile was sold and delivered to Coffman on Sunday, December 14, 1924, but alleged that, if the sale had been made on Sunday, Coffman thereafter, on a week day, had ratified the same by promising to pay

for the car and by retaining possession and using the same from the time of his purchase. They denied that Coffman had paid more than had been credited on the note, and denied liability to Coffman in any sum.

The undisputed testimony was to the effect that the note and contract evidencing the sale of the car in controversy were executed on Sunday. It also showed that appellee, credit company, was a *bona fide* holder of the note, and that the note was past due. The testimony of Coffman was to the effect that, at the time he purchased the car, he paid the sum of $200 in cash and an old car, and that he should have had a credit of $600 on the note instead of $522.25. He kept the car five months. It was in good condition when the sheriff took it from him. He had not paid the note. He ran the car a couple of thousand miles. Something was the matter with it, and the sellers came up and fixed it, and he then stated to them that the car was too big and he wanted them to take it back. He offered to give them his old car and pay the $200 note to let him out. He sent the credit company a check, but stopped payment on same before it was presented. He did not tell the sellers of the car that, if they would fix it up, he would keep it. He wrote to the credit company that he would not pay any more, and wanted it to take the car. At the time he signed the note he expected to pay for the car, but changed his mind the next morning, which was Monday, and then told the sellers of the car, a week or two later, that he wanted them to take the car back. He ran the car in the meantime. He continued to run the car after the credit company asked him to pay for it, which was in January, and was running it when the sheriff came for it. Witness never had any agreement with the credit company to pay them anything at any time.

A witness on behalf of Coffman testified that he was present when Coffman and McElhannon traded cars. Coffman traded a Baby Overland which he priced to them at $400. Witness supposed they agreed to give it, as they took it away and left the new car.

Witness Ross testified for the appellees in substance that he was working for Fleming & McElhannon at the time of the sale of the car in controversy to Coffman. Coffman agreed to give his car, and executed his note for $200 for the first payment. Witness asked Coffman four or five times, at a later date, about paying for the car, and insisted on his making the payments. The first time witness saw him, Coffman had written the credit company that he was not going to keep the car, and witness was sent up there to see Coffman about it. He talked to Coffman, and Coffman agreed that he would keep it and pay for it. A few days later McElhannon had word from Coffman that something was wrong with the car, and witness and a mechanic went to see what was the matter with it, and fixed the car, and it seemed to be all right. Coffman then told witness that he would send a check the next day for what was due. On another occasion, after talking with Coffman, Coffman told witness he was going to keep the car and pay for it. In another conversation, in regard to the check which Coffman had given the credit company and which was turned down, Coffman stated that he didn't know much about the check business, and thought the checks were paid. He asked witness to have the checks sent back, and stated that he had just put $700 in the bank, and that the checks would be paid. On cross-examination witness stated that he kept after Coffman to make his payments on the car until he said that he would "just keep the damn thing and pay for it." He never seemed angry—just made that expression, and the last time witness was at his place he said he would not pay for the car.

McElhannon testified that he sold Coffman the car in controversy, the contract of sale being evidenced by the written contract and the note. Coffman was to pay $522 cash, and he made this payment by giving a Baby Overland and his note for $200. Coffman's testimony to the effect that he traded in the car for $400 was not correct. He turned in the old car and signed a personal note for $200 and executed the note held by the credit company

in the sum of $1,045.34. Witness saw Coffman after the trade twice. Witness went to his place of business to fix the car. He talked to Coffman about keeping the car, and Coffman stated that, if they could get it fixed up in first-class condition, he guessed he might as well go ahead and pay for it. On the second trip witness talked to Coffman about keeping the car and paying for same, and Coffman stated that it was more car than he needed. Witness told Coffman that the credit company would not take the car back, but would sue him for the difference, and witness told him that it was best for him to go ahead and pay for the car. Coffman, in reply, stated that he was under the impression that the car was all that they could get, but if he knew they would give him trouble over the note, he would go ahead and pay for it. The last time witness went to see Coffman about the car Coffman drove the car all the way from his home to Caddo Gap. Coffman stated to witness that he felt like we ought to be able to handle the car out to good advantage, as it had been driven very little, showing only between four and five hundred miles on the speedometer.

Coffman was called as a witness by the credit company, and they handed him a check, dated Feb. 25, 1925, on the Bank of Caddo Gap, payable to the credit company for $174.84, and was asked if that was the check about which he had testified, and he answered that it was.

The court found that the contract was void, and that same was not ratified by the interested parties, and that the transfer of Coffman's paper to the credit company, an innocent purchaser for value, resulted in taking it out of Coffman's power to disaffirm or to recover the property. The court thereupon entered a decree in favor of Jack Coffman against the appellants in the sum of $522.56, with costs, and entered a decree in favor of the credit company against the appellants in the sum of $400, the same being the balance due the credit company on the deficiency judgment, after the application of the proceeds of the sale of the car.

This court has held that, while a contract of sale made on Sunday is void, nevertheless the parties to the contract may, on a subsequent week day, affirm or adopt the terms of the previously inoperative contract, and so become bound to perform them. *Tucker* v. *West,* 29 Ark. 386-405; *McKinney* v. *Demby,* 44 Ark. 74-78; *Fire Ins. Co.* v. *Ford,* 106 Ark. 568-570, 153 S. W. 810, 44 L. R. A. N. S. 289. In the last case we said: "In the instant case, while appellee denies that he promised to pay the note on a week day, after it was made, he does admit that the note was given in payment of a premium for a fire insurance policy issued by appellant in his favor, and that he retained the policy of insurance from the date of its issuance until the present suit was commenced. This amounted to a ratification of the contract, and appellant was entitled to recover on the notes."

Under the doctrine of these cases it was the duty of Coffman to have acted promptly if he intended to repudiate the contract for the purchase of the car on the ground that the contract was executed on Sunday, and therefore void. He could not retain possession of the car and use the same constantly, as his own testimony shows he did, from the time of his purchase until the car was taken from him by the sheriff, and then claim that he was not liable under the contract. His own testimony shows that he had run the car something like 2,000 miles in daily use of it going to and from his mill. Coffman cannot escape liability on the ground that the vendors of the car, by selling the note for the car in controversy to an innocent purchaser for value, had put it beyond his power to defend the note and therefore he was under no obligation to offer to return the car. This conduct on the part of the vendors only proved that they were treating the contract as valid and binding, and it could not excuse or exonerate appellant for his failure to act promptly in notifying his vendors and the credit company that the contract was void, nor for his failure, at least, to have offered to return the car to his vendors before he had used the same. Prompt action on his part

might have enabled the vendors to make a satisfactory adjustment with the credit company and save a loss to either. At any rate, so long as the vendors and the credit company were treating the contract of sale as valid, it certainly was incumbent upon Coffman, if he intended to repudiate such contract, to do so promptly. He could not receive the benefits of the deal and at the same time escape the burden of paying for such benefits.

The decree is therefore reversed, and the cause is remanded with directions to enter a decree in favor of the appellant against Coffman for the balance due on the note.

ROSS v. STROUD.

Opinion delivered March 14, 1927.

1. INFANTS—PROOF OF SERVICE OF PROCESS.—In the absence of a showing that a minor defendant was properly served with process in a second action, it was prejudicial error to allow such action to be consolidated with a prior action in which the defendant had appeared and to proceed to trial of the consolidated causes in the absence of the defendant.
2. CONTINUANCE—REFUSAL PREJUDICIAL WHEN.—Where, in an consolidated action, there was no showing of service on a minor defendant in one of the causes, it was error to refuse a continuance requested by the defendant's guardian *ad litem* in order to get in touch with the defendant, who was out of the State.

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

V. James Ptak, for appellant.

WOOD, J. An action was instituted by C. L. Stroud against Jack Ross, a minor, and Renzy Ross, his father. Stroud alleged that, while he was driving his Ford car, in the city of Fayetteville, at a moderate rate of speed, Jack Ross, who was driving another car at a high rate of speed, negligently collided with his car and injured the plaintiff, to his damage in the total sum of $744, for which plaintiff prayed judgment.

Renzy Ross, who was the father of Jack Ross, demurred to the complaint, and the demurrer was sustained by the court as to him. The defendant, Jack Ross, filed an answer, in which he denied specifically the allegations of negligence as set up in the complaint and the damages to the plaintiff as therein alleged; and he alleged that any injury or damage to the plaintiff was caused by his own negligence in driving his car in a reckless manner and with excessive speed.

The trial resulted in a judgment in favor of the plaintiff in the sum of $150. The judgment was afterwards set aside on the ground that no guardian *ad litem* was appointed for the minor. On September 5 the plaintiff filed another complaint against Jack Ross, in which substantially the same cause of action was set up as in the former action. On the 3d of November, 1925, Irving Whitty was appointed guardian *ad litem* for the minor defendant. The guardian *ad litem* filed what is designated as a motion and acceptance of appointment, in which he set up that the defendant was absent from the State, and that it would require several weeks before the guardian *ad litem* could communicate with him and before he could ascertain the facts essential to present the defendant's defense. The record shows that the guardian *ad litem* was directed to file an answer, and he filed same, reserving in his answer his alleged "want of reasonable notice and opportunity to defend." The answer filed contained a formal denial of the material allegations of the complaint.

The causes were consolidated for trial and were tried before a jury, resulting in a verdict in favor of the plaintiff in the sum of $894. On motion for a new trial the plaintiff offered to reduce the judgment to the sum of $400. The court entered a remittitur and rendered judgment in favor of the plaintiff in the sum of $400, from which is this appeal.

In *Pinchback* v. *Graves,* 42 Ark. 222-227, we said: "No judgment should be rendered affecting the interests of an infant until after defense by guardian, and this

defense should not be a mere perfunctory and formal one, but real and earnest. He should put in issue, and require proof of, every material allegation of a complaint prejudicial to the infant, whether it be true or not. He is not required to verify the answer, and can make no concessions on his own knowledge. He must put and keep the plaintiff at arm's length. * * * These are wise provisions, and they are so far imperative. I think, too, that a guardian *ad litem* fails in his duty, and does not apprehend the true obligation which he voluntarily assumes, if he contents himself with simply putting in a general denial, as is commonly done, and then leaves the infant to the mercy of the rude stream of the ensuing contest. His interests, after issue, require protection as well as before. Proof may be required in his behalf; witnesses against him may require cross-examination. Points on error must be duly saved.'' See also *Blanton* v. *Davis,* 107 Ark. 1, 8 and 9, 154 S. W. 947.

According to the doctrine of the above cases, the minor defendant's rights were not properly protected at the trial. The answer of the guardian *ad litem* recites that he was required to file the answer by the directions of the court, and this, too, after he had moved the court to grant him a reasonable continuance to get in touch with the minor defendant, who was then out of the State, and that it would require several weeks to communicate with him in order to ascertain the essential facts necessary for his defense. The recitals of the judgment show that the plaintiff was present and announced ready for trial, but that the defendant came not, and that the cause was heard upon the complaint of the plaintiff and the answer of the guardian *ad litem* and the evidence adduced by the plaintiff. The recitals of the judgment do not show that the guardian *ad litem* was present at the trial. The record shows that the original action instituted by the appellee against Jack Ross, a minor, and his father resulted in a judgment in favor of the appellee against Jack Ross in the sum of $150, which judgment was set aside and a new trial ordered. That

action was docketed and proceeded as No. 40 on the docket of the circuit court. Another action, designated No. 72, was then instituted by the appellee against Jack Ross on September 5, 1925, and it is recited on the margin of the complaint that summons was served on the defendant Jack Ross on September 12, 1925. But the record further recites that the minor defendant, through his guardian *ad litem,* appeared only for the purpose of objecting to the service, and moved to quash the same. The record does not show that this motion was acted upon by the court. There is no recital in the judgment of the court or in the record showing that the appellant had been duly served with process in the last action instituted against him, No. 72. Taking all the recitals of the record together, there is no showing that the appellant was ever properly served with process in the last action instituted against him. The court therefore erred in allowing this cause to be consolidated with action No. 40 and in proceeding to the trial of the consolidated causes without the presence of the minor defendant. Under the showing made in the answer of the guardian *ad litem* in action No. 72, in which he expressly reserved "to the defendant, Jack Ross, all his rights herein of reasonable notice and opportunity to defend," we are convinced that the trial court should have granted the motion of the guardian *ad litem* for a continuance of the cause. There is nothing in the record to show proper service on the minor defendant, Jack Ross. Even if it could be said that the minor defendant was served with summons, still the record does not show that the guardian *ad litem* appeared for him at the trial and made a real defense. Our conclusion therefore is that the judgment rendered by default against the minor defendant was erroneous and prejudicial to his rights. The judgment is therefore reversed, and the cause will be remanded with directions to have service of summons upon the appellant, Jack Ross, in action No. 72, and for a new trial of the consolidated causes.

DAVIS v. HAMPTON STAVE COMPANY.

Opinion delivered March 14, 1927.

1. CARRIERS—FAILURE TO SHIP OVER RAILROAD—JURY QUESTION.—Whether a stave company's failure to ship over plaintiff railroad the percentage of its finished product required by a contract granting to such stave company a special rate on rough material was due to a lack of cars furnished by plaintiff *held* a question for the jury in a suit to recover the amount of an undercharge.
2. ESTOPPEL—RESPONSIBILITY FOR NONPERFORMANCE OF CONTRACT.—He who prevents a contract from being performed can not avail himself of the benefit of the nonperformance which he has occasioned.
3. CARRIERS—BREACH OF CONTRACT.—Where the Director General of Railroads, by his failure to furnish cars, made it impossible for a stave company to comply with its contract to ship a certain percentage of its products over a particular line, he could not recover for the breach.

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

Thos. S. Buzbee, Geo. B. Pugh and *A. S. Buzbee,* for appellant.

T. D. Wynne and *Charles A. Miller,* for appellee.

SMITH, J. This suit was instituted by James C. Davis, Director General of Railroads, as agent, against the Hampton Stave Company, to recover an undercharge growing out of the alleged failure of the stave company to ship out over the lines of the Chicago, Rock Island & Pacific Railroad Company the required percentage of finished products for the amount of rough material which had been shipped into the plant of the stave company over the lines of said railroad company, under the terms of a so-called "rough material" contract.

The complaint alleged that, on the 20th day of May, 1920, the stave company entered into a contract with J. M. Dickinson, receiver of the Chicago, Rock Island & Pacific Railway Company, to secure the benefits of the proportional rates on rough forest products, as provided in § E, columns A and B, Railroad Commission of Arkan-

sas, Standard Freight Distance Tariff No. 5. A copy of the contract was made an exhibit to the complaint.

Under the terms of this contract the stave company agreed to ship out over the lines of the Chicago, Rock Island & Pacific Railway Company finished products equal to the percentage of rough forest products moving into its mill over the lines of said railroad company, as required by the tariff, and that, upon failure so to do, the stave company would pay charges based upon local rates for such forest products for which it failed to ship out the required percentage of finished products.

The complaint alleged that, upon the discharge of the said Dickinson as receiver, the Chicago, Rock Island & Pacific Railroad Company succeeded to all the right, title and interest of the said receiver in said contract, and that, on December 17, 1917, the President of the United States took over the operation of certain railroads of the country, of which the Chicago, Rock Island & Pacific Railroad was one, and that the same was operated by the United States Government from that date until February 29, 1920, and that the United States Railroad Administration succeeded to all the right, title and interest of the railroad company in the contract between the receiver and the stave company.

The complaint alleged a deficiency of finished products shipped out by the stave company, and prayed judgment for the sum due for the alleged breach of the contract by the stave company.

The stave company filed an answer, in which it denied that it had failed to ship the required proportion of finished products over the lines of the Chicago, Rock Island & Pacific Railroad Company, and, for further answer, alleged that, if it had so failed, its default was due to the failure of the railroad administration to furnish the necessary cars for that purpose.

The trial court submitted the question of the failure of the railroad administration to furnish cars to the jury,

and instructed the jury to find for the plaintiff, Director General of Railroads, if there had been no such failure.

On this issue the stave company offered testimony to the effect that, during the period of Government control, the United States Government assumed control of and operated, not only the Chicago, Rock Island & Pacific Railroad Company's line of railroad in the State of Arkansas, but also the line of railroad belonging to the St. Louis Southwestern Railway Company, both of which railroads entered and operated lines into and out of the city of Fordyce, Arkansas, where the stave company's mill was located, and that the Director General of Railroads, during the period of Government control, did not furnish cars when requested for the purpose of shipping out its finished products over the Chicago, Rock Island & Pacific Railroad, but did furnish cars enabling it to ship its finished products over the St. Louis-Southwestern Company's lines.

The answer alleged, and testimony was offered to show, that the stave company stood ready to ship its finished products to the amount required by said contract. Objection was made to testimony offered by the stave company to the effect that the Director General of Railroads failed and refused to furnish cars when requested, upon the ground that it was incompetent, and excepted to the action of the court in permitting its introduction.

The jury returned a verdict for the stave company, which fact indicates a finding that the failure of the stave company to ship finished products was due to the failure of the Director General to furnish cars for that purpose. Judgment was rendered accordingly, and the Director General of Railroads has appealed.

We think the issue, whether the stave company's failure to ship its finished products was due to the failure of the Director General of Railroads to furnish cars for that purpose, was properly submitted to the jury, and that the verdict of the jury, returned under proper instructions, is decisive of the question involved in this case.

The applicable principle of law controlling here was announced by this court in the case of *Vaughan* v. *Odell & Kleiner,* 149 Ark. 118, where it was said: "It is a well-settled and sound principle of law that he who prevents a thing from being done shall not avail himself to his own benefit of the nonperformance which he has occasioned."

The Director General of Railroads, by his failure to furnish cars, made it impossible for the stave company to comply with the contract here sued on; he cannot therefore avail himself of the nonperformance of the contract which his own failure occasioned.

The judgment of the court below is correct, and is therefore affirmed.

WINN *v.* DODGE.

Opinion delivered March 14, 1927.

1. PROHIBITION—QUESTION RAISED.—The correctness of the court's finding, in a suit to quiet title, that the plaintiff therein was the owner of the land from which it cut timber, is not open to review in a proceeding by defendants for a writ of prohibition against the entry of a decree quieting plaintiff's title.
2. PROHIBITION—PETITION FOR REMOVAL.—Filing of a petition and bond by defendants for removal of a cause of action to the Federal court on the same day that they filed a petition for prohibition in the Supreme Court will not be considered, both because it was filed too late and because they are asking affirmative relief in the Supreme Court.
3. JUDGES—AUTHORITY TO ENTER DECREE RENDERED BY PREDECESSOR. —A chancellor has authority to order a decree rendered by his predecessor to be entered of record as of the date of rendition, and he will not be required to retry the case *de novo.*
4. PROHIBITION—DOES NOT LIE WHEN.—Prohibition does not lie to prevent a chancellor from entering a decree rendered by his predecessor; the remedy of the petitioners being by appeal if the decree is erroneous.

Prohibition to Pulaski Chancery Court; *Frank H. Dodge,* Chancellor; writ denied.

Oscar H. Winn, for appellant.

Sam T. & Tom Poe, for appellee.

SMITH, J. Petitioners seek a writ of prohibition commanding the respondent, as chancellor of the Pulaski Chancery Court, to refrain from entering a decree in a cause pending in that court. The F. Burkhardt Manufacturing Company was plaintiff in that cause, and petitioners here were defendants there. The cause was filed May 19, 1925, and was heard by the Honorable John E. Martineau, the duly qualified and acting chancellor, on oral testimony, on November 9, 1926. The chancellor reserved his decision, and asked counsel for the respective parties to prepare and file briefs. The briefs were prepared and submitted to the court.

On January 10, 1927, the chancellor handed down his decision, and directed that a decree be prepared by counsel for the plaintiff quieting the title of the plaintiff to the land in controversy. The defendants had filed an answer and cross-complaint, in which they claimed title to the land in question, and prayed that they be awarded damages for the value of certain timber cut on the land in litigation by the plaintiff company. The chancellor directed that, when the decree was approved as to form by counsel for the defendants, it should then be submitted to him for approval.

Counsel for plaintiff prepared a decree in accordance with the findings of the chancellor, and, on January 12, 1927, submitted it to the attorneys for defendants, who declined to approve it. The decree as prepared by counsel was filed with the clerk of the chancery court on January 17, 1927.

On January 22, 1927, while the court was legally in session, it was ordered that the decree be entered of record, and that it be entered as of the date of its rendition, to-wit, January 10, 1927. Before the order of January 22, 1927, was made, the decree was approved by Governor Martineau, but this was done after he had vacated the office of chancellor by becoming Governor.

Chancellor Martineau was sworn in about 1:30 P. M. on January 11, 1927, as Governor of the State of Arkansas, and, on the same day, appointed Frank H. Dodge as his successor as chancellor.

On January 20, 1927, petitioners filed in this court a petition for an order prohibiting the Honorable Frank H. Dodge, as chancellor, from entering upon the records of that court the purported decree without giving petitioners a full hearing upon the merits of the cause.

It was insisted in the oral argument in support of the petition that Chancellor Dodge should have heard the cause *de novo* to ascertain what decree should, in fact, be entered, and that included in this hearing should be the claim of the defendants, petitioners here, for damages for the timber cut by the plaintiff company from the land in controversy.

Petitioners insist that, as Chancellor Martineau had not approved the decree entered, it was not his decree, and that, as Chancellor Dodge had not heard the cause, he could not know what decree should be entered. Petitioners therefore urge that the cause has not been determined, and that there is no final decree from which they can appeal, and that they are without remedy unless, by prohibition, Chancellor Dodge is restrained from entering the decree which was not approved as to form by Chancellor Martineau while occupying the office of chancellor.

On the same day on which petitioners filed their petition in this court for a writ of prohibition they also filed in the chancery court a petition and bond for the removal of the cause to the Federal court.

It is true, as argued by petitioners, that the court below did not find the quantity of timber and the value thereof cut by the plaintiff, F. Burkhart Manufacturing Company, but that fact is unimportant and that finding was unnecessary, for the reason that the court found that the plaintiff company was the owner of the land from which the timber was cut, and, upon that finding, rendered a decree quieting the plaintiff's title. The cor-

rectness of that finding is not open to review in the present proceeding. The fact that petitioners have filed petition and bond for the removal of the cause to the Federal court is also unimportant, for the reason that it was not filed in time. Moreover, petitioners are asking affirmative relief at the hands of this court.

It is true, of course, as petitioners here insist, that Chancellor Martineau ceased to be chancellor when he became Governor, and that he thereafter had no right to make any order as chancellor. But he has not attempted to do this. The order directing the entry of the decree rendered by Chancellor Martineau was made by his successor in office after his successor had qualified and was acting as such.

It is not questioned that Governor Martineau was the chancellor on January 10, 1927, nor is it questioned that he had jurisdiction as such to render the decree which was later entered as having been rendered on January 10, 1927. Chancellor Dodge determined only what decree had been previously rendered, and, when he determined that fact, he ordered its entry as of the date of its rendition. There can be no question about his jurisdiction to do this.

Chancellor Dodge might, as petitioners insist (the term of the court not having expired) have reopened the entire cause and have heard it *de novo,* just as Chancellor Martineau might have done had he remained in that office, but Chancellor Dodge could not be required to reopen and rehear the cause, inasmuch as a final decree had been rendered by his predecessor. The fact that the decree had not been spread upon the records of the chancery court did not make it necessary for Chancellor Dodge to again try the cause. Petitioners are not entitled to a second trial of the cause on its merits.

It was clearly within the jurisdiction of Chancellor Dodge to determine merely whether a final decree had been rendered, and, if so, what it was, and to order its entry. This he did, and this he had the right to do.

In the case of *Monette Road Imp. Dist.* v. *Dudley,* 144 Ark. 169, 222 S. W. 59, it was held that the writ of prohibition lies where an inferior court has proceeded in a matter beyond its jurisdiction, and where the remedy by appeal, though available, is inadequate. Here, however, the chancery court did not proceed beyond its jurisdiction, and petitioners have a remedy by appeal if the decree entered was erroneous, and, for both these reasons, the petition for prohibition will be denied.

McDONALD v. HEILBRON-PALMER TANK LINE COMPANY.

Opinion delivered March 14, 1927.

MASTER AND SERVANT—NEGLIGENCE IN FURNISHING A SAFE PLACE—JURY QUESTIONS.—Where an employee helping to pull a flywheel of a gasoline engine down to start the engine was hurt by his foot slipping off the sill on which he was standing and into the flywheel, and there was evidence that, without plaintiff's knowledge, the foundation of the engine was insecure, causing excessive jerking and vibration, the questions of the employer's negligence and of the employee's negligence and assumption of risk were for the jury.

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

Hutchins, Abbott, Allday & Murphy, for appellant.

T. D. Wynne and *Chas. A. Miller,* for appellee.

SMITH, J. Appellant, who was the plaintiff below, alleged as his cause of action against appellee the following facts: That he was employed by appellee as a common laborer to assist in drilling an oil well. He had never seen the machinery with which the well was being drilled until a few minutes before his injury. He further alleged: "That he knew nothing from experience or previous observation about the condition of the machinery and equipment on said well; that, in fact, he had never seen the machinery on said lease until the day that the injury as hereinafter set out occurred; that, when he arrived at said well, under the direction of the

foreman for the defendant company, he, together with the other employees and in their presence, under the direction and supervision of the said foreman, set about the task of starting the engine on said well; that the particular job of starting the engine is known in oil vernacular as 'kicking off' the engine; that the foreman took his place at the engine itself and one of the employees got on one side of the wheel and this plaintiff on the other, to assist in turning the wheel over, in order to make the engine spark so that the same would ignite the flow of gas and thereby cause the engine to run. Plaintiff states that the work was being done under the personal supervision and direction of the foreman of the defendant company; that this plaintiff was standing on a sill which was adjacent to the wheel of the engine, which position was necessary for this plaintiff to take in order to perform the duties required of him at that time and place; that the sill was covered with oil; the said sill is a heavy piece of timber approximately twelve inches in width, and composes a portion of the foundation of the engine located on said well; that across the said sill, about the center, was a steel or wire cable, which was practically touching the sill at the point where this plaintiff was standing and where it was necessary for him to stand in order to perform the work required of him at the time and place; that the said cable, this plaintiff afterwards learned, was placed there for the purpose of making stationary and stable the engine and its foundation, and was tied around the foundation of the engine and to the brace of the engine in the opposite direction from the point at which it encompassed the foundation of the engine. This plaintiff ascertained, after the injury hereinafter described, that the brace was necessary for the reason that the engine was not securely bolted and fastened to its foundation; that six bolts and taps were necessary to firmly attach the engine to the foundation, and that only two of the bolts were there, and only one of them had a tap on it; that, in addition to that, the brace which was supposed to support the engine and lend

stability to the engine was wholly out of repair, and, in fact, at the point where the brace entered the ground, had rotted out. The result of the failure to securely attach the engine to its moorings, and the failure to have braces sufficient to hold the moorings of the engine solid in their place, was that the engine, when it was running, violently shook on its foundation, a portion of which was the sill above described, upon which this plaintiff was standing at the time and place when he was injured as hereinafter set out. That, in addition to that, the wholly unsafe condition in which the said engine was set up caused the engine, when it was running, to shake and quiver the cable on the sill above described upon which this plaintiff was standing. That these facts were unknown to the plaintiff at the time of the injury hereinafter described, and such facts could not have been ascertained by the plaintiff; that the conduct of the engine could not have been ascertained in any manner except by observation of it and experience with it, neither of which this plaintiff had any knowledge of, and the defects of the engine above set out and the other serious defects of the engine were not then at all apparent to this plaintiff, nor were they patent or open or visible."

The complaint further alleged that, "at the time and place above set out, the persons hereinbefore referred to, under the direction of the foreman of this defendant company, proceeded to start the engine by causing the same to ignite as above described; that, in turning the wheel, the engine ignited and the wheel began to revolve; that, as a result of the ignition and the starting of the engine, the engine violently shook on its foundation and shook the foundation and the cable in such a manner and with such violence as displaced this plaintiff from the firm foothold secured by him for the purpose of performing the duties required of him by his foreman. In other words, the violence of the jar of the engine and its foundation and the cable above described and the shaking of the sill upon which this plaintiff was standing caused this plaintiff to slip, lose control of himself, and

to be hurled against the framework of the machinery and his leg thrown into the spokes of the revolving wheel of the machinery; that, as a result of the hurling of this plaintiff into the framework and his leg into the revolving wheel, one of his legs was crushed and broken. That said engine was not in any sense safe machinery, was not in any sense attached in the manner and form required by good and careful workmanship, and the machinery and brace with it on which this plaintiff was required to work was wholly unsafe, and was known by the defendant company to be in the condition hereinabove described."

Plaintiff offered testimony tending to sustain all these allegations.

The engine in question was a four-cycle gasoline engine, and had connected with it two large flywheels located on each end of the engine shaft. These flywheels were 5 or 5½ feet in diameter, and were separated by a space of 4 or 4½ feet. The shaft in its boxes rested on the sills and the foundation in question. Three men were assisting plaintiff in starting the engine, and the testimony shows that these men, including the plaintiff, selected their positions at said engine of their own choice or volition. The plaintiff got in between the flywheels, and was standing on the sill of the engine, engaged, at the time of the accident, in pulling down upon one of the flywheels thereof. One or two efforts had been made to get a shot without success. Another effort was made in the same manner, when the plaintiff's foot slipped off of the sill into the flywheel, when and where his leg was broken.

Upon his cross-examination, in detailing the exact manner in which he was injured, the plaintiff testified as follows: "I had about six and-a-half inches, I guess; I got my foot on that side of the cable (indicating) and when I pulled down I never noticed where my foot was. I never put my foot on the spoke; I just pulled down. The other men was kicking, and I pulled hard—I always try to do my part—and when the engine made a good

kick, when it made a full shot, my foot slipped off, and the next I knew they were taking me out of the fly-wheel."

At the conclusion of the introduction of the testimony in plaintiff's behalf the court directed the jury to return a verdict for the defendant, which was done, and judgment was rendered accordingly, from which is this appeal.

In support of the action of the court in directing a verdict, appellee insists that appellant's own testimony shows that the injury to him was not caused by any negligence on the part of appellee, and that the injury was a mere accident for which it is not responsible.

It is insisted that the instant case is governed by the opinion of this court in the case of *Hunt* v. *Dell*, 147 Ark. 95, 226 S. W. 1055. There are points of similarity in the two cases. But, in the case cited, the only defect in the engine which was alleged to constitute negligence on the part of the master was the absence of a compressed air starter; but it was said that, if the absence of a starter was a defect in the machinery, it was patent to any one of reasonable intelligence exercising ordinary care for his own safety, and that the danger in going between the fly-wheels to assist in turning them so as to crank the engine was likewise obvious to such an employee. We held, under those facts, that the law attributed to the employee knowledge and appreciation of the danger incident to the work in which he was engaged, and exempted the employer from any liability to him on account of the injury received under the circumstances stated.

In the instant case there were, in the opinion of the majority, dangers which were not patent and obvious and of which the plaintiff was not advised or warned. These dangers arose out of the insecure foundation on which the engine was placed and the insecure manner in which the engine was fastened to its foundation, thus causing a greater jerking and vibration than would have otherwise occurred. The majority are also of the opinion that the jury might have found, from the testimony

quoted, that the excessive jerking and vibration of the engine caused plaintiff's foot to slip when it might not otherwise have done so, and thus have found that the plaintiff's injury was caused, not by his own negligence or by accident, but as the result of the defects and dangers arising out of the insecure fastening of the engine, of which plaintiff was not advised and the risk of which he did not assume, as they were not open and obvious, as was the case in *Hunt* v. *Dell, supra.*

For these reasons the majority are of opinion that the court erred in directing a verdict in defendant's favor, and the cause will therefore be remanded, with directions to submit to the jury the question of appellee's negligence, and also the questions of assumption of risk and contributory negligence on the part of the plaintiff.

LEPANTO SPECIAL SCHOOL DISTRICT v. MARKED TREE SPECIAL SCHOOL DISTRICT.

Opinion delivered March 14, 1927.

1. SCHOOLS AND SCHOOL DISTRICTS—RECOVERY OF TAXES IMPROPERLY DISTRIBUTED.—School taxes erroneously levied and distributed pursuant to levy to a school district and consumed in educational purposes by it cannot thereafter be recovered by the school district rightfully entitled to such taxes.
2. SCHOOLS AND SCHOOL DISTRICTS—IMPROPER DISTRIBUTION OF TAXES.—The rule that school taxes erroneously distributed, pursuant to levy, to a certain school district and consumed in educational purposes by it, may not be subsequently recovered by the district rightfully entitled to such taxes, does not conflict with Const., art. 14, § 3, providing that "no such tax shall be appropriated to any other purpose nor to any other district than that for which it was levied."

Appeal from Poinsett Chancery Court; *J. M. Futrell,* Chancellor; affirmed.

Gautney & Dudley, for appellant.

J. G. Waskom, for appellee.

HUMPHREYS, J. This is a suit on the relation of the prosecuting attorney of the Second Judicial District to

recover from Marked Tree Special School District, for the use and benefit of the Lepanto Special School District, $13,862.14 and legal interest thereon, alleged to have been erroneously assessed by the Tax Commission and Assessing Board of the State of Arkansas, for the Marked Tree Special School District against certain railroad, telegraph, and express company property located within the boundaries of said Lepanto Special School District. It was specifically alleged in the complaint that the erroneous assessment began with the year 1913 and continued through the year 1924; that the error was discovered and corrected in the year 1925; that, during the period aforesaid, the erroneous annual assessments were certified to the county clerk, extended on the records to the credit of the Marked Tree Special School District, collected, placed to its credit, received and expended by it for school purposes; that, after the discovery of the error, the Lepanto Special School District made demand upon the Marked Tree Special School District for payment of said taxes so erroneously received by it, which demand of payment was refused.

A demurrer was filed to the complaint upon the alleged grounds that it failed to state sufficient facts to constitute a cause of action, and that, if a cause of action was stated, it was barred by limitations and laches.

The demurrer was sustained, over the objection and exception of appellant, and, upon its refusing to plead further and electing to stand upon its complaint, the court dismissed the action for want of equity, from which is this appeal.

This court is committed to the doctrine that school taxes erroneously levied and distributed, pursuant to the levy, to a school district and consumed in educational purposes, cannot be recovered by the school district rightfully entitled thereto. The district to which the taxes rightfully belonged should have proceeded by injunction or other proper remedy to prevent the wrongful assessment, levy and distribution of taxes, or else have brought

a suit for the recovery of such taxes before they were expended for educational purposes by the district wrongfully receiving them. *Mabelvale Special School District* v. *Halstead Special School District,* 169 Ark. 645, 276 S. W. 584. The instant case is ruled by the case cited.

Appellant contends, however, that the rule therein announced is in conflict with the last proviso of § 3, article 14, of the Constitution of the State. The proviso referred to is as follows:

"Provided, further, that no such tax shall be appropriated to any other purpose nor to any other district than that for which it was levied."

The reason that the rule does not contravene said constitutional proviso is that the taxes were appropriated and expended for the purposes and in the district for which they were levied, although the assessment of the land as being in the Marked Tree District was erroneous.

No error appearing, the decree is affirmed.

KIRBY and MEHAFFY, JJ., dissent.

H. ROUW COMPANY *v.* AMERICAN RAILWAY EXPRESS COMPANY.

Opinion delivered March 14, 1927.

1. CARRIERS—PERISHABLE GOODS—LIABILITY.—In an action against an express company for damages to strawberries in transit, refusal of an instruction that, if the berries were in good condition when shipped, the law presumes that their damaged condition on arrival at destination was caused by defendant's negligence *held* not error, in view of evidence that the berries were inherently infirm and defective, though apparently in good condition when delivered to defendant.
2. TRIAL—REPETITION OF INSTRUCTIONS.—Refusal to give a requested instruction fully covered by another instruction that was given was not error.
3. CARRIERS—LIABILITY FOR PERISHABLE GOODS.—In an action against an express company for damages to strawberries *en route,* instruc-

tions to find for defendant if the damage resulted from decay, waste or deterioration in quality, due to their inherent nature or infirmity, or if they were in a defective condition when loaded in the car, *held* not erroneous or abstract, in view of expert testimony that inspection at the destination revealed evidence of disease which might have caused deterioration in transit.

4. APPEAL AND ERROR—INVITED ERROR.—Appellant cannot complain of an instruction submitting the same issue as an instruction requested by him.

5. APPEAL AND ERROR—SPECIFIC OBJECTION TO INSTRUCTION.—That instructions in an action against an express company for damages to strawberries *en route* were incomplete in not placing the burden on defendant to show that the berries were inherently defective was not prejudicial, where no specific objection thereto was taken.

6. APPEAL AND ERROR—ADMISSION OF EVIDENCE—HARMLESS ERROR.—The admission of incompetent evidence was harmless if the fact it tended to prove was otherwise established by competent evidence.

7. APPEAL AND ERROR—ADMISSION OF EVIDENCE—HARMLESS ERROR.—Where the real issue in a case was properly submitted the erroneous admission of testimony foreign to the issue was not prejudicial where it had no tendency to mislead the jury.

8. EVIDENCE—EXPERT TESTIMONY.—In an action against an express company for damage to strawberries by furnishing a defective refrigerator car, testimony of an expert witness that the car furnished was one of 50 constructed exactly alike so as to produce proper refrigeration was admissible to prove that the car was properly constructed, though the witness did not examine it.

9. EVIDENCE—EXPERT WITNESS—COMPETENCY.—In an action against an express company for damage to strawberries *en route* because of negligence because of failure to ice the car properly, a witness *held* qualified to testify as to sufficiency of the amount of ice furnished at various stations.

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

C. M. Wofford, for appellant.

Warner, Hardin & Warner, for appellee.

HUMPHREYS, J. Appellant instituted this suit against appellee on the 11th day of June, 1925, in the circuit court of Crawford County, to recover $1,280.87 damages on a car of strawberries delivered by it to appellee on May 6, 1925, at Hammond, La., for shipment to Longfellow

Brothers, in Minneapolis, Minnesota, occasioned through the alleged negligence of appellee in furnishing a defective refrigerating car in which to ship the berries, or one that did not properly refrigerate, and in failing to properly ice said car, and to re-ice same *en route.*

Appellee filed an answer, specifically denying each allegation of negligence contained in the complaint.

The cause was submitted to a jury upon the pleadings, testimony adduced by the respective parties, and instructions of the court, which resulted in a verdict in favor of appellee, and a consequent judgment dismissing appellant's complaint, from which is this appeal.

Appellant's first contention for a reversal of the judgment is that the trial court erred in not giving its requested instruction No. 3, to which it claimed it was entitled, on the theory that the undisputed evidence revealed that the berries were in good condition and would grade U. S. No. 1, when loaded and ready for shipment, and that a large part of them were over-ripe, moldy and decayed when they arrived in Minneapolis, Minnesota, although reaching their destination on schedule time. Appellant's requested instruction No. 3 is as follows

"3. You are instructed that, if you find from a preponderance of the evidence that the strawberries, at the time they were received by the defendant, were in a good, sound, merchantable condition, and that, upon their arrival in Minneapolis, Minn., they were found to be in a damaged condition, then the law presumes that the damaged condition was caused by the negligence of the defendant carrier, and the burden is upon the defendant to show by a preponderance of the evidence that such damaged condition was not the result of any negligence on its part."

We cannot agree with appellant that the undisputed testimony showed that the berries were in good condition at the time they were loaded and delivered to appellee. The most that can be said is that they were apparently

in good condition, for there is much testimony in the record tending to show that they were inherently infirm and defective; but, even if they were in good condition at that time, it was not reversible error to refuse to give instruction No. 3, for instruction No. 2 tells the jury that, if they found the berries were delivered to appellee in good condition and that, upon arrival at their destination they were in bad condition, appellant made a *prima facie* case of negligence, and that the burden was then upon it to show that the damage did not result from its negligence. Although the two instructions were not couched in precisely the same words, they cannot be distinguished in meaning. It was not error to refuse to give instruction No. 3, as it was fully covered by instruction No. 2, which the court gave at the request of appellant.

Appellant's next contention for a reversal of the judgment is that the court erred in giving instructions Nos. 6 and 13 requested by appellee. The instructions are as follows:

"6. The court charges you that the defendant is not responsible or liable for any loss which was caused by decay, waste or deterioration in quality of said strawberries, resulting from their inherent nature, infirmity and defect, if any. Therefore if you find from the evidence that the damage, if any, to the berries involved in this case resulted from decay, waste or deterioration in quality, occasioned by their inherent nature or infirmity, if any, then your verdict should be for the defendant."

"13. The court charges you that, if you find from the evidence that the strawberries were in a defective condition when loaded in the car at Hammond, La., or that their inherent nature was such as to cause them to ripen prematurely, then the court charges you that the defendant is not liable for damages, if any, resulting to the berries from such condition, if any."

It is admitted that the instructions correctly announce the law as far as they go, but they are assailed because alleged to be abstract. They are not abstract,

for a number of expert witnesses testified that an inspection of the berries at Minneapolis revealed evidences of diseases which might have caused the berries to deteriorate *en route*. In the next place, appellant requested and obtained an instruction submitting the very same issue to the jury, which instruction is its requested instruction No. 1.

A further objection is made to the instructions because they did not place the burden upon appellee to prove that the berries were inherently defective. The fact that the instructions were to some extent incomplete did not render them prejudicially erroneous. Appellant should have made an effort to have the omission supplied in the trial court. *White* v. *McCracken*, 60 Ark. 613, 31 S. W. 882.

Appellant's next contention for a reversal of the judgment is that the court erred in permitting H. M. Green, division superintendent of appellee's business on the Illinois Central and the Yazoo & Mississippi Valley railroads, to testify respecting the general method employed by appellee in handling shipments of perishable products and to testify concerning the manner in which this shipment was handled, from permanent records in his possession. It appears from the records that nine other witnesses who actually handled the shipment from the time the car was inspected at McCombs, Mississippi, on May 4, preparatory to loading the berries, until its arrival in Minneapolis, Minnesota, on May 9, testified relative to the movement of the car, the manner in which it was handled, iced and re-iced, during the entire time same was *en route*. Their testimony tended to show that it was properly and carefully handled, iced and re-iced. No contention was made that the testimony of these nine witnesses was incompetent. In view of this fact it is unnecessary to decide whether the testimony of Mr. Meeks was competent, for, even though incompetent, it was not prejudicial, under the well-settled rule of law that it does not constitute reversible error to

admit incompetent evidence if the fact it tends to prove is otherwise established by competent evidence. *Pace* v. *Crandell,* 74 Ark. 417, 86 S. W. 812; *Maxey* v. *State,* 76 Ark. 276, 88 S. W. 1009; *Waters-Pierce Oil Co.* v. *Burrows,* 77 Ark. 74, 96 S. W. 336; *Bispham* v. *Turner,* 83 Ark. 381, 103 S. W. 1135; *Hunt* v. *Davis,* 98 Ark. 62, 135 S. W. 458; *Payne* v. *Thurston,* 148 Ark. 456, 230 S. W. 561.

Appellant's next contention for a reversal of the judgment is that the court erroneously admitted the testimony of John W. Healey, the local agent of appellee at Minneapolis, relative to what took place in handling the car after its arrival there. This agent was permitted to testify to telephone conversations he had with G. C. Early, the representative of the O'Connell Brokerage Company, that negotiated the sale of the car of berries, and D. W. Longfellow, a member of the firm of Longfellow Brothers, the consignee of the shipment, relative to the contention between them of whether Longfellow Brothers purchased the car of berries at prevailing prices for good stock, or at $2.50 a crate, or merely to bid on the car when it arrived. It is argued that the testimony was hearsay and calculated to cause the jury to lose sight of the real issue in the case. The testimony was foreign to the issue, which was whether the strawberries were damaged *en route* through the negligence and carelessness of appellee in furnishing a defective car that would not refrigerate, or in failing to properly ice and re-ice the car. The real issue in the case was submitted to the jury under proper instructions, and we are unable to say that testimony wholly foreign to the issue had a tendency to or did lead them astray. The admission of the testimony did not therefore constitute reversible error.

The last contention of appellant for a reversal of the judgment is that the court erred in admitting the testimony of H. A. Simms, mechanical superintendent of car equipment for appellee, relative to the general construction of refrigerator cars of the series or type of the car used in transporting this shipment.

The alleged incompetency of the testimony is based upon the fact that witness did not examine this particular car. One of the allegations of negligence was that appellee had furnished a defective car in which to transport the berries. H. A. Simms qualified as an expert on the subject of refrigerator cars, after which he testified that the car in question was one of a series of fifty cars which were constructed exactly alike, and that the particular type or series was constructed so as to produce proper refrigeration. This evidence was admissible as tending to prove that the particular car was properly constructed and not defective. Witness further stated that the amount of ice furnished this car at the various icing stations was sufficient to produce and maintain proper refrigeration. His expert knowledge qualified him as a witness for that purpose. The trial court did not err in admitting his testimony.

No error appearing, the judgment is affirmed.

HARVEY v. MARR.

Opinion delivered March 14, 1927.

1. APPEAL AND ERROR—TEMPORARY ORDER.—In a suit for partition of an oil and gas lease, an order of court in vacation directing the receiver to pay one-half of the cost of standardizing the well and operating the lease, made subject to adjustment of the equities in the final decree, was a mere temporary order from which an appeal would not lie, where the court later heard the cause and rendered a decree disposing of the matters contained in the former order.
2. APPEAL AND ERROR—TEMPORARY ORDER.—An appeal will not lie from a mere temporary order.
3. APPEAL AND ERROR—EFFECT OF SUPERSEDEAS.—The effect of a supersedeas bond on appeal from a final decree was to supersede all temporary orders made during the pendency of the action.

Appeal from Union Chancery Court, Second Division; *George M. LeCroy,* Chancellor; motion denied.

Haynie, Parks & Westfall, for appellant.

HUMPHREYS, J. This suit was instituted in November, 1925, by appellee against appellant, in the chancery court of Union County, to partition a commercial oil and gas lease covering the southwest quarter of the northwest quarter of the northeast quarter of section 17, township 16 south, range 15 west, in said county, which they owned half and half, and to hold appellant, E. J. Harvey, liable on a certain drilling contract between appellee and appellant, Bray-Hawthorne Company, incorporated, that they executed before said corporation sold its interest in said lease to E. J. Harvey.

Separate answers were filed by appellants in the month of December following, and by the American Trades and Savings Bank, to whom E. J. Harvey assigned his interest in said lease, denying liability under the drilling contract.

During the pendency of the suit a receiver was appointed by the chancellor to take charge of the alleged Harvey interest in the lease and collect one-half of all moneys due or to become due from sales of oil produced in the operation of the lease. On January 15, 1925, on application of appellee, and over the objection and exception of appellants, the chancellor in vacation authorized and directed the receiver to join appellee in the employment of some one to drill a well on the lease to deep sand and to standardize same; also to pay one-half of the cost of standardizing the first well, and one-half of the expense in operating the lease. No appeal was prosecuted from the order. Pursuant to the order, the receiver and appellee entered into a contract for standardizing the well on the property and for drilling a second well to the third, or deep, sand, which was successfully drilled and standardized.

On January 30, 1926, the court heard the cause upon the pleadings and testimony, resulting in a decree and partition in accordance with the interests of the several parties, and an order for the sale of the lease. The interest of E. J. Harvey was charged in part with $18,000 in

favor of appellee for standardizing the first well and drilling and standardizing the second well. Appellants prayed and were granted an appeal from the decree to this court, and filed a supersedeas bond, which was approved by the clerk of the chancery court of Union County.

After the execution and approval of the supersedeas bond, and prior to the expiration of the six months' period allowed appellants to perfect their appeal, appellee filed a transcript of the pleadings, orders and decree of this court, and made same a basis for a motion to direct the receiver to pay one-half of the cost of operating the lease, one-half of the cost of standardizing the first well, one-half the cost of drilling the second well to the third, or deep, sand, and standardizing same, and to direct the receiver to carry out the order of the chancellor made on the 15th day of January, 1925. The motion contains allegations to the effect that the receiver has collected one-half of the proceeds of the oil run from the lease and now has more than $10,000 in his hands, but has not complied with the order of January 15, 1925, because he is in doubt as to whether the supersedeas bond supersedes the final decree of date January 30, 1925, only, or also supersedes the order of date January 15, 1925.

We have examined the order of date January 15, 1925, and find that it does not purport on its face to be a final judgment. It was made in vacation, over the objection of appellants, in conformity to appellee's construction of the contract obligations of appellants to pay one-half the cost of standardizing the first well, one-half the cost of drilling the second well to deep sand and standardizing same, and one-half the cost of operating the lease. These matters are the main subjects of controversy in the cause, and were covered in the final decree, from which an appeal has been prosecuted to this court. The order stated that it was made subject to the adjustment of the equities between the parties to the action in the final decree. It was therefore a temporary order from which an appeal would not lie. The effect of

the supersedeas bond was to supersede the final decree and all other orders made during the pendency of the action.

The motion is denied.

APPLEGATE v. LUKE.

Opinion delivered March 14, 1927.

1. ALIENS—VALIDITY OF ALIEN LAND ACT.—Acts 1925, No. 249, known as the "Alien Land Act," denying to aliens incapable of becoming citizens and not protected by treaty the right to acquire, possess, use, occupy or transfer real estate, *held* not in conflict with Const., art. 2, §§ 2, 3, 8, 22 and 29, guaranteeing equality, due process of law, and the right not to have property taken for public use without compensation.
2. ALIENS—VALIDITY OF ALIEN LAND ACT.—The Alien Land Act of 1925, No. 249, denying to aliens incapable of becoming citizens and not protected by treaty the right to acquire, possess, use and occupy or transfer real estate *held* in violation of Const., art 2, § 20, providing that "no distinction shall ever be made by law between resident aliens and citizens in regard to the possession, enjoyment or descent of property."

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

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

Brewer & Cracraft, for appellee.

HUMPHREYS, J. Appellees, Lum Jung Luke, a resident alien, and E. M. Allen, a resident of Phillips County, Arkansas, instituted suit by injunction in the chancery court of said county against C. E. Yingling, prosecuting attorney for the First Judicial District, and H. W. Applegate, Attorney General of the State of Arkansas, from enforcing the alien land act of Arkansas against them, upon the ground that the act is unconstitutional and void.

A demurrer was filed to the complaint, and overruled by the court. Appellants refused to plead further, electing to stand upon their demurrer, whereupon

the chancery court declared the act unconstitutional, and perpetually enjoined appellants from enforcing the act, from which is this appeal.

The constitutionality of act 249, Acts of the General Assembly of 1925, known as the alien land act, is the sole question presented by this appeal for determination. The gist of the act is to allow aliens subject to naturalization and those protected by treaty to acquire, possess, enjoy, use, cultivate, occupy, and transfer real estate, and to prevent all other aliens from doing so, under penalty that lands acquired in violation of the act shall escheat to the State, and the violators become guilty of a felony.

It is alleged in the complaint and admitted by the demurrer that Lum Jung Luke is, and has been, a resident of said county for twenty years, and of the United States since 1882, but ineligible to naturalization and citizenship under the laws of the United States, being a person of Chinese extraction; that E. M. Allen is a resident and citizen of said county, State and the United States; that appellants are, respectively, prosecuting attorney of the First Judicial District and Attorney General of the State of Arkansas; that E. M. Allen is the owner of certain real property in the town of Elaine, within the county of Phillips, State of Arkansas, and has made a tentative contract with the said Lum Jung Luke for the purchase of said property for a valuable consideration; that appellee, Lum Jung Luke, is the owner of considerable real estate, and is engaged extensively in the buying and selling of real estate for profit, and more particularly in the buying of property in the town of Elaine for the purpose of renting the premises to workmen engaged in sawmilling occupations in said town; that appellants, C. E. Yingling and H. W. Applegate, are now threatening to institute escheat proceedings for the purpose of vesting the title to said property in the State of Arkansas, in pursuance of act 249 of the General Assembly of 1925, and are threatening to prosecute the appellees and cause an indictment to be lodged against them under the

criminal portion of said act, if the transfer of said property is made.

Appellees contend that the act in question is in conflict with §§ 2, 3, 8, 20, 22 and 29 of article 2 of the Constitution of the State. We deem it unnecessary to set out §§ 2, 3, 8, 22 and 29 of article 2 of the Constitution, or to give space in this opinion to our reasons for holding that the act is not violative of these sections, further than to cite the following recent cases of the Supreme Court of the United States construing statutes similar to the one in question, which effectively answer their arguments assailing the validity of the act as conflicting with these sections. *Truax* v. *Corrigan,* 257 U. S. 312, 42 S. Ct. 124; *Terrace* v. *Thompson,* 263 U. S. 197, 44 S. Ct. 15; *Porterfield* v. *Webb,* 263 U. S. 225, 44 S. Ct. 21; *Frick* v. *Webb,* 263 U. S. 326, 44 S. Ct. 115.

The act in question, however, seems to be in direct conflict with § 20, article 2, of the Constitution of the State. The section is as follows:

"No distinction shall ever be made by law between resident aliens and citizens in regard to the possession, enjoyment or descent of property."

Distinguished counsel for appellants admit that the section is peculiar to our own Constitution. It seems that other Constitutions do not contain such a provision. The section contains few words, and is unambiguous. The manifest and only intent which can be extracted from the language is that all resident aliens in Arkansas, whether eligible to naturalization and citizenship under the laws of the United States, have the same right to acquire and enjoy the possession of property in this State, either by purchase or descent, that any natural citizen has.

No error appearing, the decree is affirmed.

RICHARDSON v. REAP.

Opinion delivered March 14, 1927.

1. TRIAL—INSTRUCTION INVADING JURY'S PROVINCE.—In an action for damages for breaking a plate glass window, an instruction that, if the glass was already cracked, and had a hole in it, and if plaintiff knew the hole was in the glass, and this hole contributed to its breaking when struck by defendant, and the glass would not have broken had the hole not been in it, then to let the glass stay there with the hole in it was contributory negligence on plaintiff's part, *held* erroneous in not leaving to the jury to determine whether plaintiff was guilty of contributory negligence.
2. NEGLIGENCE—CONTRIBUTORY NEGLIGENCE DEFINED.—Contributory negligence is such act or omission of plaintiff amounting to a want of ordinary care as, concurring with a negligent act of defendant, is a proximate cause of the injury.

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

STATEMENT BY THE COURT.

Appellant brought this suit for damages for breaking the north plate-glass front or display window in his store building, fronting west on ——— Street, in Warren, Arkansas, and occupied by Martin-Mosely Hardware & Furniture Company, as a tenant.

The glass sets on a base 15 inches above the iron ledge which abuts on the sidewalk, the iron ledge being about 15 inches wide and about the same length as the window.

C. W. McMahon, with Hugh and Besta Ashcraft, were standing on this iron ledge, in conversation, on the day of the injury or accident, when Jim Reap, the other appellee, came along the sidewalk and accosted McMahon.

Besta Ashcraft stated that McMahon was standing in the middle. He was on McMahon's right and Hugh was on his left when Mr. Reap walked up. He shook hands with Mr. Ashcraft, stuck out his left hand to Mr. McMahon, who said, "Don't give me your left hand," and pushed his hand down, and Reap gave him a push, causing McMahon to hunch back and break the glass. "We were standing on the ledge in front of the glass,

about 6 or 8 inches in front of the glass, and when he hunched back he broke the glass.'' Mr. McMahon reached his hand up; Mr. Reap pushed him in the stomach, and that caused Mr. McMahon to hunch back and hit the glass. It popped right smart. Witnesses said all this was done in perfectly good humor.

Hugh Ashcraft stated that Reap came along, good-naturedly and in a friendly way, shaking hands with us. He offered his left hand to McMahon, who said, ''I don't want your left hand,'' and made a motion toward Reap, and he pushed Reap back, and McMahon hunched back far enough to break the glass. McMahon stood there, and Reap walked off. McMahon went in the house and talked to Mosely.

Reap stated that McMahon and two of the Ashcraft boys were standing on the basement against the store when he came along the sidewalk, shaking hands and giving a left hand to McMahon, who said, ''Don't give me your left hand,'' and put his hand here, and I pulled his hand down and the glass broke; that he did not strike him in the stomach. I was just shaking hands in a friendly way. Mosely came out of the store and asked who broke the glass, and McMahon answered he didn't know, and I stepped up and told him how it occurred, as I am telling it now. He stated that they were not playing or scuffling, but that he was just shaking hands in a friendly way, and that McMahon backed into the window when he got him by the hand when he took hold of him.

McMahon stated that he was standing on the iron plate, about 15 inches from the ground—the plate the glass stands on—when Mr. Reap came along, and he shook hands with Hugh Ashcraft with his right hand, ''and reached for me with his left hand, and I said, 'Don't want your left hand,' and, when he took hold of me with his left hand, which was done that quick, and he turned me loose; all were in a good humor, touched the glass very light, and didn't intend to break it.'' Didn't think the glass would have been broken from the push he got from Mr. Reap.

There was testimony showing that a small round hole had been broken in the glass before, about two or three feet up from the base, by its being struck with a rock, the glass being shivered around the hole on the inside.

Another witness stated that he was present on the day the glass was broken; that two or three were standing on the base of this glass when Reap came up the sidewalk, shaking hands with first one and another; about when he got in front of these gentlemen he shook hands with some one with his right hand and offered his left to another man, who said, "Don't give me your left hand," reached up and took Mr. Reap by the shoulder, and in some way this man stepped back into the glass and broke it. Didn't know the man, but the one Mr. Reap offered his left hand to was the one that hit the window. It was all done in play. Mr. Reap pushed this man's hand back, and it was done this way, just in a joking way.

The testimony tended to show that the glass would not have been broken by the action of McMahon in backing or pushing back against it, had it not been weakened by being broken before and shivered by the rock striking it.

The court instructed the jury, giving, over appellant's objection, number 5 as follows: "The court instructs the jury that, if you believe from the evidence that the glass window in question had previously had a hole broken through it by some means, and, on the occasion of the injury for which this suit is brought, that the glass cracked or broke from that point, and if the evidence shows that it did so crack, that the plaintiff knew the hole was in the glass, and that this hole being in the glass contributed to its breaking when struck by defendant, McMahon, and if you believe it would not have broken had the hole not been in it, then to let the glass stay there with the hole broken in it was contributory negligence on the part of plaintiff, and he cannot recover in this action." And the jury returned a verdict for defendants, and from the judgment plaintiff brings this appeal.

DuVal L. Purkins, for appellant.

D. A. Bradham, for appellee.

KIRBY, J., (after stating the facts). The facts in the case are virtually undisputed, the testimony showing that the glass was cracked or broken by one of the young men, McMahon, pushing or backing against it when another, Reap, who was coming along the sidewalk, shaking hands with his friends, pushed him or struck at him in a friendly way, after being told by McMahon he didn't want his left hand, causing him to dodge or "hunch back," as one of the witnesses expressed it, striking the glass and breaking it.

The testimony also shows that a hole had been broken through the glass some time before, about two feet up from the base, a small hole through which a tenpenny nail could be passed, and the glass shivered on the inside from its being struck with a rock, and that it was weakened by this former break to such an extent as caused it to break when McMahon backed against it, and that it would not have been broken from this occurrence if it had not been defective from this former break.

In defendant's instruction numbered 5, complained of, it was attempted to submit the question of the owner's contributory negligence in continuing to use this broken and defective window as a defense to this suit, but this instruction did not leave the question to the decision of the jury, but told them if they found certain facts to be true that it was contributory negligence, and the plaintiff could not recover.

This court, in *Fourche River Valley & I. T. Ry. Co.* v. *Tippett,* 101 Ark. 386, defined contributory negligence as follows: "Contributory negligence 'in its legal signification is such an act of omission on part of plaintiff amounting to the want of ordinary care as, concurring or cooperating with a negligent act of the defendant, is a proximate cause or occasion of the injury complained of.' *International & G. N. Rd. Co.* v. *Schubert,* 130 S. W. 709. This definition of contributory negligence has been

often approved, and the doctrine frequently applied by this court." Citing many cases.

The instruction was erroneous in not leaving it to the jury to determine whether the act or omission on the part of the plaintiff in continuing the use of the glass with a hole broken in it, under the circumstances, amounted to such want of ordinary care on his part as, concurring or cooperating with the negligence of the defendant, was the proximate cause or occasion of the injury complained of and contributory negligence barring his recovery.

For the error in giving this instruction the judgment must be reversed, and the cause remanded for a new trial. It is so ordered.

BARNES v. JEFFUS.

Opinion delivered March 14, 1927.

FIXTURES—REMOVABLE HOUSES.—Dwelling houses, necessary for employees operating a mill for the manufacture of timber, erected by a lessee with the landowner's consent, and removable without injury to the land, *held* to be personal property which the lessee had a right to remove.

Appeal from Ouachita Chancery Court, Second Division; *J. W. Warren,* Special Chancellor; reversed.

STATEMENT BY THE COURT.

The question of the right of the lessee to remove buildings and sheds erected on a mill-site in manufacturing timber sold and conveyed to the manufacturer is involved in this appeal.

The appellees sold and conveyed the timber on the lands to one Garland Anthony, giving him ten years in which to remove it, and the free and uninterrupted possession thereof during the term for the purpose, with the right to cut out and construct roads, tramways and railroads over the land, with the further right to maintain logging camps while engaged in removing the timber,

"and to use sufficient of said lands outside of inclosed and cultivated fields for site for mill and lumber yard."

Anthony conveyed the timber on the lands to Barnes by deed, with a like right to remove the timber within ten years from the 6th day of September, 1922, and the right to uninterrupted possession during the term, with free ingress and egress; the right to build trams and operate trams or railroads transporting the timber cut from the lands, and any other timber belonging to grantee, to bring suit for the possession thereof, and the right to use sufficient of said lands outside of inclosed and cultivated field for site for mill and lumber yard.

Barnes, appellant, put up a sawmill on the tract of land for manufacturing the timber, covered it with a shed, erected two small box-houses on blocks, with paper composition roof, one four and the other three rooms, for the use of the employees of the mill, and a mule-shed and some small outhouses. He removed the machinery from the mill before the end of the term and before using all the timber, and was engaged in tearing down the mill shed for removal when appellees brought this suit and procured an injunction preventing the removal of the improvements.

Upon the hearing the testimony showed that appellant was tearing down the mill-shed and intended to remove the two small dwelling houses, which were constructed for use of the employees in operating the mill, and built with the intention of removing them upon the removal of the machinery.

Appellees knew that the houses had been erected by appellant in the putting up and use of the sawmill for the manufacture of the timber, and consented thereto, having granted the right for the use of the land as a mill-site upon the sale of the timber, but insisted that the dwellings became fixtures to which they were entitled upon removal of the mill.

The lower court took this view, and rendered judgment accordingly, giving the appellant the right to move the sheds and small outbuildings, and permanently

enjoined him from removal of the small dwelling-houses, and from this judgment he appealed.

C. W. Smith and *R. H. Little,* for appellant.

R. K. Mason, for appellee.

KIRBY, J., (after stating the facts). The undisputed testimony shows that the small dwellings were of temporary construction, the kind necessarily and usually built on such mill-sites for the use of the employees in the operation of the mills, and that the appellants intended, at the time of their construction, to remove them with the mill when the timber had been manufactured.

These small dwelling-houses were put upon blocks that were sitting on boards on the ground, and could be removed without reducing them to raw material, and without injury to the land. Since they were also such houses as could be used and of the kind in general use for tenants on farms in that particular community, it could have been urged with more reason that they were fixtures and not removable had the contracts for sale of the timber not restricted the use of the lands for mill-site and lumber yard to those outside of inclosed and cultivated fields.

These houses were necessary for use of the employees in the construction and operation of the mill for the manufacture of the timber, and constructed with the consent of the owner of the land, and the intention on the part of the mill owner to remove them, with the machinery, when the timber had been manufactured, and fall within the classification of trade fixtures, which the lessee or tenant had the right to remove. *Field* v. *Morris,* 95 Ark. 268, 129 S. W. 543, 11 R. C. L. 1082, §§ 25-26; 26 C. J. 701, § 87; 2 Underhill, Landlord & Tenant, 1247, § 736.

In said § 26, R. C. L., it is stated: "Generally it is considered that, where the landowner consents to the placing of a building on his land by another, without an express agreement as to whether it shall become a part of

the realty or remain personalty, an agreement will be implied that it is to continue personal property."

There was no intention on the part of the mill owner in constructing the houses, and nothing in the method of construction and materials used indicated an intention, to make a permanent accession to the land or irremovable fixtures, and they did not become such, but remained personal property.

The court erred in holding otherwise, and its judgment permanently enjoining and prohibiting appellant from removal of the said buildings is reversed, and the cause dismissed.

MARYLAND CASUALTY COMPANY v. RAINWATER.

Opinion delivered March 14, 1927.

1. BANKS AND BANKING—INSOLVENCY—PREFERENCE OF STATE.—Where the State made a deposit in a bank which became insolvent, the State was not entitled to preferential payment of its claim over other creditors, the common-law rule of preference of the sovereign over the subjects not being applicable.
2. STATES—EFFECT OF MAKING DEPOSIT IN BANK.—The State, in making a deposit in a bank, does not exercise a governmental function, but merely engages in ordinary business, in which it is divested of sovereignty.
3. STATES—PREFERENCE ON INSOLVENCY OF DEPOSITORY.—Where the State has declared no intention by its statutes to claim priority of its deposits in insolvent bank over the rights of other creditors, it will be *held* to have waived any right to such preference.
4. SUBROGATION—CLAIM OF SURETIES AGAINST INSOLVENT BANK.—Sureties on depository bonds, having repaid the State for amounts for which an insolvent depository was liable, were subrogated to the State's right of collection against the insolvent bank.
5. BANKS AND BANKING—INSOLVENCY OF DEPOSITORY.—Sureties on a bond covering the State's deposits in an insolvent bank *held* not entitled to preference as against other creditors and depositors.

Appeal from Franklin Chancery Court; *J. V. Bourland,* Chancellor; affirmed.

STATEMENT BY THE COURT.

The People's Bank of Ozark, Arkansas, a duly designated State depository, on January 22 was insolvent and failed, its assets being taken over on January 22, 1926, by Loid Rainwater, the State Bank Commissioner, for administration and distribution under the laws providing therefor.

This bank had applied to the Treasurer for a deposit of State funds, offering with its application a bond of State depository, dated June 1, 1925, with the Maryland Casualty Company as surety thereon, in the penal sum of $10,000, and a like bond of the Ætna Casualty and Surety Company for $15,000. The applications were granted, and the State's funds deposited in said bank accordingly.

When it was taken over by the Bank Commissioner, the State of Arkansas had on deposit with said bank, as such State depository, the sum of $20,000 of money, all of which had been deposited in said failed bank since the execution and approval of the bonds mentioned.

On March 15, 1926, the surety companies, on demand of the State, repaid the $20,000 to the State of Arkansas, in accordance with the terms of their bonds, prorating the loss in proportion to the amount of the respective bonds. The surety companies presented their claims to the Bank Commissioner against the estate of said bank for repayment of their losses, and the Commissioner refused to allow them as preferred claims, but allowed them as common claims for the amount paid.

Suits were then brought in the Franklin Chancery Court by the bonding companies, claiming the State was entitled to priority and preference payment of its claim of $20,000 for money deposited, against all other depositors and creditors of the insolvent bank; that, by reason of the payment of said debt to the State of Arkansas by the surety companies, they had become subrogated to all the rights of the State as against the assets of said bank for the repayment of that amount, and are entitled to preference above all creditors and depositors of said

bank for the amount so paid by them as sureties. The State's contracts with the depository bank were made exhibits to the complaints.

The appellees demurred separately to the complaints, and to all parts of each which sought allowance of the claims over and above the amount allowed by appellee, and to have said claims treated otherwise than as common claims.

The court sustained the demurrers, after ordering the cases consolidated, and from this decree the appeal is prosecuted.

R. R. Lynn and *J. A. Sherrill,* for appellant.

Trieber & Lasley, for appellee.

KIRBY, J., (after stating the facts). The appellants contend that the State of Arkansas, by virtue of its sovereignty, is entitled, under the common law, to preference of its claims in this instance over and above the claims of all its citizens or subjects, and that the sureties herein, through the payment of the State's claims and the right of subrogation resulting therefrom, are likewise entitled to the same preference as the State of Arkansas had at the time of the payment of said claims.

The common law of England has been adopted by our State by statute, § 1432, Crawford & Moses' Digest, as follows: "The common law of England, so far as the same is applicable and of a general nature, and all statutes of the British Parliament in aid of or to supply the defect of the common law, made prior to the fourth year of James the First (that are applicable to our own form of government), of a general nature and not local to that kingdom, and not inconsistent with the Constitution and laws of the United States or the Constitution and laws of this State, shall be the rule of decision in this State, unless altered or repealed by the General Assembly of this State."

It will be seen from this statute that the State adopted nothing from the common law contrary to the genius of our institutions, but only that part of the common law, general in its nature, applicable to our own

form of government, and not inconsistent with the Constitution and laws of the United States or the Constitution and laws of this State, providing that such should be the rule of decision in this State, unless altered or repealed by our Legislature.

It is true also that, under the common law of England, where the King's title and that of the subject concur, or conflict, the King's title was preferred. Broom's Legal Maxims, 55. In *Marshall* v. *New York*, 254 U. S. 380, 41 Sup. Ct. 143, 65 L. ed. 315, Mr. Justice Brandeis, for the court, said: "At common law, the Crown of Great Britain, by virtue of a prerogative right, had priority over all subjects for the payment out of the debtor's property of all debts due it. The priority was effective alike whether the property remained in the hands of the debtor or had been placed in possession of a third person or was *in custodia legis*. The priority could be defeated or postponed only through the passing of title to the debtor's property absolutely or by way of lien, before the sovereign sought to enforce his right."

Blackstone says the British Crown enjoyed an incidental prerogative which is only an exception in favor of the Crown to those general rules established for the rest of the community, among which was that the King's debt shall be preferred before a debt to any of his subjects. I Black. Com. (Cooley's 4th ed.) 240.

Conceding that the State succeeded to whatever prerogative rights the King of England had and exercised under the common law as adopted by it, it has never attempted nor shown any disposition to exercise any such prerogative as claimed here since its organization. It is true, as contended by appellant, that the State does exercise a prerogative right, not to be made a defendant in any of her courts, but this is specifically declared in her Constitution, the grant of power from the people, article 5, § 20.

It is also true that no law has been enacted abrogating or repealing the common law relating to such prerogative rights, but it has been the policy and practice

of the State, in the exercise of such prerogative rights, to declare them in her laws and not insist upon having succeeded to them as against her citizens under the common law.

There is no doubt but that the State could have declared, in the law authorizing the establishment of depositories and requiring security for her moneys deposited therein, that she should also be entitled to a preference and priority of payment of her claims for money so deposited against all other depositors and creditors of such bank depositories. No such right was declared or reserved, however, under the terms of the depository law, it being the apparent intention to have the State rely only upon the security and ability of the banking institution and the solvency of its sureties for the repayment of its money deposited therein according to the law. The State, in making such deposit, was not exercising a governmental function, but only engaged in ordinary business. Its attitude with regard to the transaction was just such as might have been assumed by any individual or private corporation, which might have chosen to lend its money to the bank; and, as said in *Callaway* v. *Cossart,* 45 Ark. 88: "When a State steps down into the arena of common business in concert or in competition with her citizens, she goes divested of her sovereignty." The State cannot presume, under such conditions, to exercise the ancient prerogative of the King and claim a preference in the repayment of her moneys loaned to, or deposited in, the failed bank, as against all other depositors and creditors thereof, having made no intimation or declared no intention in her laws relating thereto that such would be done. She will be held to have waived or abandoned such prerogative right, which cannot be exercised under existing laws.

The sureties on the bonds of the depository bank having repaid the State the amounts for which the bank was liable, and they were bound as sureties, are, of course, subrogated to the State's right for collection against the failed institution, but are not entitled to any

preference as against the other depositors and creditors under existing laws, providing for none.

No error was committed in sustaining the demurrers and dismissing the complaints, and the decree is affirmed.

PHELPS v. DAVIS.

Opinion delivered March 14, 1927.

1. PARTNERSHIP—LOAN BY PARTNER—INTEREST.—Where a partner, with consent of a copartner, made a loan to the firm, having before loaned the firm money and collected interest thereon, an agreement of the partnership to pay the legal rate of interest would be implied, though no express agreement regarding interest was entered into.
2. PARTNERSHIP—LIABILITY ON LOAN BY PARTNER.—A partnership may be liable for interest to a partner who makes advances to or for the account of the firm where there is a special contract to that effect or where, from the facts and circumstances surrounding the case, it may reasonably be implied that the firm was to pay interest for the advances.

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

Brundidge & Neelly, for appellant.

John E. Miller and *Cul L. Pearce,* for appellee.

McHANEY, J. Appellants and appellee were partners, engaged in the mercantile business in the town of El Paso, White County, Arkansas, up until the 12th day of February, 1923, when the stock of merchandise on hand was divided and the partnership mutually dissolved. The partnership originally was composed of J. A. Phelps, Sr., and appellee, W. P. Davis, and continued in this way until the death of J. A. Phelps, Sr., in 1908, when J. A. Phelps, Jr., and two of the other heirs of the senior Phelps took charge of their father's interest and continued the partnership with Davis until its dissolution, as aforesaid, with the appellee owning one-half interest and the appellants owning the other one-half interest. They could not divide the notes.

accounts, land and other assets that had been accumulated by the partnership, and this suit was brought by the appellee for the purpose of partitioning same. After the partition suit had been filed, the appellee amended his complaint, alleging that the partnership was indebted to him on four promissory notes executed by the partnership to him for money that he had loaned the firm in the operation of its business. It is not disputed that the partnership owes the appellee the amount of these notes. The chancellor entered a decree ordering the assets of the partnership sold, appointed a commissioner to make the sale, and directed him to pay out of the proceeds of the sale to the appellee the sum of $2,857.51, which included the principal amount of said notes, with interest from their date until the date of the decree at six per cent. per annum, together with interest thereon from the date of the decree until paid at the same rate. From the decree allowing interest on said notes comes this appeal.

As stated by appellants in their brief: "The only question to be determined in this case is whether or not the appellee is entitled to charge interest upon advances made to the firm by himself." Appellants contend that these advances made by appellee, as represented by said notes, were to the capital fund or account of the firm, and that therefore, in the absence of an express agreement by the partnership to pay interest on same, the firm is not liable for interest, and that the appellee would have to look to the profits of the partnership business to get a return on his investment, rather than to interest for the use of his money.

Appellee admits that a partner is not entitled to interest on capital which he contributes to the firm, although his contributions to the capital may be greatly in excess of that of his copartners, unless his copartners have agreed that he may have interest on such excess advancements. But they say that the advances made by appellee in this case were not to the capital account of the firm, but were loans to the partnership, represented

by the notes of the partnership, upon which interest may be collected.

We are of the opinion that appellee is correct in this contention. Appellant, J. A. Phelps, and appellee both testified that the money loaned to the firm by appellee was used by the firm to pay its debts, and that they discussed the proposition of borrowing money from the bank, and that they were unable to obtain money from the banks, and that appellee loaned money to the firm for this purpose.

It is shown by the testimony that appellee had loaned the firm money on previous occasions and had collected interest therefor, and, while it does not appear that there was any express agreement between them that interest was to be paid on these particular loans, and no particular rate of interest was agreed upon, we think there was an implied agreement on the part of the firm to pay the legal rate of interest, from the fact that the loan was actually made with the knowledge and consent of the appellant, J. A. Phelps, Jr.

The correct rule on this subject was laid down in the case of *Rodgers* v. *Clement,* 162 N. Y. 422, 56 N. E. 901, 75 A. S. R. 342, as follows: "The appeal presents but a single question, and that is the right of the plaintiff to be credited with an item of $5,997.66, which represents the interest upon certain moneys advanced by him for the use of the firm while it was engaged in the execution of a contract for the construction of a railroad. The referee refused to allow this item, and was sustained in this ruling by the court below on appeal. The counsel seem to be in substantial accord with respect to the principles of law applicable to such a question. If the moneys advanced by the plaintiff to the firm were contributions of capital or additions to plaintiff's capital, then he was not entitled to interest on the same, since he must rely upon the profits of the business to compensate him for the investment, unless there was a special agreement between the partners that interest should be allowed. (Citing cases).

"But, on the other hand, if the moneys so paid or advanced by the plaintiff for the use of the firm were in fact loans, and the plaintiff, as to such advances, was a creditor of the firm, he stands upon the same footing as any other creditor with respect to the right to be allowed interest upon the accounting. A partner may loan money to the firm of which he is a member, and, when he does, his right to interest is to be determined in the same way as that of any other creditor. In such cases the general rule is to allow interest upon the advances, although there was no express agreement by the firm to pay it, in the absence of some agreement to the contrary, express or implied. The right to interest or an agreement to pay or allow it is to be implied in such cases without any express promise, as in like transactions between parties holding no partnership relations to each other;" (citing a long list of cases).

As was said by the authors of L. R. A. in a case-note to *Kilworth* v. *Ice,* 84 Kan. 458, 114 P. 857, and reported in 35 L. R. A. (N. S.) p. 223: "The apparent conflict between the decisions as to the allowance of interest to a partner on his advances is due to a failure on the part of some of the courts to state whether they refer to advances of money to be employed as capital, or to advances by way of loan. In the one case, as the partner is considered as looking to the profits for compensation, there is no basis upon which an agreement on part of the firm to pay interest may be implied; while, on the other hand, if it is shown that the advance was not intended as other than a loan, such an agreement may be implied from mercantile usage. There is a clear distinction between advances made by way of loans beyond the capital, and additional capital. The intention may be shown to give interest on the footing of debtor and creditor, where otherwise there would be no charge between partner and partner. *Buckingham* v. *Ludlum,* 29 N. J. Eq. 345."

We therefore adopt the rule that a partnership may be liable for interest to a partner who makes advances to or for the account of the firm, where there is a special

contract to that effect, or where, from the facts and circumstances surrounding the case, it may reasonably be implied that the firm was to pay interest for the advances.

The decree of the chancery court allowing six per cent. interest in this case was right, and it is therefore affirmed.

IVES v. ANDERSON ENGINE & FOUNDRY COMPANY.

Opinion delivered March 14, 1927.

1. APPEAL AND ERROR—PRESUMPTION FROM DIRECTED VERDICT.—On appeal from a directed verdict for plaintiff, the evidence must be given its strongest probative force in favor of the defendants.
2. SALES—WARRANTY—JURY QUESTION.—In an action on notes for the purchase price of an engine, whether plaintiff warranted the engine to be suitable for defendant's purposes and capable of raising a sufficient quantity of water to irrigate defendant's land *held* for the jury.
3. SALES—EXPRESS WARRANTY.—To constitute an express warranty, it is not necessary that the word "warrant" be used, but it may be based on the statements of the seller as to the quantity or condition of the chattel sold, on which the buyer relies and on which the seller intended that he should rely.
4. SALES—EXPRESS WARRANTY.—Statements of the seller's agent that an engine sold had ample strength and power to pull the well successfully, that it was in good condition and would give satisfaction, amounted to an express warranty.
5. SALES—WAIVER OF BREACH.—A breach of warranty in the sale of an oil engine is not waived by an offer of the buyer to pay part of the purchase money, without complaining of the unsatisfactory condition of the engine purchased.

Appeal from Arkansas Circuit Court, Southern District; *George W. Clark,* Judge; reversed.

John W. Moncrief, for appellant.

M. F. Elms, for appellee.

McHANEY, J. This is an action by appellee to recover upon two promissory notes in the sum of $1,314 each, both dated March 20, 1923, with interest from date at eight per cent. per annum, on the first of which payment was indorsed in the sum of $296.36, $96.36 of which

was for interest and $200 on the principal. One of the notes became due nine months and the other twenty-one months after date. These notes were given for the purchase price of a sixty horse-power Anderson oil engine, title to which was retained in the seller, and were given to the Anderson Foundry & Machine Company, the name of which was thereafter changed to the Anderson Engine & Foundry Company. Appellants defended on the ground that they were induced to purchase the engine on false and fraudulent representations and statements to the appellants that said engine was a good, efficient, sound engine, and was capable of and would operate a certain pump of appellants for watering rice grown by them, and by these representations they were induced to purchase the engine and execute the notes sued on, whereas the engine was not as represented, and would not do the work claimed for it; that appellee knew they were purchasing said engine for the purpose of operating a pump on their rice farm, the well and pump of which were examined by the appellee, and that appellee assured them that the engine was capable of pumping the water to the quantity desired; that these representations were false, and known by the appellee to be false, and that, relying upon said representations, they purchased same; that, if said engine had been as represented, it would have given good service and efficiently operated said pump and well for eight or ten years; that it proved worthless, inefficient, unsound, and that, as a result, they lost their rice crop by failure of the engine to pump water sufficient to irrigate their crops, and that they had been damaged by reason of the loss of crop in excess of the purchase price of the engine; that the vendor warranted said engine to be capable, sound and efficient to operate said pump, which warranty was breached by the failure of the engine to operate efficiently. They made their answer a cross-complaint against appellee, and denied that they were indebted to it in any sum.

Appellee replied to the cross-complaint, in which it denied that it made any false or fraudulent representa-

tions or statements concerning said engine, and denied that it warranted or guaranteed same as alleged, and states that the engine sold was formerly the property of R. L. Ives, and that R. L. Ives sold said engine to the appellants, and that the notes from appellants were taken to appellee for the reason that R. L. Ives was indebted to it in a like sum on the purchase price of said engine.

On the issues thus joined, the parties went to trial. Ralph Wilson testified, for appellants, that he helped appellant, B. B. Ives, in his rice crop in 1923, and that he heard the conversation and trade between appellant, B. B. Ives, and the agent of the appellee when he purchased the engine; that Mr. Ives did not know anything about oil engines, but that he inquired about the efficiency of the engine and what it would do; that Mr. Miller, the pumper, who was familiar with the well and amount of water required, gave them the dimensions of the well and the amount of water it was pumping, and that the agent of appellee stated the engine was capable of pulling the well, and that it had plenty of power, was in first-class condition, and would properly operate the well, and, after that, Mr. Ives bought the engine. In 1923 two capable men, recommended to Ives by the agent of appellee as being capable, operated the engine; that it would not operate very well, but continually got hot; that Mr. Ives knew that the engine had been previously operated up north of Stuttgart, and that the company had remodeled the engine. After Mr. Miller had told him the depth of the well, the capacity of it, how much water it would throw if it had proper power, the agent said the engine would pull it and throw the water with ease. He further testified that they had trouble with the engine in the 1923 season; did not have sufficient power, and sufficient water could not be put through it to keep it cool, and would overheat; that perhaps it would run ten days without giving any trouble, and that, if the engine had been as represented, they would have had no trouble with it; that it was worse in 1924 crop than in 1923; continued to grow worse; two of the engine heads burst in 1924, which

they had welded, and they would crack over again, and they would try to remedy it by new heads. They got the best of oils, which were recommended by appellee, and had experts to look at it, and it was not due to the oil that the engine would get too hot and was overloaded; that they could not finish the pumping season in 1924 with that engine; that, when the engine got hot, the port-holes would close up with carbon and would show red-hot, and they would have to use an excessive amount of oil, and about half the time the engine would not pull itself and they would have to stop and put in oil. The engine caught fire and burned up, and after that they did not use it any more. He was asked this question: "Q. Mr. Wilson, if this engine had done the work that they told you it would do, would it have overloaded? A. No sir." He stated that he had experience in these matters, and that the average life of an oil engine ranges from eight to ten years; that R. L. Ives had used the engine only part of one season before B. B. Ives bought it from the machine company.

On cross-examination he admitted writing, as agent for appellant, B. B. Ives, the following two letters:

"Jan. 8, 1924.

"Anderson Foundry & Machine Co.

"Mr. Winfield T. Durbin.

"Dear sir: We told the banker here to inform you as to our condition, but it seems that he did not do it. We are not in the condition that we would like to be. It is impossible for us to pay the full amount this year, although we can pay the interest and $200 on the note. If this will be satisfactory with you, let us know, and we will make this remittance at once. We did not get to put in the rice we expected to on account of the high water we are bothered with here, and we didn't make a fortune at it. Hoping this will meet with your approval, I remain, Yours truly."

"1/18/24.

"Anderson Foundry & Machine Co.
"Anderson, Indiana.

"Gentlemen: In reply to your letter of the 16th inst., which was in reply to one written by me on the 9th, concerning the payment of a note you hold against me for $1,314, will say that it is out of the question for me to pay or make the payments as you have set out in your letter. The offer I made you, viz., immediate payment of $200 and interest, was made with the ability to make same, this I can do, but to do more it is a question where I can do so. I am a member of the Arkansas Rice Growers' Cooperative Association, and I am bound under the contract with them to ship or deliver my rice to them to mill and sell. I have received an advance payment thereon, the balance will be paid at times as the association accumulates funds to distribute to the members of the association. I am unable to tell when these payments will be made, or how much I will receive when the payments are made, therefore I am at sea as to the possibility of me making a payment greater than I have named. It might be possible that I will be able when I receive the payments on my rice to pay one-half, with interest, but the whole is impossible."

Appellant, B. B. Ives, testified, substantially corroborating Mr. Wilson, and further, that he told appellee that he wanted to water 200 acres or more, and that the agent told him the engine was "of ample strength and power to pull the well successfully, and said it would do it, and he said the engine was in good condition, just as good as new, and would operate that well successfully and give satisfaction." Agent also said he would guarantee it; that he believed what the agent told him, and bought it on his recommendation; that he thought the agent knew what he was talking about; that he had seen the engine up near Stuttgart, but that he had not paid any attention to it, and that he didn't know anything about oil engines at the time, and had had no experience with them. "Q. What finally became of that engine? A. It burned."

He testified that it did not give satisfaction in 1923, and did not in 1924; that he tried to water 190 acres with it in 1924, but that it would not do it; that the agent of the appellee was there after the engine burned, and stated that he did not expect it to burn down, but did not expect it to go through the 1924 crop.

At this point the court took charge of the witness and conducted the examination, and the witness stated that the engine was not satisfactory in 1923, and that they wrote the appellee about the trouble with the engine, its getting hot, and they sent a blue-print for them to use in repairing the engine, but that they couldn't do it as they wanted it done. He thought they wanted them to use the water over again through the engine, and they dug a pool, filled it up with water, and then ran the water through the engine and back into the pool again; that he directed his son-in-law, Mr. Wilson, to write the letters and offer to make a payment of $200 on the notes, and that, prior to the installation of the oil engine, they had a sixty-horse power steam boiler and a forty-horse power engine which would throw 1,200 gallons.

The court then stated that the letters of January, 1924, constituted a complete ratification of the contract made in March, 1923, and that these letters precluded the raising of any objection to any defects that they knew existed at that time, and he thereupon directed the jury to return a verdict for the appellee on the two notes sued on. Thereupon counsel for appellants asked permission of the court to introduce further evidence, and stated that they offered to prove by the witnesses, B. B. Ives and Wilson, that the appellee advised appellants, in the fall of 1923, that, by running more water through the engine, the trouble would not occur, but would be eliminated; and that defendants relied and depended on that, and were expecting to follow those instructions in the spring of 1924 when the season opened, which ordinarily would be in May or June, and that they would follow these instructions, use the quantity of water suggested and indicated by appellee, which did not eliminate

or reduce the trouble at all, but grew worse and increased until the engine finally burned. Also, that appellants had tendered the return of the engine to plaintiff. The court refused the proffered testimony, and the jury, as directed, returned a verdict for appellee for the amount of the notes sued on, with interest, from which comes this appeal.

We think the court erred both in directing a verdict for the appellee and in refusing to permit counsel to proceed with his case as suggested. Giving the evidence, as set out above, its strongest probative force in favor of appellants, as we are bound to do under numerous decisions of this court, we think it was a question for the jury to determine whether the appellee guaranteed or warranted the engine to be suitable for appellant's purposes, and that it would perform the work of pumping the well with a sufficient quantity of water to water the land appellant B. B. Ives told him he wanted to water.

To constitute an express warranty it is not necessary that the word "warrant" be used, but may be based on the statements of the seller as to the quality or condition of the chattel he is selling. As stated by this court in the case of *Warren* v. *Granger,* 151 Ark. 457, 236 S. W. 608: "It is true Granger did not testify that Warren had used the term 'warrant' in stating the quality of the ice-box, but it was not essential that he should have done so to establish a warranty, because such was the purport and necessary effect of what he did say."

The court then quoted with approval from 24 R. C. L. (Sales) § 437, as follows: "To constitute an express warranty the term 'warrant' need not be used; no technical set of words are required, and it may be inferred from the affirmation of a fact which induces the purchase and on which the buyer relies and on which the seller intended that he should do so, but it has been said that the words used must be tantamount to a warranty, and not dubious or equivocal."

Appellant, Ives, testified that the agent of appellee said that the engine had "ample strength and power to

pull the well successfully, and said it would do it, and he said that the engine was in good condition, just as good as new, and would operate that well successfully and give satisfaction." Again he testified that the agent said he would guarantee it to operate it. "Q. He guaranteed it would do these things? A. Yes sir." Admitting this testimony to be true, which we must do for the purpose of this decision, this amounted to an express warranty by the seller of the engine to do the work the witness testified that he said it would do.

But it is contended by appellee that, since the appellant, B. B. Ives, had used the engine for the 1923 crop and found it unsatisfactory, and that, in January, 1924, he wrote the two letters above set out, and later, in February, made a payment of $200 and interest thereon without making any complaint in these letters about the unsatisfactory condition of the engine, this amounted to a ratification of the purchase and a waiver of any right to insist on a breach of warranty thereafter. But this is not correct. The most that can be said of this is that it is a reaffirmance of the sale after the breach of the warranty, which does not constitute a waiver of the breach. In *Parrett Tractor Co.* v. *Brownfiel,* 149 Ark. 569, 233 S. W. 707, this court said: "The substance of the declaration contained in this instruction is that an unconditional promise to pay the balance of the purchase price, with the knowledge of the breach of the warranty, constitutes a waiver of the breach. This is but another way of saying that a reaffirmance of the sale after the breach of the warranty constitutes a waiver. Such is not the law. This court held in the case of *Plant* v. *Condit,* 22 Ark. 454, that, where there is a breach of an express warranty, the vendee may rescind the contract, or he may affirm the contract, keep the property, and, when sued for the price, set up the false warranty by way of recoupment." *Weed* v. *Dyer,* 53 Ark. 155, 13 S. W. 592.

In the case of *Courtesy Flour Company* v. *Westbrook,* 146 Ark. 17, 225 S. W. 3, we said: "The law on the subject is that, where chattels are purchased under

express warranty as to quality, the purchaser may rescind on discovering the inferior quality of the article sold, but is not bound to do so, and, on the contrary, may retain the article purchased and sue on the warranty, or recoup the damages when sued for the price."

Furthermore, appellants' counsel offered to prove that, in the fall of 1923, the appellee advised appellants that, by doing certain things, the trouble with the engine would be eliminated, and appellants relied and depended on that, and were expecting to follow those instructions in the spring of 1924, when the season opened.

We are therefore of the opinion that the case, as far as appellants were permitted by the court to make it out, was one for the jury, and that appellants should have been permitted to develop their case. For the error in directing a verdict for the appellee the judgment will be reversed, and the cause remanded for a new trial.

GOWER v. JOHNSON.

Opinion delivered March 28, 1927.

1. ELECTIONS—PRIMARY ELECTION CONTEST.—Under the primary election law (Crawford & Moses' Dig., § 3746 *et seq.*), a contest is a statutory proceeding which is intended to furnish contestant with a summary remedy and to secure a speedy trial of the issues.
2. ELECTIONS—CONTEST OF PRIMARY ELECTION—TIME.—The requirement in the primary election law that proceedings to contest a nomination be filed within 10 days after certification of the nomination complained of (Crawford & Moses' Dig., § 3746 *et seq.*) is mandatory and jurisdictional.
3. ELECTIONS—CONTEST OF PRIMARY ELECTION—COMPLAINT.—In a primary election contest a complaint alleging that both plaintiff and defendant received votes in the election for the office of sheriff, that defendant did not receive a majority of the legal votes, that plaintiff is the legal nominee, without alleging the grounds of the contest or that the plaintiff received either a plurality or a majority of the votes, *held* insufficient.
4. ELECTIONS—PRIMARY ELECTION—TIME OF FILING CONTEST.—Where a complaint in a primary election contest failed to state a cause

of action, it cannot be cured by an amendment not filed within the time required by the statute for contesting.

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

STATEMENT OF FACTS.

This is a statutory proceeding by John B. Gower against Sam Johnson to contest the right of the latter to be declared the nominee for sheriff of Stone County under the primary election held by the Democratic party on the 10th day of August, 1926. The complaint is somewhat lengthy, and, for that reason, is not set out in full. It is alleged that Gower received ——— votes in said election for the office of sheriff in Stone County, and that Johnson received ——— votes in said election. It is further alleged that Johnson is not the legal nominee for sheriff and did not receive a majority of the legal votes cast in the election for said office, and that plaintiff is the legal nominee and should be given the certificate of nomination.

The ground of contest is that the names of the voters who voted for Johnson do not appear upon the certified list of poll-tax payers required by the statute and because those voting for Johnson did not show a legal right to vote as required by statute. The circuit court sustained a demurrer to the complaint. The complaint was filed August 23, 1926, and, on the 3rd day of September, 1926, the plaintiff asked leave to amend his complaint by stating the number of voters who voted for him and the number who voted for the defendant, and otherwise specifying grounds of contest which were not stated in his original complaint. The defendant also filed a motion to dismiss the complaint because it did not state all of the candidates for sheriff at said primary election, and that the plaintiff received more votes than any other candidate for said office.

The court found the issues in favor of the defendant, and the complaint of the plaintiff was ordered dismissed. Judgment was entered in conformity with the holding of

the court, and the plaintiff has duly prosecuted an appeal to this court.

J. Paul Ward, for appellant.

Jeffrey & Bengel, for appellee.

HART, C. J., (after stating the facts). The judgment of the circuit court was correct. Under our previous decisions construing our primary election statute, the right to contest a primary election is a statutory proceeding, the purpose of which is to furnish a summary remedy and to secure a speedy trial. The provision requiring the contest to be filed within ten days has been held to be mandatory and jurisdictional. If the contest is not filed within ten days after certification of the nomination complained of, the failure to institute the contest within that time is fatal to the right of the contestant. *Hill* v. *Williams,* 165 Ark. 421, 264 S. W. 964; and *Storey* v. *Looney,* 165 Ark. 455, 265 S. W. 51.

As was said by the Supreme Court of the United States in *Walsh* v. *Mayer,* 111 U. S. 31: "The provisions requiring it to be asserted in a particular mode and within a fixed time are conditions and qualifications attached to the right itself, and do not form part of the law of the remedy. If it is not asserted within the limited period, it ceases to exist, and cannot be claimed or enforced in any form."

The allegations of the original complaint were too general. It was not stated that one of the candidates received a plurality of votes at the election or that they were the only two candidates voted upon at said election for sheriff, or that the plaintiff received a majorty of the votes cast for that office. Hence the court properly sustained a demurrer to it. The statute under consideration gives both the right to contest and the remedy of the contestant, and he must bring himself strictly within the statute by stating specifically the grounds upon which he contested the election; and his complaint, which merely stated his conclusion in the premises, was properly held to be subject to demurrer. The amendment was not filed within the time required by the statute, and, for that rea-

son, the court properly refused to consider it. *Bland* v. *Benton,* 171 Ark. 805, 286 S. W. 976. Under the statute, the contestant is limited to the grounds of contest set out in his original complaint, and these grounds cannot be enlarged by subsequent amendment not made within the time required by the statute for contesting.

It follows from the views we have expressed that the judgment appealed from must be affirmed.

ADAMS v. HARRELL.

Opinion delivered March 28, 1927.

1. TRUSTS—BASIS OF DOCTRINE.—The doctrine of trusts rests on the principle that equity looks on that as done which ought to be done, and in this application of this principle it looks through form to substance and fashions its decrees to protect parties from bad faith.
2. APPEAL AND ERROR—CHANCELLOR'S FINDING.—An appeal in a chancery case is tried *de novo,* and the chancellor's finding on disputed questions of fact will not be reversed unless clearly against the preponderance of the evidence.
3. TRUSTS—GOOD FAITH OF TRUSTEE.—A finding of the chancellor that in the administration of a trust the trustee acted in good faith *held* supported by the evidence.

Appeal from Jefferson Chancery Court: *Harvey R. Lucas,* Chancellor; affirmed.

STATEMENT OF FACTS.

R. T. Adams and Mrs. Angela Cook brought this suit in equity against J. A. Harrell for an accounting by him as trustee, and the grounds of the suit are that he acted in bad faith in the administration of the trust estate and owes them certain amounts as their share of the profits, which he had appropriated to his own use. Harrell filed an answer in which he denied all the allegations of the complaint and averred that he had discharged in good faith his duties as trustee, and had faithfully administered the trust estate. Mrs. Kate Allen was allowed to intervene and claim a certain amount of the trust fund

which remained in the hands of the trustee and which he admitted belonged to her.

It appears from the record that, some time prior to the 16th day of April, 1924, T. L. Cook had obtained the title to an oil lease at Norphlet, in Union County, Arkansas, comprising three and one-half acres. R. T. Adams ascertained that Cook would sell an undivided interest in the lease, and told J. A. Harrell about it. At the request of Adams, Harrell agreed to furnish the money to buy a one-fourth interest in the lease each for himself and Adams. Harrell paid $880 to Cook and took Adams' note for $440. This made Adams and Harrell each have a one-fourth interest in the lease. Subsequently, Mrs. Kate Allen and William Tierce jointly purchased an undivided one-fourth interest in the lease, for which they paid $880. Money being needed for the development and operation of the lease, Mrs. Allen lent $4,000 for this purpose and took a note signed by Cook, Harrell and Adams. Cook was made trustee of the operation and development of the lease, and the $4,000 borrowed from Mrs. Allen was turned over to him for that purpose. He did some work in starting drilling operations and then secretly left the State, taking the $4,000 with him.

Harrell located him through his wife in Memphis, Tennessee, and, through her, induced him to come back to El Dorado. When Cook arrived there, Adams, Harrell and Mrs. Cook got him in a room and demanded that he assign the lease to Harrell as trustee. Cook finally agreed to do this and did do so. Because Mrs. Cook had induced her husband to return to Union County, she was given the one-fourth interest in the lease which had been retained by Cook. When Cook assigned the lease to Harrell as trustee, Harrell issued certificates to Adams and Mrs. Cook, showing that they owned each a one-fourth interest in the lease, and a certificate to Tierce and Mrs. Allen showing their joint ownership of a one-fourth interest. Harrell retained his one-fourth interest in the lease.

Harrell began drilling operations, and two producing wells were drilled on the lease. Thereafter, Harrell sold the lease for the sum of $16,000, to be paid in oil. Then he sold the oil payment for the sum of $5,000 in cash and $6,000 payable in oil. He realized from the sale $11,000. He then made an accounting showing the items received by him and those expended by him in the administration of the trust estate. After accounting for all funds received by him as such trustee, Harrell admitted having in his hands $810.90 which was due Mrs. Allen and for which she was allowed to intervene.

The chancellor made a specific finding of facts in favor of Harrell, and found that the plaintiffs failed to establish their charges of bad faith against Harrell, and it was decreed that their complaint should be dismissed for want of equity. It was decreed that Mrs. Kate Allen should recover from J. A. Harrell the sum of $810.90. To reverse the decree, the plaintiffs have duly prosecuted an appeal to this court.

McNalley & Sellers, for appellant.

Coy M. Nixon and *E. W. Brockman*, for appellee.

HART, C. J., (after stating the facts). The subject of trust forms a large part of equity jurisprudence, and the equitable doctrine established in relation to trusts and trust estates enables a chancellor to deal with them in a way to maintain justice and good faith between the parties interested. The entire doctrine of trusts rests upon the principle that equity looks upon that as done which ought to be done. In the application of the principle, equity looks through form to substance, and it fashions its decrees to carry out the purposes of the trust agreement and to protect the parties from bad faith and unnecessary advantage. In this connection it may also be stated that the appeal in chancery is a trial *de novo* in this court upon the same pleadings and evidence heard in the court below, and the finding of the chancellor upon disputed questions of fact will not be reversed unless it is against the clear preponderance of the evidence. Bearing in mind these well settled principles of

equity and our familiar rules of practice in equity appeals, it cannot be said that the decree of the chancellor should be reversed.

Harrell rendered a definite and detailed account of his administration of the trust estate. It showed each item of money received by him and for what purpose it was expended. It is not shown that Harrell in any manner profited by his administration of the trust estate.

In the beginning, he furnished money with which he and Adams each obtained a one-fourth interest in the oil and gas lease owned by Cook. Mrs. Allen and Tierce then jointly acquired a one-fourth interest. Cook retained a one-fourth interest. The parties borrowed $4,000 from Mrs. Allen to use in drilling operations. Mrs. Allen says that she loaned them this money because Harrell signed the note. The money was turned over to Cook to be used by him in drilling for oil on the lease. Cook did some work, but secretly left the State, taking the money belonging to the trust estate with him. Harrell, through Cook's wife, induced him to return to Union County and to assign the lease to Harrell, as trustee for those beneficially interested in it. The interest of Cook was assigned to his wife.

Harrell then undertook to administer the trust estate by drilling for oil on the lease. He brought in two producing wells and sold the lease for the sum of $16,000 to be paid in oil. He then sold the oil payment of $16,000 for $5,000 in cash and $6,000 payable in oil. He obtained in all $11,000, for which he accounted to those owning the beneficial interest in the lease.

It is claimed by the plaintiffs, however, that he acted in bad faith in selling the $16,000 to be paid in oil for less than par value. They introduced witnesses whose testimony tended to establish that he should have obtained par for the $16,000 which was payable in oil. On the other hand, according to the testimony of Harrell and of two other reputable witnesses, who had had considerable experience in that oil field, Harrell sold the $16,000, which was payable in oil, for the full value thereof. It

is not shown that Harrell profited by the venture. The most that can be said about it is that he became uneasy about the venture and sold too low in order that he might reimburse himself for amounts advanced by him in purchasing the interest of himself and Adams in the lease and in borrowing money on his personal security and making other expenditures in drilling for oil. In this connection, it may be stated that Mrs. Allen was pressing Harrell for payment of the $4,000 which she had loaned to him and his associates. Cook had run off, and nothing could be made out of Adams or Mrs. Cook. Mrs. Allen was looking to Harrell for payment of the $4,000 loaned by her to him and his associates. Adams had never paid any part of the amount advanced by Harrell to him for his one-fourth interest in the lease. Under these circumstances, it cannot be said that the finding of the chancellor that Harrell acted in good faith in the matter is clearly against the preponderance of the evidence.

Again, it is claimed that Harrell acted in bad faith in making certain payments to a man named Koury. Harrell explains that these amounts were paid to Koury for well-drilling on the lease. We do not deem it necessary to set out the evidence in full or to discuss and review it in detail.

The chancellor made a specific finding of facts substantially as above stated and embodied the same in his decree. We deem it sufficient to say that we have carefully read the evidence in the case and cannot say that the finding of facts made by the chancellor is against the clear or decided preponderance of the evidence. The decision of the chancellor shows that it was made in conformity to the principles of equity above announced, and it is our opinion that the decree should be affirmed. It is so ordered.

PATTON v. BROWN-MOORE LUMBER COMPANY.

Opinion delivered March 28, 1927.

1. MONEY RECEIVED—IMPLIED PROMISE.—An action on an implied promise is maintainable where one person has received money or its equivalent, which, in equity and good conscience, he ought not to retain, although there is no privity between the parties, and whether the money was received from the plaintiff or from a third person.
2. LOGS AND LOGGING—RIGHT TO RECOVER FOR TIMBER CUT.—Where the owners of land sold to a lumber company timber owned by them and received payment for less than the amount of their own timber which was cut, *held* that they were under no obligation to pay for timber cut from the land of another by the lumber company.

Appeal from Conway Chancery Court; *Hugh Basham,* Chancellor; affirmed.

J. F. Koone, for appellant.

Strait & Strait, for appellee.

MEHAFFY, J. The appellant, plaintiff below, filed a complaint in the Conway Chancery Court which, omitting the caption, is as follows:

"The said plaintiff is, and has been in all times hereinafter mentioned, the owner in fee of the north half of the northeast quarter and the northeast quarter of the northwest quarter of section 33, township 10 north, range 16 west, in Van Buren County, Arkansas, together with all timber of whatsoever kind standing and growing thereon.

"During the year 1921 the Groblebe Lumber Company, a nonresident corporation, and the said Brown-Moore Lumber Company, a corporation organized and existing under and by virtue of the laws of the State of Arkansas, as agents of the said Q. A. Morgan, W. W. Barrett and E. R. Barrett, with their knowledge and consent, and without the knowledge or consent of plaintiff, wrongfully cut and removed from said lands 500,000 feet of pine timber of the value of $2,500; and said timber has been removed by said corporations beyond the reach of said plaintiff.

"The defendants, Q. A. Morgan, W. W. Barrett and E. R. Barrett, are nonresidents of the State of Arkansas, and have received and not accounted to plaintiff for the sum of $2,500 as the purchase price of said timber, said sum having been paid to said defendants jointly by said corporations as agents aforesaid.

"Said corporations are insolvent, not owning sufficient property subject to execution to satisfy the claim of the plaintiff; and the said Brown-Moore Lumber Company is a reorganization and continuation of the said Groblebe Lumber Company.

"Wherefore, plaintiff prays that the court declare that the said Q. A. Morgan, W. W. Barrett and E. R. Barrett are indebted jointly to plaintiff in the sum of $2,500; that the property held under attachment herein be ordered sold and the proceeds of said sale be declared a trust fund for the benefit of plaintiff and applied in satisfaction of his claim; and that he have all other and further equitable relief."

Q. A. Morgan, W. W. Barrett and E. R. Barrett filed the following answer:

"Come the defendants, Q. A. Morgan, W. W. Barrett and E. R. Barrett, and, for their separate answer to the complaint of the plaintiff filed herein as to them, say:

"That they have no knowledge or information upon which to base a belief and therefore cannot say whether or not the plaintiff is the owner in fee of all or any part of the lands so alleged and described in this complaint, and has no knowledge or information and therefore cannot say whether or not the Groblebe Lumber Company or the Brown-Moore Lumber Company cut, took or removed from said lands 500,000 feet of pine timber of the value of $2,500, or any other amount of timber or any other value, or that said timber was removed beyond the reach of said plaintiff, but deny that, if either the Groblebe Lumber Company or the Brown-Moore Lumber Company cut or removed any of said timber, same was done as the agent of Q. A. Morgan, W. W. Barrett, E. R. Barrett, or with their knowledge or consent. And

deny that they or either of them have any connection with it or received anything for said timber or had any knowledge that same had been cut, and deny that either the Groblebe Lumber Company or the Brown-Moore Lumber Company had any authority for them to cut or remove said timber.

"Wherefore, defendants having answered as to them, pray that plaintiffs' complaint be dismissed for the want of equity, and for all other proper relief."

There was no dispute about S. K. Patton owning the tract of land from which he claimed the defendants had taken the timber. The plaintiff waived his right to any judgment against the Brown-Moore Lumber Company and the Groblebe Lumber Company, and the case as to them was dismissed.

The testimony showed that Morgan and W. W. and E. R. Barrett sold their timber to the Groblebe Lumber Company for $100,000, and that said lumber company was indebted to Morgan and the Barretts, in January, 1922, in the sum of $35,000; that Morgan, who was at one time stockholder in one of the companies which was now insolvent, heard, some time in 1920, of a discrepancy in the description of the land, and wrote to the lumber company. The Brown-Moore Company purchased the interest of the other corporations and, after all the timber had been cut by the two companies, Morgan was informed by Patton that he owned one tract of the land and Morgan wrote to the corporations advising them of this fact. He also wrote Barrett that Patton claimed the land.

About one-half of all the timber taken from section 33 was taken from the land owned by Patton. Testimony also showed that, in the suit of Morgan and others against the Brown-Moore Lumber Company, the suit was for the entire amount of timber cut by both companies; that Morgan and the Barretts sold the timber in Van Buren and Conway counties to the lumber company and furnished it a blue-print. The blue-print showed Patton's a part of that to be cut. Morgan and the Barretts

owned about 8,000 acres. The reports of the cutting made to Morgan and the Barretts did not particularly describe the 120 acres belonging to Patton. Morgan and the Barretts owned section 33, except the 120 acres of Patton. Morgan and the Barretts were informed that Patton's timber had been cut before their suit against the Brown-Moore Lumber Company, but not until after the timber had been cut and removed.

An accounting was made to Morgan and the Barretts of the Patton timber just as other timber was accounted for. It was thought to be the property of Morgan and the Barretts until after it was cut and removed. The contract provided for the lumber company to pay one-fourth of the amount of timber on any section when they began cutting, at the rate of $5 a thousand for the estimated amount. Parts of section 33 which did not belong to Morgan and the Barretts were included in the cruises furnished by Morgan and the Barretts. The contract of the lumber companies with Morgan and the Barretts referred to the deed for a description of the lands on which the timber was located. Morgan, W. W. and E. R. Barrett were tenants in common and owned a large tract of land which they contracted to sell to the lumber company. The company made payments under the amounts due under the contract in the total sum of about $40,000. The lumber company at first made reports when it started to cut, but later discontinued to make reports, but the reports only showed that it would start cutting upon a certain section, without showing or indicating what part of the section. They had land in sections where they did not own the whole section, and it was impossible to tell from the reports what part of the section they were cutting on. The lumber companies made payments to Morgan and the Barretts.

It appeared that, after the litigation began, the payments made were according to estimate on 520 acres when Morgan and the Barretts only owned 400 acres in that section. They simply accepted the payments that

were made by the lumber companies. The lumber companies never had authority from Morgan or the Barretts to cut timber on any lands not included in the description of the deeds, which were recorded and referred to in the contract. The sale of the timber was set at the price of $100,000 and $5 a thousand feet mentioned to be paid when they began cutting, but, if they had paid $5 for all of it, it would have amounted to $180,000 instead of $100,000, which was the contract price for the timber.

The appellees said: "The first payment was made to us for the privilege of cutting on section 33, and this was before any timber was cut. We did not know until after this litigation came up that any timber had been cut on the 120 acres belonging to Patton."

The appellees learned this after the litigation began. If the payments came from timber cut on section 33, it would only be 50 per cent. of the estimated timber on 520 acres, and Morgan and the Barretts owned 400 acres. The lumber companies are still indebted to Morgan and the Barretts in the sum of more than $30,000, mostly for timber cut from sections that had not been reported to them. Groblebe wrote to one of the appellees that the cruise furnished and the abstract were not the same, and requested a careful check. Barrett wrote the lumber company, after checking carefully the land, directing its attention to the fact that Morgan and the Barretts only owned 400 acres in section 33. They again wrote to the lumber company that they did not convey it all the lands covered by the blue-print and cruise and offered to accept payment on section 33 as a basis of an average of the timber on the amount of land owned by appellees in said section. The only description ever furnished the lumber companies was referred to in the recorded deeds and the abstract furnished said company. They did not sell or attempt to sell the lumber companies the land owned by appellant, and no authority was given the companies to take timber from the lands owned by Patton. The appellees never received the full number of payments for the right to cut the timber on section 33.

The appellant seeks to recover in this case on an implied promise to pay. There is no contention that there was an express promise, and, on the other hand, there is no contention or dispute about appellant's owning the land. So that really the only question in the case is whether the appellees are liable under an implied promise. Appellant cites many authorities to the effect that, when one has in his possession money belonging to another, an action may be maintained against the person who has the money, and that an express promise is unnecessary. The action is not dependent upon an express promise, and, as many authorities say, not even upon one implied in fact, but it is maintainable in all cases where one person has received money or its equivalent under such circumstances that, in equity and good conscience, he ought not to retain it, and, *ex aequo et bono,* it belongs to another. And it is said that this is so, irrespective of whether the money was received from the plaintiff or from a third person. 2 R. C. L. 778.

The authorities are practically unanimous in holding that, if one has money belonging to another, which, in equity and good conscience, he ought not to retain, it may be recovered, although there was no privity and no express contract or agreement. Under such circumstances the law implies a promise to pay, and if the appellees in this case had received money from the corporations that belonged to the appellant, which, in good conscience, they ought not to retain, plaintiff would be entitled to recover. But we do not think that the proof in this case justifies a finding or conclusion that appellees have any money belonging to appellant under such circumstances as the law requires in order to make them liable.

The appellees entered into a contract with the corporations on May 28, 1919, by which they sold the Groblebe Lumber Company certain timber. It is true that a blueprint was furnished which showed appellant's land as well as appellees'. But there was also an abstract and deed furnished, and this record shows that the abstract

was an abstract of appellees' lands, and there is no suggestion even that it included appellant's land. Moreover, the contract itself provided "timber upon said lands owned by said first parties situated in Conway and Van Buren counties, Arkansas, and completely described in a certain deed executed by Lloyd England of Little Rock, Arkansas, in favor of Q. A. Morgan and now recorded in the said counties of Conway and Van Buren, Arkansas, and conveyed approximately 8,300 acres of land."

It is perfectly clear that the appellees did not intend to sell any timber except what they owned and what was described in the deed to which the contract referred. The undisputed proof shows that appellees did not know that any timber had been cut on appellant's land until after the litigation began. The undisputed proof also shows that the corporations are still indebted to the appellees for timber in a sum very much larger than appellants claim, and there is no proof in the record showing that appellees received any money for appellant's timber. In fact, they did not receive pay for all of their own timber. Therefore it cannot be said that appellees had in their possession money which, *ex aequo et bono,* belonged and ought to have been returned to appellant, as was shown in the case of *Porter* v. *Roseman,* 165 Ind. 255, 74 N. E. 1105, 112 Am. St. 222, 6 Ann. Cas. 718.

Our own court has held that, in order to maintain a suit of this kind, the plaintiff must prove that the defendant actually received the money, and this, we think, he failed to do, and a promise to pay is never implied where it would be unjust to the party to whom it would be imputed, and such promise will be implied only where, in equity and good conscience, the duty to make such promise exists. That is, the law implies a promise only when, under the circumstances and proof, it would be the duty of the defendant to make such a promise. We do not think the proof in this case justifies the conclusion that there was any implied promise to pay. The decree of the chancellor is affirmed.

ASHCRAFT v. JEROME HARDWOOD LUMBER COMPANY.

Opinion delivered March 28, 1927.

1. DEATH—WHO MAY SUE.—Under Crawford & Moses' Dig., § 1075, the administrator of a deceased employee may recover for his death against his employer for the benefit of everybody concerned, including the next of kin.
2. DEATH—WRONGFUL EMPLOYMENT OF MINOR—RIGHT OF PARENT.—A father cannot maintain an action against the employer of his deceased son for damages on account of loss of the son's earnings, where he consented to the son's wrongful employment in violation of the statute.
3. MASTER AND SERVANT—NEGLIGENCE—JURY QUESTION.—In an action against a lumber company for the death of a minor employed in unloading logs, evidence *held* sufficient to take the case to the jury.
4. MASTER AND SERVANT—SAFE PLACE TO WORK—JURY QUESTION.—Whether a minor employed in unloading logs had a safe place in which to work *held* for the jury, where stakes which held the logs had been removed and the cars were put in motion, causing a log to roll off on such minor.
5. DEATH—CONSCIOUS SUFFERING.—In an action for the wrongful killing of an employee, evidence that he was "gasping and struggling and groaning" thirty minutes after the accident, was sufficient to take to the jury the question whether there was conscious suffering.
6. TRIAL—DIRECTION OF VERDICT.—It is never proper to direct a verdict against the plaintiff except in cases where, conceding the credibility of the witnesses and giving full effect to every legitimate inference that may be deduced from their testimony, it is plain that he has not made out a case sufficient in law to entitle him to a verdict and judgment thereon.

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

D. E. Waddell and *D. D. Glover*, for appellant.

Henry & Harris and *Williamson & Williamson*, for appellee.

McHANEY, J. Appellant, J. J. Ashcraft, brought this suit in his own right and as administrator of the estate of Guy Ashcraft, deceased, against the appellee to recover damages on account of the death of Guy Ashcraft, a minor, under the age of sixteen years, who was the

son of appellant, and for whose estate appellant had been appointed administrator.

Appellant's intestate was killed on the 19th day of June, 1925, while in the employ of the appellee as a tong hooker in the unloading of logs from flatcars brought into appellee's plant over the Missouri Pacific railroad and set on the unloading track of appellee. An unloading machine consists of a steam-engine, two drums, several gears and a crane that extends out thirty feet from the machine with a cable properly attached, is operated by steam, and on this cable there are two hooks which the tong hookers attach to each end of the log and then, by an operation of the machinery, the log is lifted from the car and deposited on the ground, or on a little car that takes the log up into the mill, and appellant's intestate was one of the boys used by appellee in attaching the hooks to the logs and disengaging them therefrom when deposited on the little car, and was so engaged at the time of his death. It was his duty to set the brakes on the car, when the car was moved, to stop it, and he was required to remain on the car to perform his duties, except when he got off to unhook the tong hooks from the log when it was loaded on the little car to be taken up into the mill.

Appellant alleged in his complaint that, when the logs were loaded on the train, stakes or standards were placed on either side of the car for the purpose of holding the logs, and that they were piled up on the cars between the stakes and then were wired over the top of the logs to hold them in place. And it is further alleged "that, when said train of logs was brought into its mill, the defendant company, through its agents, servants and employees, negligently removed the standards or stakes that fastened them together, and, after so doing, negligently moved said car from its position that it was stopped in by the use of the steam-loader, and the deceased, Guy Ashcraft, was negligently ordered by his foreman to hold the car by setting the brakes when it reached a certain place. Plaintiff alleges that the

defendant company was negligently operating said flat-cars with defective brakes, which it knew or, by the exercise of ordinary care, could have known, and which was unknown to the deceased. Plaintiff alleges that, when the deceased was ordered to apply the brakes and stop said car, the brakes on said car failed to hold, and the deceased was again negligently ordered to scotch it and stop it, and deceased, in obedience to said order, attempted to scotch the wheels of said car to stop it, and, when the wheels of said car struck the scotch applied by the deceased, it caused said logs to roll off of said car and one of which fell on the deceased," from which he died.

Damages were prayed in the sum of $10,000 for the benefit of plaintiff, and $15,000 for deceased's pain and suffering. Later, appellant amended his complaint, charging a violation of the child-labor law, claiming that the deceased was under the age of sixteen years and was allowed to work around dangerous machinery in violation of the law. Appellee demurred to the complaint and amendment to the complaint, which was overruled, and answered, denying all of the material allegations of the complaint. At the conclusion of the testimony, the court, at the request of appellee, directed the jury to return a verdict for appellee on the whole case, but directed a verdict for $1 as nominal damages. Appellant objected, excepted, and prayed an appeal to this court, which was granted, and appellee prayed and was granted a cross-appeal from the direction of the court to the jury that plaintiff was entitled to recover nominal damages.

The first question arising on this appeal is whether appellant may maintain an action in his own right for loss of services of his minor son when he, as personal representative of the deceased, or administrator, is suing for the benefit of the estate. By § 1075 of C. & M. Digest it is provided: "Every such action shall be brought by and in the name of the personal representatives of such deceased person, and, if there be no per-

sonal representatives, then the same may be brought by the heirs at law of such deceased person."

In this case the suit is brought by the father in his own right and as the administrator of the estate. The administrator can recover for the benefit of everybody concerned, and, if the prayer in his complaint is not broad enough to recover for the benefit of the next of kin, it may be amended to cover same.

We have reached the conclusion in this case that the father cannot maintain an action in his own behalf for his damages on account of the loss of earnings of his son for the reason that he himself consented to the employment of his minor son in the work in which he was engaged, and thereby consented to the wrongful employment of such child under the age of sixteen years, if it be said to be in violation of the statute against the employment of minors, and he will not be allowed to profit by his own negligence or wrongful act in such case. *Nashville Lumber Co.* v. *Buzbee,* 100 Ark. 87, 139 S. W. 301, 38 L. R. A. N. S. 754; *Kansas City & Texas Coal Co.* v. *Gabsby,* 70 Ark. 434, 66 S. W. 915.

We have also reached the conclusion that the court erred in taking this case from the jury and in directing a verdict against the appellant. Appellant's witness, A. R. Nave, testified that, at the time of the injury to appellant's intestate, they were unloading five cars; that they would run five cars in on the track, and, when they would unload a half car, they would move the string of cars up a distance; that they would unload them by having the boys hook the tongs in the end of the log, pick it up by the machinery and lift it around to where they desired to place it.

"Q. When you had unloaded one-half of this car, what did you do at the time to release the cars and put them in motion? A. When I unloaded this one and a half car I went to pull down, pull the cars down—saves a little work to pull them down, and then the cars started, I just picked this log up and came on around and laid it down and I called, 'Hold the brake' and they never did.

Q. You picked up a big log on that car you were moving? A. It was moving when I picked it up. Q. Picking up this big log and getting it out started the cars moving? A. Yes sir, I suppose so."

Again the witness said that the stakes were out of the car when he went down there, and he discovered that the stakes were out of the car; that he had instructed them not to take them out.

"Q. The stakes were not in there? A. They took them out after I picked that up—I couldn't pick up the log next to the stakes. Q. You mean to say they took the stakes off while the car was running? A. No sir, they had taken them out. They had them all unloaded except about two and a half cars. I had taken two off this car and they had taken the stakes out."

It will be seen therefore that the witness knew it was dangerous to unload the cars with the stakes out. He was the person in charge of the unloading, operating the unloading machine under whose immediate direction the tong hooker boys were working, and the jury might have concluded, had they had an opportunity to pass upon the question, that it was negligence to proceed with the unloading of such cars with the stakes pulled. The witness had instructed the boys not to pull the stakes from the sides of the cars, and, while he does not testify who did pull them, he testifies that he proceeded with the unloading of the cars, knowing the stakes to be out, and knowing that the logs might roll and cause injury to appellant's intestate.

The jury might have found from the evidence that, when the witness picked up the last log before the accident, appellant's intestate got off the car to go down to the little car where the log was being placed for the purpose of unhooking the tongs, and that, while he was getting down, the log rolled off the car and fell on top of him because there were no stakes on the car to hold it. The jury might also have found that it was negligence on the part of appellee for its employee to move the string of cars by starting them in motion with the

unloading machine, and then calling on the boys to stop the cars. Whether or not appellant's intestate had a safe place in which to work with the stakes removed from the cars, and the cars put in motion by the steam loading machine, when the logs were liable to roll and cause injury to the boys who were working thereon, was certainly a question for the jury.

But it is insisted that there can be no recovery for the benefit of the estate because there was no evidence of conscious pain and suffering. We differ with counsel in this contention. According to the evidence, no one saw the accident and does not know exactly how it happened. Appellant testified that his first information of the accident was given to him by Mr. Longley, who told him that Guy had been hurt. He said:

"I stopped my work and went to where he was, and when I got there he was gasping and struggling and groaning. Q. Did they have the log off of him when you got there? A. They had taken the log off and had laid him back and he was lying on his back, gasping and struggling. From the time it happened until I got there it must have been twenty or twenty-five minutes, from the time they could get the doctor and for us to get there. Q. How long did he live after you got there? A. Five minutes; he lived from the time he was hurt probably thirty minutes. Q. He had been taken out from under the log and laid out to the side and was gasping and groaning when you got there, at the time you got there? A. Yes sir."

John Ashcraft, Jr., brother of deceased, said that he arrived at the scene of the accident shortly after the doctor got there, and that his brother was living at the time, and he saw him gasp for breath three or four times after he got there, and some blood came out of his mouth, but none out of his ears.

While the testimony is very meager as to whether the deceased suffered any conscious pain and suffering, yet, when it is viewed in the light most favorable to appellant and giving it its strongest probative force in his favor, we cannot say as a matter of law that the deceased

immediately became wholly unconscious and remained so until death. It was a question for the jury, and should have been submitted under appropriate instructions.

In the case of *St. Louis-San Francisco Rd. Co.* v. *Pearson,* 170 Ark. 842, 281 S. W. 910, this court said: "The court is never justified in directing a verdict except in cases where, conceding the credibility of the witnesses, and giving full effect to every legitimate inference that may be deduced from their testimony, it is plain that the party has not made out a case sufficient in law to entitle him to a verdict and judgment thereon."

In the Pearson case, the deceased lived only about ten minutes after the accident. The testimony showed that there were some signs of life, that he was gasping for breath but could not speak, and on this point the court said: "It is true that the length of time was short, but, when the testimony is considered in the light most favorable to plaintiff, it cannot be said that it was not legally sufficient upon which to predicate an instruction on conscious pain and suffering." *Stamps* v. *St. Louis I. M. & Sou. Ry. Co.,* 84 Ark. 241, 104 S. W. 1114.

For the error indicated the judgment will be reversed, and the cause remanded for a new trial.

SILBERNAGEL *v.* TALIAFERRO.

Opinion delivered January 17, 1927.

LANDLORD AND TENANT—LIABILITY OF MORTGAGEE FOR RENT.—Where a crop subject to a landlord's lien was turned over to persons having a mortgage thereon, on their promise to pay the rent, they could not relieve themselves of liability by turning the property over to a receiver in a foreclosure proceeding; their act constituting a wrongful conversion.

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

Reinberger & Reinberger, for appellant.

Crawford & Hooker, for appellee.

McCULLOCH, C. J. There are two appeals in separate cases, now under consideration, which have been consolidated in this court, the facts being conceded to be substantially identical so far as they affect the decision of the court.

Appellants are copartners, conducting a mercantile business in the city of Pine Bluff, and appellees are the respective owners of farm lands in Jefferson County. The lands were rented to certain tenants of the year 1923, and the tenants mortgaged their crops to appellants for supplies. The tenants, with one exception, consisted of a copartnership composed of three persons, who, during the crop-gathering season, became insolvent and were adjudged bankrupt. It does not appear in the abstract of the record when this adjudication of bankruptcy occurred, but it seems to have been before the institution of this action, which was commenced by appellees against appellants on November 20, 1923, to recover the amount of the rent due to them from their respective tenants.

It was alleged in each of the complaints that the crops of cotton and corn raised by the tenants on the lands rented from appellees had been delivered to appellants upon express promises of appellants to pay the rent due the appellees, and that the market value of the crop so delivered was more than sufficient to pay the rent, but that appellants, after having received the cotton, appropri ated same to their own use and refused to pay the rent.

Appellants filed an answer containing denials of all the allegations of the complaint. On the trial of the cause, appellees introduced testimony establishing the fact that the cotton was gathered by the tenants, and appellants demanded delivery of the crop to them, and the crop was delivered to appellants upon the express promise that they would pay the rent to appellees. The decided preponderance of the evidence was to this effect, and the court found that appellants received the corn and cotton into their possession and promised to pay the rent, but, after appropriating the crop to their own use, they refused to pay the rent.

Appellants defended on the sole ground that they had not converted the crops, but that same had been delivered to a receiver appointed by the chancery court of Lincoln County; that the receiver had sold the crop by order of the chancery court; that the only remedy of appellees was to intervene in that suit for the enforcement of their respective liens. In other words, the contention is that appellants did not convert the crop, and therefore are not liable for the rent. The proof in the case does not sustain the defense of appellants. It appears from the testimony in the case that, on December 13, 1923, appellants instituted an action in the chancery court of Lincoln County against the tenants, their mortgagors, foreclosing their mortgages, and that a receiver was appointed. Appellants offered testimony to the effect that the crop, at least most of it, was delivered, not to them, but to the receiver. They admitted, however, that a portion of the crop was delivered to them and that they in turn delivered it to the receiver, when all of the crop was sold by the receiver under an order of the court and the proceeds were turned over to them.

If, as contended by appellants, they never received the crop into their possession, but, on the contrary, the crop was turned over to the court's receiver, who sold the same, the liens of the landlords could not be enforced against them, and the only remedy of the landlords would be to intervene in the case in which the receiver was appointed. The proof in the case, as we have already said, does not support this contention, because, from a preponderance of the testimony, the crops were turned over to appellants on the promise that they would pay the rent, and, if they received the crop, which was subject to a statutory lien, with notice of the existence of the lien, they could not relieve themselves of liability by turning the property over to the receiver. *Rose City Merc. Co* v. *Miller*, 171 Ark. 872, 286 S. W. 1010. This constituted a wrongful conversion of the property, which rendered appellants liable for the rent. The decree of the court in each case was correct, and the same is affirmed.

CORNING MOTOR COMPANY v. WHITE.

Opinion delivered February 14, 1927.

SALES—RETENTION OF TITLE OF AUTOMOBILE—REPAIRER'S LIEN.—The lien of the seller of an automobile for the balance of the unpaid purchase price under a contract retaining title *held* superior to that of an automobile repairer, under Crawford & Moses' Dig., § 6874.

Appeal from Randolph Circuit Court; *John C. Ashley*, Judge; reversed.

Oliver & Oliver, for appellant.

KIRBY, J. Appellant motor company made a conditional sale of a Ford automobile to one Ben Godfrey, retaining the title until paid for, and the purchaser took the car to the shop and garage of appellee for repairs, and, upon his failure to pay the charges therefor, appellee retained possession of the car, claiming a lien thereon for repairs. The purchaser failed to pay for the car, and appellant did not know of its whereabouts until the 20th day of May, 1925, when appellee notified him he had it in his possession, and claimed a lien for repairs and for storage thereon.

After demand made, appellant brought suit in replevin, on the 22d day of May, for the car. Appellee denied that plaintiff was entitled to the possession of the car, that he wrongfully detained same, and that plaintiff was damaged by such wrongful detention, and, by way of cross-complaint, set up a claim for $45.45 for labor and repairs on said automobile and $25 for storage. Appellee retained possession of the car, giving bond for performance of the judgment of the court.

A trial in the justice court resulted in defendant's favor, and, on appeal, the judgment was rendered in appellant's favor for the car or its value, specifying the amount thereof, and against appellant on the cross-complaint for $25 for storage, and from this judgment the appeal is prosecuted.

Appellant contends that there is no testimony to support the verdict on the cross-complaint, and that the court

erred in submitting the question of the recovery to the jury. This contention is correct. There is no testimony whatever showing that appellant knew that its car was in the possession of appellee, or in his storage room, until he was notified of that fact by appellee the day before he brought replevin, after appellee had refused to surrender the possession of the car on demand. Appellee also stated that he would not have released the possession of the car upon demand any time before, except upon payment of the amount due for repairs for which he claimed a lien.

In *Lowe Auto Co.* v. *Winkler,* 127 Ark. 433, 191 S. W. 927, in an action for replevin to recover possession of an automobile held by a garage company for payment of repair bill, the court held the owner entitled to the possession of the car, regardless of any lien defendant might have on it for repairs, saying: "In *Shelton* v. *Little Rock Auto Co.,* 103 Ark. 142, 146 S. W. 129 we held that the act of 1899, *supra,* was repealed by act 147, p. 259, of April 15, 1903, and that the remedy prescribed in the latter statute must be pursued. The decision in the case just cited related only to the remedy, but it necessarily follows that, if the remedy prescribed by that statute was swept away by the subsequent enactment of the Legislature, the lien itself, which arose under the common law, was also superseded by the statutory lien. It was said in the opinion in the case just cited that the act of April 15, 1903, covered the whole subject, and is inconsistent with the provisions of the former statute, and it necessarily follows from that conclusion that the lien created by the common-law was superseded by the one created by the statute."

In *Webber Implement & Auto Co.* v. *Pearson,* 132 Ark. 101, 200 S. W. 273, it was held as stated in the first paragraph of the syllabus: "A repair man who performs labor and does repair upon an automobile has a lien for his labor which takes precedence over the rights of a conditional vendor." The court cited *Gardner* v. *First National Bank of DeQueen,* 122 Ark. 464, 184 S. W. 51,

where it was held a blacksmith or wheelwright, who had made repairs on the wagons and shod the horses mortgaged, but allowed by the mortgagee to remain in the possession of the mortgagor and be used by him, had a lien superior to the lien of the mortgage.

Since this decision was rendered, act approved February 27, 1919, was passed, and § 9 thereof has become § 6874, C. & M. Digest of the Statutes. This act provides for liens of blacksmiths, wheelwrights and automobile repairers, the enforcement of such liens covers the whole subject, and, in so far as it is inconsistent with the provisions of former laws and decisions construing same, repeals them. It still recognizes the superiority of the lien over mortgages, where the property is permitted to remain in possession of and be used by the mortgagor, but expressly provides that the lien upon automobiles for repairs shall be subject to the lien or claim of the vendor of automobiles, trucks, tractors and all other motor-propelled conveyances retaining title thereto for any claim or balance of purchase money due thereon, necessarily repealing statutes and constructions thereof in conflict therewith.

Appellee had no right therefore to retain the possession of the car against the demand of the vendor for possession under the unconditional sale, the purchase money therefor not having been fully paid, and the undisputed testimony shows that the appellant demanded possession of the automobile immediately after he ascertained that appellee had it. There was no testimony warranting the submission of the question of liability for payment for repairs and storage to the jury, and none supporting the verdict rendered therefor on the cross-complaint.

The judgment is reversed accordingly, and the cause dismissed as to the cross-complaint.

AMERICAN SOUTHERN TRUST COMPANY v. MCKEE.

Opinion delivered February 14, 1927.

1. BANKS AND BANKING—GOOD FAITH IN LOAN AGREEMENT.—The fact that a bank's condition was such that collections could not be made without great difficulty and disastrous results to borrowers does not tend to show that the bank acted in bad faith in agreeing to employ a certain agent to look after its collateral for creditor banks which were to make further advances.
2. BANKS AND BANKING—LOAN AGREEMENT.—Creditor banks had a right to enter into a contract with a debtor bank whereby they agreed to lend it additional money if it would employ a certain agent to look after the making of loans and collecting collateral.
3. BANKS AND BANKING—LOAN AGREEMENT.—A bank heavily indebted to two other banks was authorized to agree to carry its cash balance with such other banks, in consideration of their making additional loans to it.
4. BANKS AND BANKING—LOAN AGREEMENT.—A contract whereby creditor banks made further advances to a debtor bank, sent their agent to protect their interests, and required the debtor bank to keep its cash deposits with them, cannot be construed as authority to take over the debtor bank, or to control and manage same.
5. CONTRACTS—MERGER OF ORAL INTO WRITTEN AGREEMENT.—Prior oral agreements forming a part of the negotiations for a contract became merged in a subsequent written contract, and are incompetent in evidence for the purpose of enlarging the scope of such written agreement.
6. EVIDENCE—PAROL EVIDENCE RULE.—A written contract, free from doubt and ambiguity, cannot be altered or contradicted by parol evidence, except for fraud or mistake.
7. CONTRACTS—MODIFICATION.—Parties to a written contract may, subsequent to its execution, modify it and substitute a valid oral agreement therefor.
8. PRINCIPAL AND AGENT—PROOF OF AGENCY.—Neither agency nor the extent of an agent's authority can be proved by his declarations or actions.
9. PRINCIPAL AND AGENT—AUTHORITY OF AGENT.—Acts and declarations of an agent which were beyond his authority as contained in a written contract, are not binding on his principal.
10. PRINCIPAL AND AGENT—APPARENT AUTHORITY OF AGENT.—A principal is liable for the acts of an agent, though not authorized, if they were within the apparent scope of his authority, which the principal knowingly permits the agent to exercise or holds him out as possessing.

11. PRINCIPAL AND AGENT—DUTY TO INQUIRE AS TO AUTHORITY.—One dealing with an agent without inquiring of the principal as to his authority does so at his peril, unless he knows of acts and declarations of the principal determining the agent's authority.

12. PRINCIPAL AND AGENT—ESTOPPEL OF PRINCIPAL BY AGENT'S ACTS.—A principal will not be estopped to deny his agent's authority unless he knows of the acts and declarations of the agent in excess of his express authority and not within his apparent authority.

13. PRINCIPAL AND AGENT—GENERAL AND SPECIAL AGENTS.—The powers of general and special agents are governed by the same principle, to-wit, they can do anything within the scope of their agency so as to bind their principal, though there may be secret instructions limiting their powers; but, whether the authority be general or limited, they cannot charge their principals if they exceed it.

14. PRINCIPAL AND AGENT—AUTHORITY OF GENERAL AGENT.—A general agent, unless he acts under special and limited authority, impliedly has power to do whatever is usual and proper to effect such purpose as is the subject of his employment.

15. PRINCIPAL AND AGENT—IMPLIED POWER.—The implied power of an agent, however general, must be limited to such acts as are proper for an agent to do, and cannot extend to acts clearly adverse to the principal's interests or for the benefit of the agent personally, nor to acts not usually done by agents in that sort of transaction.

16. PRINCIPAL AND AGENT—AUTHORITY OF SPECIAL AGENT.—The authority of a special agent must be strictly pursued, and those dealing with him must, at their peril, determine the extent of his authority.

17. PRINCIPAL AND AGENT—SCOPE OF AUTHORITY.—Where a principal permits a special agent so to act as reasonably to induce others to credit him with broader powers than he possesses, he will be estopped to deny the existence of as broad an authority as he permitted the special agent to exercise.

Appeal from Arkansas Chancery Court, Southern District; *H. R. Lucas*, Chancellor; reversed in part.

Bryan, Williams & Cave, Coleman & Gantt and *Coleman & Riddick* and *G. W. Botts*, for appellant.

Floyd Wingo, Buzbee, Pugh & Harrison, Geo. C. Lewis, John L. Ingram, John W. Moncrief, Cohn, Clayton & Cohn, Peyton D. Moncrief and *Rogers, Barber & Henry*, for appellee.

MEHAFFY, J. This suit was begun in the Arkansas Chancery Court against the American Southern Trust Company of Little Rock, and others, seeking to recover against them for amounts due depositors, and also other creditors of the Bank of Gillette at the time said bank was closed.

The plaintiffs allege that the Bank of Gillette, on June 24, 1921, and for some years prior thereto, was engaged in the banking business in Gillette, State of Arkansas. H. S. Jones was president of the said bank; William Moll, J. W. A. Norden, A. H. Richter, J. I. Devore and Henry S. Jones constituted the board of directors, and J. W. A. Norden was secretary, and Roy Koen, cashier. It is alleged that the Bank of Gillette, on June 4, 1921, and for some time prior thereto, was largely indebted to the American Bank of Commerce & Trust Company and the First National Bank of St. Louis, Mo., and that the Bank of Gillette was insolvent, and that said insolvency was known by the American Southern Trust Company and the St. Louis bank, and that said Bank of Gillette was unable to pay indebtedness to said banks, and, in order to prevent the loss of said indebtedness, the American bank and St. Louis bank, in order to attain their preference over the other creditors of the Bank of Gillette, entered into a conspiracy with the president and board of directors of the Bank of Gillette, and entered into the following illegal agreement with the president and board of directors of the Bank of Gillette:

"Minutes of special meeting of the board of directors of Bank of Gillette.

"Gillette, Ark., June 4, 1921.

"At a meeting of the board of directors, being a special meeting called by the president, the following resolution was read and adopted:

"Whereas, it becomes necessary that a certain agreement between the American Bank of Commerce of Little Rock, Ark., the First National Bank of St. Louis, Mo., the Bank of Gillette, Gillette, Ark., and Geo. F. Walz (a copy

of which agreement is attached hereto and made a part of these minutes) be entered into.

"Therefore be it resolved: That the president and secretary of this bank are hereby directed and authorized to enter into and execute the above mentioned agreement for and on behalf of this bank.

"Be it further resolved: That we, the undersigned officers and members of the board of directors, waive all formal and legal notice of this special meeting.

"Henry S. Jones, President.
"Wm. Moll, Director.
"J. W. A. Norden, Director.
"A. H. Richter, Director.
"A. J. Devore, Director.

"Attest: J. W. A. Norden, Sec.

"Approved this the 29th day of June, 1921. Henry S. Jones, president.

"Attest: J. W. A. Norden, Sec.

"Agreement between the First National Bank of St. Louis, Mo., and the American Bank of Commerce and Trust Company, Little Rock, Ark., concerning the handling of the Bank of Gillette, as arranged between Mr. Coffman of the First National Bank and W. A. Hicks of the American Bank of Commerce & Trust Co.

"It is understood between the two banks mentioned above that the Bank of Gillette is to employ Mr. Geo. F. Walz at a salary of $350 per month, Mr. Walz to serve as trustee for the two banks and represent them as the two banks may have agreed with the Bank of Gillette, expenses of Mr. Walz's employment to be paid by Bank of Gillette.

"It is agreed that the First National Bank of St. Louis, Mo., and the American Bank of Commerce & Trust Company, Little Rock, Ark., are to lend to the Bank of Gillette, during the year 1921, if it becomes necessary, an additional aggregate sum of $75,000, two-thirds of which is loaned by the American Bank of Commerce & Trust Company and one-third by the First National Bank.

"The Bank of Gillette is to carry its cash balances on deposit with the First National Bank of St. Louis and with the American Bank of Commerce & Trust Company of Little Rock, and with no other banks; balances to be carried on the basis of one-third with the St. Louis bank and two-thirds with the Little Rock bank. Mr. Walz, in representing the two banks, is to obtain from the Bank of Gillette all of the collateral which they own in the way of notes, etc., to secure money already advanced and money to be advanced by the two banks in question.

"It is also understood by the present officers of the Bank of Gillette and Mr. Walz is to have absolute authority in the granting of loans and accepting of collateral. No loans are to be made by the Bank of Gillette without first obtaining the approval of Mr. Walz.

"Notes for the money loaned to the Bank of Gillette are to be made payable to the banks advancing the money, and are to carry a maturity of 'on demand,' and, if not demanded, then Oct. 1, 1921.

"All collateral obtained on loans made to the Bank of Gillette is to be held in trust for the two banks advancing money as referred to above, and, in collecting the collateral, all money collected is to be applied on the indebtedness owing the two banks in proportion to the money advanced by the two banks, that is, one-third of the collections to go to the First National Bank and two-thirds to the American Bank of Commerce & Trust Company, as the collections are made. For matter of protection, however, the collateral is to be held in separate envelopes, one containing collateral securing the loan of the First National Bank of St. Louis, Mo., and other securing the loan of the American Bank of Commerce & Trust Company of Little Rock, Ark., it being understood that the margin of collateral over the amount of money loaned is to be the same, as nearly as possible. Should it occur, in making collections, that more of the collateral as held by one is paid than that as held by the other bank, it is understood that the payments will be distributed as referred to above, on the one-third and two-thirds basis,

and collateral transferred from one envelope to the other of sufficient amount to offset collateral that has been paid, so as to make the same proportion of margin.

"It is also understood that no contract has been entered into with Mr. Walz as to definite time of employment, but it is understood with the officers of the Bank of Gillette that Mr. Walz will be retained by them just as long as we desire him to remain, or until the indebtedness of the Bank of Gillette to the First National Bank of St. Louis, Mo., and the American Bank of Commerce & Trust Company of Little Rock, Ark., is paid in full.

"The above outline is hereby acknowledged to be understood and agreed to by all parties mentioned in this contract, viz., the First National Bank of St. Louis, Mo., the American Bank of Commerce & Trust Company of Little Rock, Ark., Geo. F. Walz, trustee for the First National Bank of St. Louis and the American Bank of Commerce & Trust Company of Little Rock, and the Bank of Gillette, by its president and cashier.

"First Nat'l. Bank of St. Louis,
"Frank A. Hicks, V. P.
"American Bank of Commerce & Trust Co.
"By W. A. Hicks, V. P.
"Bank of Gillette,
"Gillette, Ark.
"Geo. F. Walz."

Plaintiffs alleged that the object of the agreement was to secure the American and St. Louis banks an unlawful and illegal preference of other said creditors of the said Bank of Gillette; that, in pursuance of the said conspiracy to procure said illegal preference, the agreement and contract was kept secret, and that the other creditors had no knowledge of it. They allege that, in pursuance of said agreement, George F. Walz, as agent of the American and St. Louis banks, took charge of the entire assets of the Bank of Gillette, consisting of notes, cash, and other securities, and exercised absolute and exclusive control of the Bank of Gillette and its assets until some time in January, 1923, when the Bank of Gillette was closed by

the Bank Commissioner. They alleged that, at the time the bank was closed, their entire assets, except the fixtures, were in the hands of Walz as representative of the American Southern Trust Company and the St. Louis bank, and have not been delivered to the Bank Commissioner for the use and benefit of creditors of the Bank of Gillette; that the president and board of directors of the Bank of Gillette permitted said Walz to have complete and absolute control and absolute management of said Bank of Gillette from the 29th day of June, 1921, up to the time the Bank of Gillette was closed by the Bank Commissioner, and that said president and board of directors neglected and refused to exercise the care, supervision and control of the management of the said Bank of Gillette as are required of them as president and board of directors of said bank; that from June 29, 1921, until the time the bank closed, the Bank of Gillette was insolvent, and that its insolvency and the fact that its assets were turned to said Walz as agent for said banks were not divulged to the public at large, but that it was held out that said bank was solvent, was held open for deposits, although, as soon as deposits were made in said bank, they were immediately transmitted by Walz to the American Southern Trust and St. Louis banks, and that cash from all notes was transmitted, and that nothing was left in possession of the president and board of directors of the Bank of Gillette.

The First National Bank of DeWitt alleges that, relying on representations as to the solvency of the Bank of Gillette, as made and held out to the public by the defendants, it did advance to one Wm. Moll the sum of $4,329.12; that it was made to Moll with the understanding and agreement of the Bank of Gillette that said bank would guarantee the payment of funds so advanced to Moll for the benefit of said Bank of Gillette; that said advances are evidenced by promissory notes of Wm. Moll and the guaranty of the Bank of Gillette, signed by Henry S. Jones, president, and Norden, secretary; that no part of said sum has been paid, and that Moll is insol-

vent; that judgment has been taken against Moll, and that it is uncollectable. The Bank of DeWitt states that it would not have advanced said sums except by guaranty of repayment by the Bank of Gillette, and that said guaranty would not have been accepted except for the fact that the defendants had represented the Bank of Gillette as being solvent; that, if it had known of the control of the American and St. Louis banks, it would not have advanced the funds; that all legal means had been used for collecting said sums from Wm. Moll, and that payment had been refused by the Bank of Gillette; that, during the time said George F. Walz had charge, large sums of money were collected and transmitted to the American and St. Louis banks, and that said banks were holding the funds under the illegal contract above set out. They state that the amount of $350 a month paid to Walz, under the terms of the illegal contract, were illegal and *ultra vires;* that, under the terms of the contract, Walz was the agent of the American and St. Louis banks, and had no right to divert the funds to pay himself; that the president and board of directors of the Bank of Gillette had no legal right to enter into the contract.

Suit was filed for the depositors of the Bank of Gillette, setting forth specifically the amount due each. Interventions of other creditors were filed. The American Bank of Commerce & Trust Company filed separate answers to the original complaint, and to the complaints of all other parties, and also answer to the interventions. The American Bank & Trust Company denied specifically the allegations in the complaints and interventions, and pleaded the statute of limitations, and admits that it entered into the written agreement set out in plaintiff's complaint, but denied that, under said agreement, it took charge of the Bank of Gillette, or that it ever assumed the complete supervision, direction and control of the collateral of the Bank of Gillette, its assets, business and affairs, to the exclusion of legal officials. It denied that it assured the Bank of Gillette that it would stay with it and take care of it and pull the bank through; denied that

they operated the bank or caused it to be operated; denied that it kept said bank open by continuing and receiving deposits; and denied that it knew that the Bank of Gillette was unsafe for depositors; denied that it executed any outline agreement or arrangement to take charge of and operate and conduct the Bank of Gillette.

The directors of the Bank of Gillette filed answers and cross-complaints, but the real contentions of all of the parties seeking to recover against the American Southern Trust Company are that the contract authorized the American bank and St. Louis bank to take charge of and conduct the affairs of the Bank of Gillette, and that they were, in fact, operating it as a branch bank, and also that Hicks and Coffman told the directors of the Bank of Gillette that they would see them through, and that, under the contract entered into and these statements of Hicks and Coffman, the American Bank became liable to all depositors and all other creditors as if the Bank of Gillette had been operated by it as a branch bank, and that Walz assumed complete control of the Bank of Gillette and its affairs, to the exclusion of the board of directors of said bank, and that, if they were not liable because of these things, they still would be liable, it is contended, because they caused the Bank of Gillette to be kept open to receive deposits, and that this was unlawful, and deceived the public, and caused them to extend credit to the Bank of Gillette when they would not otherwise have done so. Testimony was taken by the plaintiffs and interveners for the purpose of showing that Walz was the representative of the American and St. Louis banks, and that, under their direction, and representing them, he exercised complete control of the Bank of Gillette and its affairs.

Some witnesses testified that they supposed Mr. Walz was managing the Bank of Gillette, and others testified about his conduct there, and about his declarations and action. Mr. Sanders testified that, after he became director, he supposed that Mr. Walz was managing the bank, and he testified at some length about Mr. Walz's

conduct and statements. It is also alleged that, not only Mr. Walz, but Mr. Sam Poe, was sent down to represent the American and St. Louis banks. The defendants introduced testimony then to show that Walz was not sent for the purpose of taking charge of the bank, but because the Bank of Gillette owed the American and St. Louis banks large amounts of money; that he was sent there, as the contract provided, to look after the loans and collateral; that, before they made the contract, they told the directors that they were inclined not to lend any more money, and that they had a conference with Mr. Jones, Mr. Norden and Mr. Koen, and stated to them that they would be willing to lend the bank more money under the arrangement suggested. The agreement was afterwards reduced to writing in the form of the contract set forth in the plaintiffs' complaint; that when Mr. Norden stated that, "We are at your will", Mr. Hicks stated to him, "I don't want you to feel that way. It is nothing to us whether you borrow from us or some one else. If the arrangement is not satisfactory, we don't want you to enter into it."

Mr. Norden then said it would be satisfactory. They then discussed the terms, and the Bank of Gillette was to give them all collateral, and they were to advance an additional $75,000, or as much thereof as was needed. That Hicks was to prepare the contract, and the said Norden asked him if Walz was to have charge of the bank or to have anything to do with reference to the bank, except the loans, and Hicks says he told him plainly that Walz was to have nothing to do with the operation of the bank; that, "of course, Mr. Walz is down there, and if he has the time, and you gentlemen want him to do anything, that is entirely up to him, but he is not going down there with that intention."

It appears that, after Walz went down to Gillette, there was some dissatisfaction, and Mr. Norden, Mr. Jones and Mr. Sanders called on Mr. Hicks, and said that Walz was not satisfactory to the directors. Hicks told them that, if Walz was not satisfactory, they would

get somebody else who was. Hicks saw Walz, and told him about the complaint, and afterwards wrote the bank that Walz knew that he did not own the bank, but was only acting as our trustee, and we thought this action would be satisfactory to the directors. These directors afterwards wrote a letter in which they stated they were getting along just fine with Mr. Walz, and were pulling together for the interest of the bank's affairs, thanking Mr. Hicks for his attention in the matter, and stating that no doubt his talk helped them to get together; stated also in the letter that, if any time something needed attention, they would keep Hicks advised.

Mr. Norden testified that their verbal contract was not reduced to writing at all; that they received the written agreement later. Norden testified that they did not put in there they were going to see us through if it took them from one to five years. Norden said he did not agree to the contract until they said they were going to see us through. There can be no controversy, of course, about the written contract. It is introduced in evidence, and speaks for itself, and it is the only contract entered into between the parties, and the plaintiffs contend that, under that contract, the American Bank became liable to the creditors of the Bank of Gillette.

At the time the contract was entered into, the Bank of Gillette was largely indebted to the American and St. Louis banks. The condition of the country was such that the Bank of Gillette could not make collections. Many of its loans had been made to rice farmers, and it is said that they were holding rice for a better price, and, for that reason, the Bank of Gillette could not collect, and therefore wanted additional loans from the American and St. Louis banks. Doubtless all parties thought at that time that, if it could get additional loans from these banks, it would tide it over until it could make collections from the rice farmers, and then could pay all of its obligations.

We do not think that the fact that the conditions were such that the collections could not be made without great difficulty and without disastrous results to the borrowers,

tends to show that the parties were in bad faith. When money is loaned by a bank at any time to persons who depend on rice crops or any other crops to make payments, the lender necessarily takes some chances, because no one can tell in advance whether there will be a good crop or a poor crop, nor can any one tell whether the price will be high or low, and the ability of the producer to pay is influenced by both the amount of crop raised and the price the producer can get for it.

We think it appears from the record in this case that a reasonable, prudent business man would have been justified in believing that the debtors of the Bank of Gillette, if given a little time, could pay their obligations and, if so, the Bank of Gillette would have been in prosperous condition. This was evidently the belief of the American and St. Louis banks when they agreed to advance additional sums of money to the Bank of Gillette, and, if this is true, they had the right to have somebody present at the bank to look after the collateral, loans, and collections, and for protection. It is not unreasonable, since the Bank of Gillette was already indebted to them largely, that they would want to look after their interests, if they were going to advance them additional sums of money.

There can be no doubt, if the American bank and the St. Louis bank had authorized Walz to do what the witnesses swear that he did do in connection with the Bank of Gillette, they would have been liable. If the American and the St. Louis banks had authorized Walz to take charge of the Bank of Gillette, or if these banks had used the Bank of Gillette as an instrument through which to carry on their business, or had operated it as a branch bank, or had taken the management and control of the same, their liability would have been the same as if they had done the business in their own name; but, whether these banks became liable depends, not upon what Walz said or did, unless what he said and did was either authorized by them or the knowledge of these things brought home to them, but their liability depends upon

the contract entered into. The contract provides for the employment of Walz as a trustee for the two banks, to represent them as they had agreed, with the Bank of Gillette. The two banks certainly had the right to enter into a contract with the Bank of Gillette that, if the Bank of Gillette would employ Walz so that he might look after the loans and the collateral, they would be willing to lend $75,000 additional to the Bank of Gillette.

The assets of the Bank of Gillett at the time were in excess of its liabilities, but the condition of the country was such that it could not collect immediately, and needed more money, because it could not at that time collect from the rice growers, or, rather, it was thought inadvisable to try to collect at that time, and, since the Bank of Gillett was already largely indebted to these two banks, it would have authority to agree to carry its cash balances with these two banks. Certainly there could not have been anything wrong, if they were going to lend the money that it needed, to require it to keep its cash balances with them, rather than with some other bank. They could also lawfully require Walz to obtain all the collateral to hold in trust to secure them, and give him absolute authority in accepting loans and collateral. The notes taken from the Bank of Gillette for the money advanced were to be made payable on demand, and the collateral to be held in trust for the banks advancing the money.

We do not think that any of these things, or all together, could be construed as authority to take over the Bank of Gillette, or to take control or management of the same. This contract could not be construed to mean that the two banks were operating it as a branch bank or as an instrument through which to carry on their business, and that is the important question, so far as the liability of the banks is concerned. If they managed it, operated it, and controlled it, we have already said they would be liable, or if the contract could be construed as authorizing Walz to assume control; his authority and duties are those prescribed by the contract. It is earnestly insisted that there was an oral contract or agreement. In

answer to that, however, it is sufficient to say that, whatever discussion or statements there may have been prior to the consummation of the written contract, the agreement of the parties was finally reduced to writing, and the oral statements made prior to that time were merged in that contract, and the written contract became binding on all parties.

This court has said: "Antecedent propositions, correspondence, and prior writings, as well as oral statements and representations, are deemed to be merged into the written contract which concerns the subject-matter of such antecedent negotiations, when it is free from ambiguity, and complete." *D. K. & S. Rd. Co.* v. *M. & N. A. Rd. Co.,* 104 Ark. 475, 149 S. W. 60.

Again it is said: "Prior oral agreements and antecedent writings forming a part of the negotiations for a contract become merged in the subsequent written contract, and are incompetent as evidence for the purpose of enlarging the scope of such written contract." *Harrower* v. *Insurance Co. of North America,* 144 Ark. 279, 222 S. W. 39.

There can be no doubt in this case that the oral agreement, if there was any, was merged in the written contract, and it is universally held that a written contract, free from doubt and ambiguity, cannot be altered or contradicted by parol evidence except for fraud or mistake. It therefore follows that, unless the appellant is liable under the written contract, it would not be liable.

"It is true, of course, that the parties to a written contract may, subsequent to its execution, modify and substitute an oral agreement therefor." *Cook* v. *Cave,* 163 Ark. 407, 260 S. W. 49.

But the parties in this case did not claim that, after the execution of the written contract, it was in any way modified, or that an oral contract was substituted for it. They claim to have called on Mr. Hicks because of the alleged misconduct of Mr. Walz. They evidently thought that Walz was exercising authority that he did not possess under the terms of the agreement. After their inter-

view with Mr. Hicks, they wrote a letter stating, in substance, that Mr. Walz's conduct was satisfactory.

It thus appears that the directors of the bank did not themselves think that Mr. Walz had authority to do what he was doing. In fact, they knew what his authority was, because they had a copy of the contract themselves, which expressly stated the authority of the agent. There was a great deal of testimony introduced with reference to the acts and declarations of Mr. Walz, and it is earnestly argued that these show that the Little Rock and St. Louis banks had taken charge of the affairs of the Bank of Gillette. There is, however, no principle of law better established than the principle that you can neither prove agency nor the extent of an agent's authority by his declarations or actions. The principle is well stated in Mechem on Agency, vol. 1, § 285. The rule is stated there as follows:

"The authority of an agent, and its nature and extent, where these questions are directly involved, can only be established by tracing it to its source in some word or act of the alleged principal. The agent certainly cannot confer authority upon himself or make himself agent merely by saying that he is one. Evidence of his own statements, declarations or admissions, made out of court, therefore (as distinguished from his testimony as a witness), is not admissible against his principal for the purpose of establishing, enlarging or renewing his authority; nor can his authority be established by showing that he acted as agent or that he claimed to have the powers which he assumed to exercise. His written statements and admissions are as objectionable as his oral ones, and his letters, telegrams, advertisements and other writings cannot be used as evidence of his agency. The fact that the agent has since died does not change the rule. Where his authority is in writing, he cannot extend its scope by his own declarations. His acts and statements cannot be made use of against the principal until the fact of the agency has been shown by other evidence."

This court has many times held that the acts or declarations of one does not prove that he is an agent, and that the agent cannot bind his principal beyond the limits of his authority. It therefore follows necessarily that the acts and declarations of Walz, that were beyond his authority as contained in the written contract, are not binding on the bank. This brings to us a consideration of the contract itself, and to the question as whether, under the contract, the banks took such charge and control of the Bank of Gillette as would make them liable to the creditors of the bank in this suit.

We think that the contract is close to the border line, but, after a careful consideration of the contract itself, together with all the testimony in the case, and the very able arguments of learned counsel on both sides, we have reached the conclusion that, under the contract, the American Southern Trust Company is not liable to the creditors of the Bank of Gillette. We think that, under the contract, they did not take such control and management of the Bank of Gillette as would make them liable.

Of course, it is true that a principal is liable for the acts of his agent, although they might not be authorized, if they were within the apparent scope of his authority.

Apparent authority is that which, though not actually granted, the principal knowingly permits the agent to exercise, or holds him out as possessing.

In the view we have taken of this case, Walz had no apparent authority beyond the authority given to him in the written contract, because there is no evidence of the banks' holding him out as having any other additional authority. Such authority cannot be proved by his acts or declarations, unless the principal authorized his acts or declarations, or knew of them.

"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 authority which he has; such authority as a reasonably prudent person, using diligence and discretion in view of the

principal's conduct, would naturally suppose the agent to possess." *Ozark Mutual Life Association* v. *Dillard,* 169 Ark. 136, 273 S. W. 378.

It will be observed that the court has held in the above cited case that the principal is bound only when he knowingly permits the agent to act for him, or when he holds the agent out as possessing power to act; that is, his acts are within the apparent scope of the authority of the agent if the principal knowingly permits his agent to do certain things or assume certain authority, or such authority as he appears to have by reason of the authority which he actually has.

There is no testimony in this case tending to show that the principal held out Walz as having authority to do anything except what was authorized under the written contract, and it is a well-established principle of law that one dealing with an agent, without inquiring of the principal of his authority, does so at his peril. It is not sufficient that he knows of the acts and declarations of the agent, or that he makes inquiry of the agent; he must make inquiry of the principal, or he must know of the acts or declarations of the principal in order to determine the authority of the agent. Counsel discuss not only the principle of apparent authority, but also the question of estoppel. There could be no estoppel, of course, unless the principal knew of the acts or declarations of the agent and the things that the agent did, and, as we have already said, the principal is not bound by either the acts or declarations of its agent unless within the apparent scope of his authority. If they had authorized Walz to take charge of the affairs of the bank, to run the bank for them, or to displace the board of directors or officers of the bank, the appellant bank would have been liable in the same way that it would if it had taken charge of the bank and operated it in its own name, but, under the authority in the contract, Walz had no right to do the things it is alleged that he did, and the officers and board of directors had no right to permit him to do these things. If the bank is not liable, it follows, of course, that George

F. Walz is not liable under the contract, and, as he was not a director or an officer of the bank, we think he is not liable under the proof in this case.

There are several cross-appeals; the cross-appeal of the Atlas Oil Company and of the Mente & Company, Inc. The claim of the Atlas Oil Company was disallowed by the chancellor, and it is argued that there is no evidence to sustain the chancellor's findings. The chancellor had before him all of the evidence in the case, a portion of which showed the business in which the oil company was engaged, also the evidence of dealing in oil by Sam T. Poe, and this is true also of the claim of Mente & Company, Inc., and we think there was sufficient evidence before the chancellor to justify his findings, and that he was correct in his findings, unless the claimants had introduced proof to show that their claims were for money deposited.

As to the findings of the court below on the claim of the First National Bank of DeWitt and L. A. Black, we cannot say that the finding was against the preponderance of testimony. It follows from what we have already said that the decree against the American Southern Trust Company and Geo. F. Walz must be reversed and dismissed, and the decree in all other respects should be affirmed. It would be useless to set out or discuss all the testimony in the case. After a careful examination of the entire record, we have reached the conclusion above set forth, and the decree of the chancery court against the American Southern Trust Company and George F. Walz is reversed and dismissed, and the decree in all other things is affirmed.

KIRBY, J., disqualified.

MEHAFFY, J., (on rehearing). It is insisted by the appellee, in its argument on petition for rehearing, that the court in its opinion wholly overlooks two major contentions of appellee. First, that appellant was cooperating with the officers of the Bank of Gillette in keeping it open and holding it out to the public as a solvent institution, when it was

insolvent, and known to be so by the officers and directors and appellant; that this constituted fraud on the depositors who put their money in the institution, and was a wrongful act, rendering all persons and corporations participating in it jointly and severally liable to the persons damaged thereby. The second is that the court ignored the contention of appellee that loans were made to Crandall, to Wm. Molls, to Simmons and Brock and others in excess of 30 per cent. of the capital stock, and that, as a result of such loans, more than $50,000 of this excess was lost; that such loans were made in violation of the banking laws of the State.

The appellee, in his argument on the petition for rehearing, takes up, first, the proposition that Walz was a general agent of appellant, and that appellant is liable to third persons dealing with the Bank of Gillette through Walz, and argues that the court, in its opinion, laid down a rule which applies only to cases of special agent and is never applied to the acts of a general agent.

"While the courts have very often defined and distinguished general and special agents, the great trouble is that they are totally unable to define general and special agents in terms which make the distinction applicable to each particular case. Their powers, when properly analyzed, however, are governed by the same general principle, to-wit, they can do anything within the scope of their agency so as to bind the principal, notwithstanding there may be some secret instructions limiting their powers; and, whether the authority be general or limited, they cannot charge their principals if they exceed it. They are of course more likely to transcend the bounds of a narrow than of an extended power; but the principle in either case is the same." 31 Cyc. 1338.

"A general agent, unless he acts under a special and limited authority, impliedly has power to do whatever is usual and proper to effect such a purpose as is the subject of his employment. Hence, in the absence of known limitations, third persons dealing with such a general agent have a right to presume that the scope and char-

acter of the business he is employed to transact is the extent of his authority. This rule, as already stated, does not apply when limitations upon the authority of the agent have been brought home to the knowledge of the third person dealing with him, nor when the third person fails to make such inquiry as conditions demand, especially if the facts and circumstances are such as to suggest inquiry. Furthermore, the implied power of any agent, however general, must be limited to such acts as are proper for an agent to do, and cannot extend to acts clearly adverse to the interests of the principals, or for the benefit of the agent personally. And an agent has no implied authority to do acts not usually done by agents in that sort of transaction, nor to do them in other than the customary manner. The most general authority is limited to the business or purpose for which the agency was created.

"The authority of a special agent must be strictly pursued, and those dealing with him must, at their peril, determine the extent of his authority; for, as in the case of acts and transactions of a general agent, a special agent cannot bind his principal by acts outside the scope of his authority. A special authority, like a general authority, confers by implication all powers necessary for or incident to its proper execution, and secret instructions or restrictions do not limit the special agent's authority, so far as innocent third persons are concerned; and if a principal has permitted a special agent so to act as reasonably to induce others to credit him with broader powers than he actually possesses, he will be estopped to deny the existence of as broad an authority as he permitted the special agent to exercise." 31 Cyc. 1340.

The above is a general statement of the law with reference to general and special agents, and, we think, a correct statement, and we do not think there is any conflict with the general rule and the rule announced by this court in its original opinion.

Walz was authorized, under the written contract, to deal with loans and collaterals. In other words, he was to have absolute authority in the granting of loans and accepting collateral. No loans were to be made by the Bank of Gillette without first obtaining the approval of Walz. And we hold that he would bind his principals in doing anything within the apparent scope of his authority as to loans and collateral. This would be true whether he was a general or a special agent. He would, however, have no implied authority to take charge of and run the Bank of Gillette, and for depositors, creditors or any other persons to act on the assumption that Walz had authority would not be justified, but would be assuming that he was acting in violation of law. The statute provides that the affairs of and business of the bank shall be managed and controlled by a board of directors of not less than three, who shall be selected from the stockholders at such time and in such manner as may be provided in its by-laws. Crawford & Moses' Digest, § 683.

The board of directors of the Bank of Gillette, in the management and control of its affairs, made the contract, doubtless believing, at the time they made it, that it was the best arrangement they could make at the time in the management of the affairs of the bank. And, assuming that Walz was a general agent, he was a general agent with reference to loans and collaterals only, and he had no implied authority to take charge of the affairs and manage and control the affairs of the bank when the law expressly provides that the directors must do this. He had authority to do anything with reference to loans and collaterals, and his principal was bound by his acts, but, as to the other acts complained of, unless he was held out by his principal as having authority to do them, or was authorized, or his acts were ratified, the principal would not be bound.

We have not overlooked the distinction between the powers and authority of a general and special agent, and we have not overlooked the rule stated in R. C. L., which

is as follows: "There is a marked distinction between the power and authority of a general and a special agent to bind his principal. A general agent is usually authorized to do all acts connected with the business or employment in which he is engaged, while a special agent is only authorized to do specific acts in pursuance of particular instructions, or with restrictions necessarily implied from the act to be done. Where it appears that an agent has done an act for the benefit of his principal and that the latter has not questioned the authority of the agent to bind him, it will be presumed, until the contrary appears, that the agent was duly authorized. Although the agent exceeds his authority, the principal will be bound to the extent that he has acted within the powers conferred on him. In other words, the authorized acts of the agent are valid, and only those in excess of his authority are invalid. A person dealing with an agent must not act negligently, but must use reasonable diligence to ascertain whether the agent acts within the scope of his powers. He is not authorized, under any circumstances, blindly to trust the agent's statements as to the extent of his powers. * * * Very obviously, the principal is liable for all such acts and statements of his agent as he may have expressly authorized; and this includes, by implication, whether the agency be general or special, all such powers as are necessary and proper as a means of effectuating the purposes for which the agency was created. Being clothed with power to do a particular act, the agent will be deemed to have also whatever authority attaches to the doing of the act or is necessary to its performance." 21 R. C. L. 853-4.

One of the cases decided by this court, to which attention is called by the appellee, is *Liddell* v. *Sahline*, 55 Ark. 687, 17 S. W. 705. The court in that case said:

"A person dealing with a general agent can hold the principal, if the acts of the agent are within the general scope of the business intrusted to him."

All the other cases decided are practically to the same effect. We do not think there is anything in the

above case that contradicts the rule announced by the court in the original opinion. Walz was appointed with reference to loans and collateral, and everybody dealing with him had a right to assume that any thing or act within the general scope of his authority with reference to those matters was authorized by his principal. We have not overlooked the testimony of Jones, Norden and Koen, nor can there be any question or doubt that the contract entered into gave Walz authority as to loans and collateral.

Appellees contend that the letter of April 15, 1922, shows that Walz had authority to employ attorneys for the Bank of Gillette and to make contracts for it. That it was stated that there would possibly be cases where he and the directors would not agree, but that in such cases the voice of the directors was not to prevail, but the matter was to be referred to Walz's principals, and his principals would make their decision as to which way the matter should be handled.

They then argued that the learned chancellor deemed that sufficient to support a finding that appellant did authorize Walz to do the things which the witnesses swear that he did do. And they add that, unless it can be said that the chancellor's finding is against the reasonable construction to be placed upon this evidence, his finding should not be reversed by this court. The letter referred to not only does not justify the conclusion that Walz had authority to employ attorneys for the bank, but the letter expressly states that the writer called to the attention of Mr. Coffman and Mr. Walz the complaint registered. And the writer of the letter adds: "We considered the entire proposition at length. So we have agreed that you can do just as you like about the employment of an attorney, which will be perfectly satisfactory with Mr. Walz. If you decide to employ the attorney at DeWitt in addition to the attorney at Stuttgart, there is no objection to that."

We think also that the testimony of Mr. Hicks as to the agency contradicts the construction placed upon the

letter by appellees. Mr. Hicks testified: "Mr. Norden himself raised that question in our conference as to whether or not Mr. Walz was to have supervision of the bank, and I told him positively no, that we did not want Mr. Walz to have anything to do with the operation of the bank. All that we wanted him to do was to represent us as our trustee in the handling of the collateral and loans," etc.

The above is the testimony of Mr. Hicks with reference as to what was said in the conference, and this testimony is not denied by any of the parties in the conference.

Mr. Hicks also said in his testimony: "I told Mr. Walz very plainly at that time that all we wanted him to do was to act as our trustee in the handling of the collateral; that we wanted him to obtain all the collateral on the notes that the Bank of Gillette had, keep them under his supervision; to assist them in collecting those notes, to assist them in getting better collateral on the notes that they had, and supervise in an advisory capacity the granting of new loans, and he was not to make any new loans without the approval of the directors, and he was to have nothing to do whatever with the inside operation of the bank."

Mr. Sanders himself testified that he did not say that the bank was wrongfully handled, and that Mr. Hicks said that the American Bank desired to assist them in their financial troubles, and that if Walz could not get along he would give us a man that could.

We have already held, in the original opinion, that the authority of Walz was limited by the written contract. Appellees, in their brief for rehearing, say that, unless the finding of the chancellor is against the reasonable construction to be placed upon the evidence, his finding shall not be reversed by this court. That is true, but that means his finding of facts, and we have held that the statements and acts of Walz are not competent to prove the extent of his authority. It is also insisted that the appellant knew that Walz was running the Bank

of Gillette. We think the testimony of Mr. Hicks, above quoted, to the effect that he made the statement at the conference, is sufficient to show that the appellant did not know that Walz was running the bank, but instructed him that he was not to and could not run the bank. Mr. Hicks also told them that, if Walz's conduct was not satisfactory, they would get them another man and send down there.

The statement in the letter above referred to, that Mr. Walz was willing to submit to the board of directors any contract that he has made, etc., evidently meant contracts that he had authority to make. And the decicision referred to that would be made by the creditor banks necessarily meant decisions with reference to the loans and collaterals. Really what the directors objected to in Walz was his manner and the way he talked to people.

It is next insisted that the appellant aided the Bank of Gillette to keep open and receive deposits while said bank was insolvent and known to the appellant to be insolvent. If there were no evidence in the case as to the condition of the country at the time the contract was made, such condition was matter of common knowledge. Many institutions and persons would have failed if they could not have got help, and apparently it was thought that, by lending the Bank of Gillette $75,000 additional money, that additional money would enable the bank, not only to pay its debts, but to assist the farmers to make another crop, and at that time it appears that everybody was of the same opinion.

Mr. Maxwell was Bank Commissioner, and had supervision over all the banks of the State. The Bank of Gillette filed its statements as required by law, and the department made special investigation of the affairs of the bank. He discussed the matter with Mr. Hicks, and learned that Mr. Hicks or the American Southern Trust Company was willing to extend further credit in conjunction with the First National Bank. Mr. Maxwell further says that, in 1920 and 1921, not only banks but

financial institutions in general were needing all the assistance they could get to preserve their existence; that the condition was brought about by the deflation of values in commodities; and that we had no forewarning of it; that, as a result of this condition, many banks in the State were suddenly placed in a condition where they were over-extended; that he had a conference with representativess of the Little Rock banks for the purpose of obtaining cooperation of the larger institutions in Little Rock in assisting the country banks throughout the State. He said the reports filed by the Bank of Gillette during his administration did not indicate insolvency, and, if he had thought it was insolvent, he would have required it to restore any impairment of its capital by levying an assessment on its stockholders, if necessary. He further said if there had been any indication of insolvency he would have closed the bank. It therefore appears that the Bank Commissioner, whose duty it was, under the law, to know, did not believe it was insolvent, and the appellant did not believe it was insolvent. The Bank Commissioner was told about the contract. It has been suggested by some of the appellees that the contract was kept secret. It was made known to the banking department; it was spread on the records of the Bank of Gillette, and every time the Bank of Gillette was examined by the banking department it was known, and we do not think there was any effort to keep it secret.

Petitioners call our attention to a statement in the opinion with reference to lending money on crops, and states that the court evidently overlooks the proof that new money had to be loaned to persons already indebted to the bank before they could start making rice crops. As we have already said, the situation was bad. It was necessary to furnish the rice farmers with money to make crops, or they could not make them, and doubtless everybody thought at the time that that was not only the best, but the only, way by which they could collect what the rice growers already owed.

In addition to this, the proof was that the American Bank loaned on real estate approximately $50,000, and thereby enabled the Bank of Gillette to pay $50,000 of its indebtedness with money received loaned on real estate which was not, prior to that time, pledged to the Bank of Gillette. That the Bank of Gillette was hard pressed and needed to borrow more money was, of course, known to all the parties. But, if a bank in that condition could not borrow money because the lender would become liable for all its debts if he advanced money, then, if a bank should happen to get where it did not have money to meet its obligations, it would have to fail, no matter how much property it had. If lending money by one bank to another when the borrowing bank needed it would make the lender liable for all the debts, and liable, as appellees argue, for fraud in keeping the bank open, then no bank could afford to lend another money.

It is next contended that the appellant is liable for loans made by its agent, Walz, in excess of the statutory limit, and lost. The liability referred to by appellees is a statutory liability, but there certainly could be no liability on the part of the bank because of the loans made to Crandall, Moll and others. These parties were already indebted to the Bank of Gillette before Walz went there. And Mr. Norden says in his testimony that the bank had a large number of loans outstanding when Walz came. Crandall's debt was reduced while Walz was there. Walz held the borrowers down, and that made some of them sore. But the lending money to these parties mentioned by appellees was evidently for the purpose of collecting the debt these parties already owed.

After a careful reexamination of the entire record we have reached the conclusion that the original opinion was correct, and the petition for rehearing is therefore denied.

NATURAL GAS & FUEL CORPORATION v. NORPHLET GAS & WATER COMPANY.

Opinion delivered February 21, 1927.

1. GAS—FRANCHISE TO FURNISH GAS.—A franchise granted by a town council to a corporation to furnish gas for heat, light and power, when accepted, becomes a binding contract to be governed by the same rules and principles that control other contracts.
2. MUNICIPAL CORPORATIONS—VALIDITY OF ORDINANCE GRANTING FRANCHISE.—Where the ayes and noes were not called and recorded, as required by Crawford & Moses' Dig., § 7528, in passing an ordinance granting an exclusive franchise to furnish gas to the inhabitants of a town, the ordinance was invalid.
3. MUNICIPAL CORPORATIONS—ESTOPPEL TO DENY VALIDITY OF ORDINANCE.—By permitting a gas company to expend large sums of money in laying gas mains in streets, and in other respects to act upon the assumption that an ordinance granting it an exclusive franchise to furnish gas to the inhabitants of a town was valid, the town is estopped to deny the validity of the ordinance, though it was not passed as required by Crawford & Moses' Dig., § 7528.
4. MUNICIPAL CORPORATIONS—EFFECT OF ESTOPPEL.—Though a municipal corporation was estopped to deny the validity of an ordinance granting to a gas company an exclusive franchise to furnish gas to its inhabitants, a rival gas company which had acquired vested rights to supply a portion of the inhabitants of the town was not concluded by the estoppel of the town.
5. GAS—RIGHT TO CONTEST EXCLUSIVE FRANCHISE.—Where a gas company established its mains and secured contracts to supply the inhabitants of an unincorporated village, it acquired rights entitling it, upon the subsequent incorporation of the village, to contest the validity of a town ordinance granting an exclusive franchise to supply gas to a rival gas company.

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

STATEMENT OF FACTS.

Norphlet Gas & Water Company and the town of Norphlet brought this suit in equity against the Natural Gas & Fuel Corporation to enjoin it from furnishing natural gas to the inhabitants of the town of Norphlet and to require it to remove its pipe lines and gas mains from the streets and alleys of the town of Norphlet. The

suit was defended on the ground that Natural Gas & Fuel Corporation had a contract with the inhabitants of the town of Norphlet to lay its gas mains in the streets of the town and to furnish gas to its inhabitants, and that the purported franchise of the Norphlet Gas & Water Company was invalid.

On the part of the plaintiffs, it was shown that, on June 1, 1925, the town of Norphlet granted to the Norphlet Gas & Water Company an exclusive franchise for the term of twenty-five years to lay its gas mains in the streets and alleys of said town and to furnish the inhabitants thereof with natural gas for heat, light and power.

On the part of the defendant it was shown that a charter was granted to it by the State of Arkansas on the 11th day of April, 1922. By the terms of its charter it was given power to establish, construct and operate pipe lines and other appurtenances for distributing and marketing gas and other mineral products. It was also given the power to distribute and deliver such gas through its own pipe lines and other appurtenances suitable for that purpose, and to purchase, lease or contract for all such machinery or property as might be incident and necessary to any of the objects granted. Pursuant to the provisions of its charter, it obtained an easement or right-of-way to lay its gas mains from the gas fields to the village of Norphlet before it was incorporated as a town. It obtained an easement from the owners of the real property in the village to lay its mains along the public highways and streets of the village. In the beginning, it had about one hundred customers. When gas and oil were discovered in that territory, the village of Norphlet greatly increased in population, and the defendant extended its gas mains to furnish natural gas to the inhabitants thereof. At the time the town was incorporated it had 2,500 inhabitants, and the defendant had from 275 to 300 domestic consumers of natural gas. It had about 25 industrial consumers, and also furnished gas to blacksmiths and machinery shops in said town. At this time it had expended about $20,000 in laying its

gas mains and in preparing to furnish the inhabitants of the town of Norphlet with natural gas. After the town of Norphlet granted to the Norphlet Gas & Water Company its franchise, that company expended something over $50,000 laying its gas mains and in preparing to serve the inhabitants of the town of Norphlet with natural gas.

The chancellor found the issues in favor of the plaintiffs, and the defendant was enjoined from furnishing natural gas for any purpose to people living within the corporate limits of the town of Norphlet; and it was ordered to remove its pipe lines and equipment for furnishing natural gas from the streets and alleys of said town. The case is here on appeal.

Pace & Davis, Jeff Davis and *R. E. Wiley,* for appellant.

G. E. Garner, for appellee.

HART, C. J., (after stating the facts). A franchise granted by a city council to a public service corporation to furnish gas for heat, light and power, when accepted, becomes a binding contract, to be governed by the same rules and principles that control other contracts. *Mena* v. *Tomlinson Bros.,* 118 Ark. 116, 175 S. W. 1187; *Arkansas Light & Power Co.* v. *Cooley,* 138 Ark. 390, 211 S. W. 664; *Pocahontas* v. *Central Power & Light Co.,* 152 Ark. 276, 244 S. W. 712; and *El Dorado* v. *Citizens' Light & Power Co.,* 158 Ark. 550, 250 S. W. 882.

The record in the case at bar, however, fails to show that the ayes and nays were called and recorded as required by § 7528 of Crawford & Moses' Digest upon the passage of the ordinance granting an exclusive franchise to the Norphlet Gas & Water Company to furnish natural gas to the inhabitants of the town of Norphlet for the period of twenty-five years. The section of the digest just referred to has been held mandatory, and a failure to comply with it makes the ordinance void. *Cutler* v. *Russellville,* 40 Ark. 105, and *Arkansas Light & Power Co.* v. *Cooley,* 138 Ark. 390, 211 S. W. 664.

But it is insisted by counsel for the plaintiffs that the town of Norphlet is estopped from questioning the validity of the ordinance because it has stood by and allowed the Norphlet Gas & Water Company to expend great sums of money in laying its gas mains in the streets and alleys of the town and in purchasing equipment for the purpose of carrying out its contract. The record shows that it has expended over $50,000 in making preparations for carrying out its contract, and that it is fully equipped to do so. In this connection it may be said there is a marked distinction between the doctrine of estoppel as applied to *ultra vires* and *intra vires* contracts of municipal corporations, which are recognized both by the text-writers and the adjudicated cases on the subject.

On this question Judge McQuillin says:

"A municipality cannot be estopped to question the use of its streets without a franchise, or the validity of a franchise where it has no power to grant such a franchise. * * * On the other hand, if a municipality has the power to grant a franchise and a public service company uses the streets with the knowledge of the municipality, the latter may be estopped to question the right to use the streets without a franchise, or the validity of the franchise granted, where it does not violate statutory or charter requirements. For instance, a municipality which has acquiesced for years in the use of its streets by a public service company, which has spent thousands of dollars in connection with such use, and which has received the benefits of such use of the streets and has regulated the use and levied licenses and granted permission as to certain uses, cannot contest the right of the company to use the streets. Likewise, acquiescence by a municipality in the use of streets by a railroad company, pursuant to a grant of such right by the Legislature, precludes the municipality from objecting thereto." 4 McQuillin, Mun. Corp., § 1687.

Judge Dillon says:

"And if the municipality has the power to grant such right or franchise, and a corporation, believing and assuming that it has the consent or grant of the municipality, has, with the knowledge of the proper municipal authorities, proceeded to exercise the right of franchise, and has constructed, maintained and operated its works and appliances in the city streets, the municipality will, in a proper case, be estopped by the acts and conduct of its officers and representatives, in knowingly permitting and acquiescing in the use and occupation of the streets, from asserting the invalidity of the grant of the franchise, so far, at least, as concerns its own failure to pass an ordinance or take steps necessary to effectuate the grant." 3 Dillon, Mun. Corp., 5th ed., 1242.

In *City Railway Co.* v. *Citizens' Street Railroad Co.*, 166 U. S. 557, 17 S. Ct. Rep. 653, in discussing the subject, the court said: "All that is necessary to create an estoppel *in pais* is to show that, upon the faith of a certain action on the part of the city, which it had power to take, the company incurred a new liability; as, for example, by the negotiation of a new loan, and the issue of a new bond and mortgage to secure the same."

In *City of Louisville* v. *Cumberland Tel. & Tel. Co.*, 224 U. S. 649, 32 S. Ct. Rep. 572, it was held (quoting from the syllabus):

"Permitting the transferee of a franchise to act thereunder and expend large sums of money and exacting from it a bond to comply with the conditions of the franchise will operate to estop a municipality from denying that the franchise was transferable and the transferee had succeeded to all the rights of the transferring corporation."

In *Moore* v. *New York*, 73 N. Y. 238, 29 Am. Rep. 134, the rule was tersely stated as follows:

"The unauthorized acts of city authorities—that is, those *ultra vires*, in the sense that they are not within the general powers conferred, are not binding on

the corporation, and corporations are not estopped by acts of corporate agents strictly *ultra vires.* A city may set up as a defense its own want of power under its charter to contract, but, in favor of *bona fide* holders of its negotiable securities, and, by parity of reasoning, those innocently dealing with it, and in good faith parting with property and expending money for its benefit, it may be estopped to avail itself of irregularities in the exercise of the power conferred."

These and many other authorities to the same effect may be found in a case-note to 7 A. L. R. 1248 *et seq.*

This distinction has been recognized and applied by this court. In *Newport* v. *Railway Company,* 58 Ark. 270, 24 S. W. 427, the town of Newport was sued to recover an amount alleged to be due on a contract to construct a levee. The court held that, inasmuch as the contract sued on was not within the scope of the corporate powers of the town, it could not be ratified, and the town was not estopped by having accepted and received the benefit of the work done under it. On the other hand, in *Town of Searcy* v. *Yarnell,* 47 Ark. 269, 1 S. W. 319, it was held that a municipal corporation has the power to dispose of property held for general convenience, pleasure, or profit. It was further held that a contract of sale by a municipal corporation which is fair and lawful, and fully performed by both parties, cannot afterwards be avoided by the corporation on the ground of *ultra vires.* The principle was again applied in the case of *Town of Augusta* v. *Smith,* 117 Ark. 93, 174 S. W. 543.

Again, it is insisted by counsel for the defendant that, even if the town of Norphlet should be held to be estopped from questioning the validity of the ordinance to the Norphlet Gas & Water Company, this estoppel would not apply to the Natural Gas & Fuel Corporation. As will appear from our statement of facts, this corporation received a charter from the State of Arkansas authorizing it to construct and operate pipe lines and gas mains for the purpose of furnishing natural gas to consumers. Pursuant to the authority thus granted,

the company extended its gas mains and pipe lines to the village of Norphlet, under grants of some kind from the property owners allowing it to do so. It also acquired the right to lay its pipes and gas mains in the village of Norphlet and made arrangements to furnish about one hundred people who lived there with natural gas. When oil and gas were discovered, the population of the village began to increase rapidly, and the defendant extended its gas mains in proportion so that it might furnish gas to the inhabitants. At the time the town of Norphlet was incorporated the defendant had its pipe lines and gas mains all over the town, as they now exist, and was furnishing gas to between 275 and 300 domestic consumers and to about twenty-five industrial consumers. The record shows that there was no particular length of time to these contracts. They simply seemed to be during the will of the contracting parties. It is insisted that, under these circumstances, the right of the defendant was merely a license, and constituted no property right in it whatever.

In *New Orleans Gas Co.* v. *Louisiana Light Co.,* 115 U. S. 650, it was held that municipal corporations constitute a part of the civil governments of the State and their streets and highways, which is the province of government to render safe. In carrying out this duty the distribution of gas by means of pipe lines in the streets or highways of a city is a franchise to be granted for the accomplishment of a public purpose.

Again, in *City of Louisville* v. *Cumberland Tel. & Tel. Co.,* 224 U. S. 649, it was held that the right to use the streets in a city for the purpose of a public utility "has been called by various names—an incorporeal hereditament, an interest in land, an easement, a right-of-way—but, howsoever designated, it is property."

This principle has been recognized and applied by this court in *Clear Creek Oil & Gas Co.* v. *Fort Smith Spelter Co.,* 148 Ark. 260. In that case it was held that a corporation, organized under our statute for the purpose of developing and marketing natural gas, had a

right to maintain its lines of pipes for that purpose along the public highways and the streets of cities or towns, with the consent of the authorities thereof, and that such corporation might become a public utility corporation if it wished to do so, but that, in any event, by complying with the statute as to its organization, it would acquire the right to extend its pipe lines and furnish gas to private consumers.

The defendant extended its pipe lines to the village of Norphlet and obtained the right-of-way to lay its pipe lines along the streets of the public highways of the village. It then made contracts with the inhabitants of the village to furnish them with gas. These acts gave it a property right, which it had a right to protect from invasion in the courts. The defendant had the right to supply gas to the inhabitants of the village through pipes and mains laid in the streets and public highways as then constructed, upon performing the condition of its contract for service with the inhabitants of said village. This gave it a property right, and not a mere license. In this view of the matter, no estoppel on the part of the town of Norphlet could affect its right. It did not in any manner acquiesce in the Norphlet Gas & Water Company's constructing its lines in the town of Norphlet, and it did nothing whatever to estop itself from contesting the validity of the ordinance attempted to be granted to the water company. If the right it possessed at that time to furnish gas to the inhabitants of the town was a property right, it could not be taken away by estoppel on the part of the town. The town could not have taken away its rights, even by passing an ordinance prohibiting it from furnishing gas to the inhabitants of the town. The town could only have taken away its right by granting an exclusive right to another company to furnish gas to the inhabitants of the town. As we have already seen, this was not done, and no estoppel on the part of the city should operate to take away any vested property right of the defendant. The same equitable principles which would estop the city from question-

ing the invalidity of the ordinance granted to the Norphlet Gas & Water Company would also estop it from questioning the validity of the contract rights of the defendant. The rights of the defendant could not be taken away by a species of estoppel on the part of the city in a matter in which the city could not legally act for it.

Justices WOOD, SMITH and KIRBY agree with the view herein expressed as to the estoppel on the part of the town of Norphlet, but they dissent from the view which holds that the town of Norphlet cannot act as the representative of the defendant and thereby estop it. They believe that the city acts as agent and trustee for its inhabitants in the premises; and that the estoppel on its part also operated to estop its inhabitants and the defendant. In other words, they are of the opinion that, the town being estopped to deny the validity of the franchise, the estoppel is as effective against the city and all others as though the franchise were valid and legally granted. On the other hand, Justices HUMPHREYS, MEHAFFY and McHANEY think the doctrine of estoppel has no application in the case. They believe that the doctrine of estoppel allows the city to do indirectly what it is forbidden to do directly, and in practical effect to evade a plain mandatory provision of the statute.

The result of their divergent views is that the view expressed by myself must control in the disposition of the case. According to my views, the municipality is estopped on its own account, and could not grant an exclusive franchise to any other company to furnish gas to the inhabitants of the town of Norphlet during the life of the franchise, nor could it escape any of the liabilities imposed upon it in the way of making payments for city gas if such is provided in the contract. It does not seem to me, however, that an estoppel on the part of the city could operate to deprive the defendant of any of its property rights. The city could represent it only in a governmental capacity, but could not deprive it of any of its property rights under any species of estoppel as in the present case. The only way, it seems to me,

that the town of Norphlet could take away the right of the defendant to furnish the inhabitants of the town of Norphlet with natural gas would be to pass a valid franchise to some other company giving it the exclusive right to furnish the inhabitants with natural gas. This would take away the right of the defendant, because it has no exclusive right and has no franchise right for any particular length of time.

In this connection it may be said that the defendant would have no right to extend its mains further, and can only furnish gas to the inhabitants of the city who are so situated that they may be served from the gas pipes and mains as now constructed.

It follows that the decree must be reversed, and the case will be remanded to the chancery court with directions to enter a decree in accordance with this opinion, and for further proceedings according to the principles of equity and not inconsistent with this opinion.

SMITH, J., (dissenting). It was held in the case of *Newport* v. *Railway Co.*, 58 Ark. 270, 24 S. W. 427, that a town could not, by ratification, make a contract binding which was *ultra vires*. But the granting of a franchise is not *ultra vires*. On the contrary, express authority to grant certain franchises is conferred. By § 7492, C. & M. Digest, it is provided that "for the purpose of providing water, gas, electric light, heat, cold storage, or street railroad, the mayor and council may contract with any person or company to construct and operate such utilities, and may grant to such person or company, for a time which may be agreed upon, the exclusive privilege of using the streets and alleys of such city for such purposes. * * *"

While a contract for a franchise can be made only by the passage of a resolution or ordinance, adopted by a majority of the council, upon the passage of which the yeas and nays were called and recorded, and a franchise not so granted is voidable in its executory stage, it does not follow that, because the contract is voidable in its executory stage, it can never have vitality or binding effect.

There are many cases which distinguish between a contract which is *ultra vires* in the general and primary sense that it is wholly outside of the power of the corporation to make under any circumstances, and which is therefore void *in toto,* and one which is *ultra vires* in the restricted sense that the power to contract was irregularly exercised and which may or may not be validated.

In the chapter on Municipal Corporations in 19 R. C. L., § 428, page 1155, it is said: "And when a municipal corporation, having power to grant a particular franchise, undertakes to grant it, and the grantee, believing that it has a valid franchise, proceeds to erect its structures in the street and to exercise such franchise, with the knowledge and without the objection of the municipality, the latter will be estopped from asserting the invalidity of the franchise on account of defects in the execution of the power. Conversely, a public service company, which takes and retains all the advantages and benefits of an ordinance under which it is permitted to operate its works in the streets, cannot escape the performance of duties to the public imposed upon it by the ordinance, on the ground that the ordinance and the duties imposed by it are *ultra vires* both the municipality and the company." The annotated case of *Hagerstown* v. *Hagerstown R. Co.,* 123 Md. 183, Ann. Cas. 1916B, 1267, together with the cases cited in the annotater's note, sustain the text quoted.

That a city may estop itself from denying its liability under a contract improperly made, but of which it has accepted the benefits, is decided in the cases of *Forrest City* v. *Orgill,* 87 Ark. 389, 112 S. W. 891; *Texarkana* v. *Friedell,* 82 Ark. 531, 102 S. W. 374; *Oglesby* v. *Ft. Smith,* 105 Ark. 506, 152 S. W. 145; *Augusta* v. *Smith,* 117 Ark. 93, 174 S. W. 543: *Venable* v. *Plumerville,* 130 Ark. 477, 198 S. W. 196. See also *Dell Special School District* v. *Johnson,* 129 Ark. 211, 195 S. W. 393; *International Harvester Co.* v. *Searcy County,* 136 Ark. 209, 206 S. W. 312.

Other authorities cited in the opinion of the Chief Justice sustain the view that a town may, by ratification, make valid a franchise granted by an ordinance improperly passed. There appears to be no question that, if such a contract can be ratified, the one here involved has been. It has been fully acted upon after its acceptance.

It is also settled law that, when a franchise is granted and accepted, it becomes a contract to be construed like other contracts. *Arkansas Light & Power Co.* v. *Cooley,* 138 Ark. 390, 211 S. W. 664; *Lackey* v. *Fayetteville Water Co.*, 80 Ark. 108, 96 S. W. 622; *Little Rock Ry. & Elec. Co.* v. *Dowell,* 101 Ark. 223, 142 S. W. 165; *Hot Springs Electric Light Co.* v. *Hot Springs,* 70 Ark. 300, 67 S. W. 761.

Appellee therefore has a valid franchise, purporting to give it the exclusive right to furnish gas to the inhabitants of the town of Norphlet. The question here to be decided would appear, therefore, to be whether it shall enjoy the benefits which such a grant ordinarily confers.

The majority hold that the franchise rights of appellee are qualified by the prior vested rights of the appellant company. To that extent, at least, under the view of the majority, the exclusive franchise is not an exclusive franchise.

As the majority say, appellant did obtain a charter from the State, but that fact is unimportant here. Nothing in the charter gave it any right to use the streets of the town of Norphlet. The charter merely gave it the right to construct and operate pipe lines in this State and to distribute gas when it thereafter acquired the right to do so. And what rights has it acquired so far as the town of Norphlet is concerned?

The only right alleged or claimed is such as was acquired by private contracts with persons residing in territory which later became a part of the town. Contracts were made by appellant with individuals to supply gas. There was no other grant of any kind, and there is no pretense that the town of Norphlet granted any right to the use of the streets to appellant, for the town

was nonexistent when appellant laid its pipes. No attempt was made to grant appellant the right to use the public streets by any one. Indeed, this use is not the subject of private contract. Appellant had only private contracts, made with each consumer of its gas, and it acquired, therefore, at most, a mere license to use these streets, subject to be terminated when the town came into existence and took control of its streets. If this is not true, the town can never control its streets until the private contracts between appellant and its customers have expired. If appellant is entitled, from contractual rights with individual consumers, to the use of the streets of the town in its operations, in opposition to the exclusive franchise granted appellee by the city, the validity of which it is estopped to deny, there is no reason why it may not continue such use so long as its customers wish to buy gas from it, regardless of the franchise granted or any that may hereafter be granted.

Appellee has an exclusive franchise, the validity of which the town is estopped to deny, by its terms limited to a period of twenty-five years, whereas appellant is given, under the majority opinion, the right to the use of the streets, in opposition to appellee's right to the use thereof, which may continue indefinitely.

Appellant has not been deprived of any vested rights, for it had none. It had merely private contracts, which did not and could not create an easement in the streets operating to deprive the town, which was later organized, of the control thereof.

The right of cities and towns to see that all the inhabitants have such necessities as light and gas and water is conferred by the statute quoted and this power may be exercised when it thought advantageous to do so by the grant of a franchise conferring the exclusive right on the grantee to supply these necessities, upon such conditions as may be agreed upon.

Appellant must be charged with knowledge of the power thus conferred by statute, and its private con-

tracts were made subject to the possible exercise of this power.

Appellant has no other or greater rights than it acquired by its private contracts to furnish gas, and these contracting consumers could confer no greater right than they themselves possessed. As residents of the town, they, like all others, were subject to the right of the town to grant a franchise. It is the town, acting through its council, which grants franchises, and not the citizens thereof, where a franchise may be granted at all, and all persons are affected alike when this power is exercised.

This power has been exercised, and, in the exercise thereof, appellee acquired a franchise, and its rights thereunder should be protected.

I submit, with all deference, that nothing was decided in the case of *Clear Creek Oil & Gas Co.* v. *Fort Smith Spelter Co.,* cited by the majority, which gives any support to the conclusion here reached. In that case appellant, the prevailing party, "obtained franchises from the cities of Van Buren and Fort Smith * * * to distribute and sell gas to the inhabitants of those cities." It was there said that "The real point of the controversy between the parties is whether the contracts between appellant and appellees for the sale and purchase of gas were executed by appellant when it was not acting in any public capacity, as contended by appellees, or whether appellant was from the start a public service corporation and the contracts attempted to confer preferential rights on appellees as consumers."

On account of the conflicting views of the members of the court, the opinion of the Chief Justice becomes the law of the case, and he says: "The only way, it seems to me, that the town of Norphlet could take away the right of the defendant (appellant) to furnish the inhabitants of the town of Norphlet with natural gas, would be to pass a valid franchise to some other company, giving it the exclusive right to furnish the inhabitants with natural gas. This would take away the right

of the defendant, because it has no exclusive right and has no franchise right for any particular length of time." This is exactly what has been done. The franchise granted appellee has become valid by estoppel, and it is therefore as much a franchise as if it had been granted by a valid ordinance, and appellee (plaintiff) having acquired an exclusive franchise, its rights thereunder should be enforced.

Neither appellee nor the city has undertaken to appropriate any property belonging to appellant. The restraining order, from which this appeal is prosecuted, granted appellant time to remove its property, and no complaint is made that the time allowed was not sufficient for that purpose. The only right denied appellant is that of infringing upon a valid franchise, and the decree of the court below should therefore, in my opinion, be affirmed.

Mr. Justices WOOD and KIRBY concur in the views here expressed.

FOULKES v. FOULKES.

Opinion delivered February 28, 1927.

1. WILLS—RIGHT OF DEVISEE TO RENOUNCE WILL.—An heir who is devisee under a will of his mother has no right to renounce the will and take under the law of intestacy, as the testatrix had a right to dispose of the property among her children as she saw fit.
2. WILLS—RIGHT OF DEVISEE TO RENOUNCE WILL.—Where a testatrix devised land to one of five children on which she placed a certain value, subject to the devisee paying to the estate all in excess of one-fifth part of the entire estate, the devisee could not renounce the devise, which he claimed to be overvalued, and still take under the residuary clause, as a devisee electing to take benefits under a will must also assume its burdens.
3. APPEAL AND ERROR—APPEALABLE JUDGMENT.—A decree adjudging the rights of devisees under a will and ordering the sale of property and distribution of the proceeds is a final decree, from which an appeal lies.

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

Sam T. & Tom Poe, for appellant.

R. P. Taylor and *Lee Miles,* for appellee.

KIRBY, J. This suit was begun by appellee against the other heirs and the executor of the estate for construction of his mother's will, appellee claiming the right to renounce the devise to him under § 3, allowing it to fall into the residuum of the estate, and to claim, under paragraph 7, an equal share of the estate with the other heirs, and from the decree adjudging he had the right to do so and ordering the sale of the property, and the distribution thereof in equal shares to the other heirs, the debts of the estate having all been paid, this appeal is prosecuted.

Paragraphs 1 and 2 of the will made bequests to three of appellee's sisters of a piano and household furniture, and personal effects.

Paragraphs 3 and 6 read as follows:

"Three. I give and devise to my son, W. J. P. Foulkes, subject to the charge hereinafter expressed, lots one (1) and (2), block five (5), Plunkett's Second Division to the city of Little Rock, Arkansas, with all appurtenances thereunto belonging, the said lots to be held to be of the value of seventy-five hundred ($7,500) dollars, of which the said W. J. P. Foulkes, within one year after my death, shall pay all in excess of a one-fifth part of my entire estate (excluding, however, the bequests hereinabove made), which excess shall constitute a lien against the said described lots in favor of my estate."

"Six. After the above bequests are made, with said advancements included, I give, devise and bequeath all of the residue of my property of every kind and character, real, personal and mixed, and wheresoever situated, to my five children, W. J. P. Foulkes, J. J. C. Foulkes, Mrs. Rose Owens, Mrs. Nellie Heiden and Mrs. Carrie Blanz, each a one-fifth part, so that with the said advancements each of my said five children shall share and share

alike in my estate, except as to the special bequests above made, in paragraphs one and two."

In paragraph 4 appellant is given certain lots, the value fixed at $2,000, and charged with an additional advancement of $600, all to be charged against him as an advancement. One of the daughters, Mrs. Owens, is also charged with a $2,000 advancement in paragraph 5.

The Union and Mercantile Trust Company of Little Rock was appointed executor, in paragraph 7, and it was shown that one of the sisters had died since the death of the testatrix, leaving no heirs, with the estate to be divided among four instead of five children.

There was some testimony tending to show that the value placed upon the devise of the home place to appellee was much greater than its market value, and also relative to the claim of appellant that he should be entitled to a credit upon the amount of the advancement charged to him in paragraph 5, as well as to collection and disposition of rents from the property devised to appellee.

The testatrix had the right to dispose of her property among her children according to her pleasure, or to give it all to somebody else, if she preferred to do so, by will properly executed, and there is no right of election of appellee to renounce the will and take under the law as though no will had been executed, such as a widow has, to elect between the provision of a will and of the statute.

In *Wisner* v. *Richardson,* 132 Ark. 575, 202 S. W. 17, where the appellants were attempting to avoid the payment of certain debts charged against the land devised to them, the court said: "But their election in the premises extended only to the right to take, or not to take, under the terms of the will. They could not elect to take the benefits granted by the will and renounce its burdens. If they elected to claim the property devised to them, they took that property with the burden upon it which the will imposed, and that burden was to pay the debts. They, of course, took no interest in the tract, which was

devised by the testatrix to her husband. Appellants refer to themselves as the heirs of their sister. So they are. But the will arrested the operation of the law of descent and distribution. Collateral heirs are not given a right, such as a widow has, to elect between the provisions of a will and the provisions of the statute."

The intention of the testatrix is clearly and accurately expressed in the devise made to this appellee, and he had no right, as a devisee, to renounce the devise in the one paragraph of the will and insist upon the devise made in the other paragraph, since he believed it would be less burdensome and equal a greater amount, and provide a greater benefit to him than if he took in accordance with the devise in both paragraphs.

There is no conflict between the devise made, nor any provision or expression in the will indicating a contrary intention of the testatrix that this devisee should share in the distribution of the estate, except in the manner and as provided for by the will, and the court erred in decreeing otherwise. Of course he can pay in a less sum than the difference between the value of the property as fixed by the devise in paragraph 3 and the one-fourth interest in the estate by the amount, crediting the one-fourth of the residuum of the estate to which he is entitled under paragraph 6 will reduce it.

There is no merit in the motion to dismiss the appeal on the ground that the judgment appealed from is not final.

It follows that the judgment of the lower court and the decree of the chancellor is erroneous, and it is reversed, and the cause remanded with directions to enter decree not inconsistent with this opinion, and for further necessary proceedings.

STUMPFF v. LOUANN PROVISION COMPANY.

Opinion delivered February 28, 1927.

1. HIGHWAYS—JURISDICTION OF COUNTY COURT.—Before a village became an incorporated town, the county court had jurisdiction to vacate an old county road and open a new road, under Crawford & Moses' Dig., § 5226, giving the county court power to establish and open new roads and to change and vacate roads.
2. HIGHWAYS—VALIDITY OF ORDER VACATING ROAD—EVIDENCE.—In a suit to enjoin the erection of a house along a former public road which had been vacated by the county court, evidence *held* to sustain a finding that the order vacating the old road and opening a new road, on which a *nunc pro tunc* order was based, was made before the town's incorporation, and that such order was not procured by fraud.
3. HIGHWAYS—ORDER VACATING ROAD—COLLATERAL ATTACK.—A suit to enjoin the erection of a house along the location of a road which had been vacated by an order of the county court is a collateral attack upon a judgment of the county court.
4. JUDGMENT—PRESUMPTION ON COLLATERAL ATTACK.—In a collateral attack upon a judgment of a court of general jurisdiction every presumption will be indulged in favor of the jurisdiction of the court and the validity of the judgment.
5. JUDGMENT—COLLATERAL ATTACK.—As the county court is a court of superior jurisdiction, its judgment, rendered in pursuance of jurisdiction rightfully acquired, cannot be attacked collaterally.
6. HIGHWAYS—COLLATERAL ATTACK ON ORDER VACATING ROAD.—Persons claiming a vested right in an easement over a public road which had been vacated by order of the county court in the exercise of its jurisdiction under Crawford & Moses' Dig., § 5226, could not enjoin the erection of a building thereon, as such proceeding would be a collateral attack upon the order of the county court.
7. JUDGMENT—EVIDENCE ON COLLATERAL ATTACK.—Though evidence should be clear, decisive and unequivocal to warrant the entry of a *nunc pro tunc* order, the rule does not apply where such an order is collaterally attacked.
8. HIGHWAYS—RELIEF FROM ORDER VACATING ROAD.—Where an order of the county court in the exercise of its jurisdiction vacating an old county road affected vested rights, the remedy of persons aggrieved was by appeal from such order, and not a collateral attack on the order.

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

STATEMENT BY THE COURT.

Prior to the discovery of oil in and near it in 1922, the town of Louann was an unincorporated village. In that year oil was discovered, and the village grew in population rapidly, and, on July 2, 1923, the town was incorporated. The Camden and Louann road, a public highway, passed through the village and ran across 80 acres of land which formerly belonged to O. C. Reeves. Reeves sold about one acre of this tract to appellee, Q. C. Murphy, which acre was situated north of the Missouri Pacific Railroad and north and east of the depot in said town. This Camden and Louann public road passed along to the north of Murphy's property and adjacent thereto. The town of Louann had been platted prior to its incorporation, and one of its streets running north and south was designated on said plat as Main Street, another running east and west was known as Alton Avenue. First Street is a street running north and south and is the second street east of Main Street. H. B. Solmson, trustee, owned all the land east of First Street to the eastern end of Alton Street, on both sides of Alton Avenue, all of which property had been platted as Myar's Addition, and through it passed the Camden and Louann road after crossing First Street to the east end of Alton Avenue. Appellee, Murphy, and appellant, Shirey, owned the remainder of the land on either side of said public road east of Main Street, and in February, 1923, appellant Shirey, appellee Murphy and H. B. Solmson presented a petition to the county court of Ouachita County, asking that the route of the old original public road be changed through their land and that the same be opened along the route known as Alton Street to a width of sixty feet, the petitioners being the owners of all the property on both sides of the old road and on both sides of the location to which the same was sought to be changed. The petition was filed under § 5226 of Crawford & Moses' Digest.

No action on this petition was shown on the records of the county court until September 22, 1924, when the

court entered an order *nunc pro tunc* granting the petition, vacating the old road, and opening as a public road the location as shown on the map or plat as Alton Street from the point where Alton Avenue intersected at the east end the original road, westerly to its intersection with Main Street, as shown on the map. This *nunc pro tunc* order was entered as of the 14th day of March, 1923. After the time when it is said that the order changing the public road was made by the county court, a map of the town of Louann was laid out by appellant Shirey, with Alton Avenue open and the original county road closed. Appellant Shirey and Stumpff owned lots which occupied a part of the old public road, and commenced to build a house thereon. The appellees procured a restraining order preventing the erection of a house on any part of the old public road, and this order was made permanent by a final decree of the court. In the decree the court found that the county court of Ouachita County made a *nunc pro tunc* order on September 22, 1924, as of March 18, 1923, by which it undertook to vacate and change said road; that the order was actually made on March 18, 1923, but was not entered until September 22, 1924, and that there was no fraud in obtaining or making said order nor in the obtaining or making of the *nunc pro tunc* order; that the appellees had vested rights in the easement over said public road, and that the construction of a building thereon would be an obstruction of said road and a violation of the rights of appellees.

From the decree of the court making the injunction perpetual comes this appeal.

Gaughan & Sifford, for appellant.

Thos. W. Hardy, for appellee.

McHANEY, J., (after stating the facts). The county court had jurisdiction to make the order vacating the old county road and opening same on Alton Avenue. Section 5226 of Crawford & Moses' Digest reads as follows:

"All public roads and highways shall be laid out, opened and repaired agreeably to the provisions of this act, and the county court of each county shall have full

power and authority to make and enforce all orders necessary as well for establishing and opening new roads as for changing and vacating any public road or part thereof."

It will be seen from the above statement of facts that the chancellor found that the county court did make the order changing and vacating the public road from its then location in the town of Louann and opening same on Alton Avenue, and that this order was entered on September 22, 1924, as of March 18, 1923. Appellees contend that there was no evidence to show that the county court ever made or rendered any judgment in March, 1923, for the reason that the judge's docket and the records of the court do not show such order was made, and they further contend that no evidence was introduced to show that any such order was made at the time the *nunc pro tunc* order was entered. In this appellees are in error, as R. L. Shirey, one of the appellants, states that he moved to Camden about April, 1923, and that he saw Judge Hawkins, the county judge, and asked him what he had done about the road matter, and that the judge told him it had all been settled; that he had granted the petition to change the road, and that he heard no more about it until this suit was filed. After this conversation with the county judge, he commenced the erection of a house on the old road location, on the strength of what the judge had told him.

Q. C. Murphy and T. W. Hardy testified for the appellees to the effect that the county judge had told them, some time in the spring or summer of 1923, that the town of Louann had been incorporated, and that he had nothing further to do with it. We think the court, in view of the facts and circumstances surrounding this case, was justified in finding that the *nunc pro tunc* order was properly made, the original order having actually been made in March, 1923, but not entered until September, 1924, and that there was no fraud in the procuring of the order nor in the entry *nunc pro tunc*. We cannot therefore say

that the finding of the chancellor in this regard was against the clear preponderance of the evidence.

Moreover, this action involves a collateral attack upon the judgment of the county court.

A direct attack on a judgment is usually defined as an attempt to reform or vacate it in a suit brought in the same action and in the same court for that purpose. On the other hand, a collateral attack upon a judgment has been defined to mean any proceeding in which the integrity of a judgment is challenged, except those made in the action wherein the judgment is rendered, or by appeal, and except suits brought to obtain decrees declaring judgments to be void *ab initio*. *Hooper* v. *Wist,* 138 Ark. 294, 211 S. W. 145; *Cassady* v. *Norris,* 118 Ark. 457, 177 S. W. 10.

In the same case, announcing the well established rule relating to the presumption in favor of the validity of a judgment on collateral attack, the court used this language: "It is well settled in this State that, in a collateral attack upon a judgment of a court of general jurisdiction, every presumption will be indulged in favor of the jurisdiction of the court and the validity of the judgment or decree." *Crittenden Lbr. Co.* v. *McDougal,* 101 Ark. 390, 142 S. W. 836; *Clay* v. *Barnes,* 121 Ark. 474, 181 S. W. 303; *Jones* v. *Ainell,* 123 Ark. 532, 186 S. W. 65.

The county court is a court of superior jurisdiction, and its judgment, rendered in pursuance of jurisdiction rightfully acquired, cannot be attacked collaterally. *Sharum* v. *Meriwether,* 156 Ark. 331, 246 S. W. 501.

If the appellees felt themselves aggrieved by the action of the county court in entering its *nunc pro tunc* order on September 22, 1924, their remedy was by way of appeal from the finding of the county court on that date that it had, on March 18, 1923, made the order it was then entering. Counsel for appellees cite the case of *Turnbow* v. *Baird,* 143 Ark. 543, 220 S. W. 826, holding: "Courts should be cautious in rendering *nunc pro tunc* orders and decrees; and, while the power may be exercised on parol testimony alone, the evidence should be

clear, decisive and unequivocal," but this refers to the rule of evidence governing the court in determining whether the order or decree in question was actually made, and not the rule to govern the validity of such an order or decree on collateral attack. In other words, this was the correct rule to govern the county court in determining on September 22, 1924, whether it had made the order vacating the old county road and establishing a new road over Alton Street on March 18, 1923, and this would have been the correct rule for the determination of this question on appeal to the circuit court.

If the vacating of the old county road involved the vested rights of the appellees, then they should have appealed from the order of the county court made on September 22, 1924, holding that it had made an order on March 18, 1923, vacating the old road and laying it out anew over Alton Street. Having failed to do so within the time allowed by law, they cannot come into a court of equity and by collateral attack upon the judgment of the county court obtain the relief which should have been sought by appeal.

The result of our views is that the decree of the chancery court was wrong, and that it should be reversed and the cause dismissed, and it is so ordered.

HELENA v. FIRST NATIONAL BANK OF HELENA.

Opinion delivered March 7, 1927.

1. BANKS AND BANKING—CONVERSION OF TRUST FUND.—Where bank officers know that a fund on deposit is a trust fund, they cannot appropriate that fund to the private benefit of the bank or knowingly participate with the trustee in appropriating the fund to his own use, without being liable to refund the money.
2. TRUSTS—DEPOSIT OF TRUST FUND.—A trustee may legally deposit the trust funds in a bank to his individual account and credit, and knowledge of the bank that a fund so credited is a trust fund does not affect the legal character of the act.

3. BANKS AND BANKING—DEPOSIT OF TRUST FUNDS.—A bank has a right to presume that a trustee will apply trust funds deposited to his individual credit to proper purposes under the trust.

4. BANKS AND BANKING—DEPOSIT OF TRUST FUND.—The mere fact that a bank knows funds credited to a depositor individually are trust funds does not charge the bank with notice of his intention to misappropriate them or put it upon notice that such was his intention.

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

STATEMENT OF FACTS.

The city of Helena brought this suit in equity against the First National Bank of Helena and its stockholders for the purpose of following and recovering the sum of $51,618.62 which, it was claimed, the bank had knowingly allowed Joseph C. Myers, as treasurer of the city, to convert to his own use. The bank answered and denied all the material allegations of the complaint. It specifically denied that it had allowed or in any way participated in the conversion of the funds of the city of Helena by its former treasurer.

The basic facts necessary to a determination of the issues raised by the appeal may be briefly stated as follows: On May 9, 1914, Joseph C. Myers was elected treasurer of the city of Helena, and continued in office until May 3, 1922, at which time he resigned. Joseph C. Myers, as treasurer of the city of Helena, deposited in the First National Bank of Helena, from time to time, more than $110,000 of the funds of the city. The deposits were placed in the bank by Myers in his individual name, with knowledge on the part of the bank that the funds were the funds of the city of Helena, and had come to his hands as city treasurer. Joseph C. Myers issued his own checks on said funds from time to time, until about the time he resigned, when an investigation showed that he was short in his accounts as city treasurer in the sum of $51,618.62. The funds, so far as the record discloses any actual knowledge on the part of the bank, showed that it believed that Myers was paying out the funds in behalf

of the city of Helena to liquidate its indebtedness for current expenses of running the city government and for other legal debts of the city. The evidence shows that all the funds were drawn out on checks signed by Joseph C. Myers, and there is nothing in the record to show that any of these amounts were paid to the bank, or that it received any benefit therefrom. The officers knew, in a general way, that Myers was issuing the checks to persons having claims against the city, but never made any inquiry about the matter or attempted to see that the funds were paid out to those having legal demands against the city. Myers did not deposit any individual funds in the bank, and the officers of the bank knew that the money deposited by him belonged to the city of Helena. Myers did not have the checks in his possession, and did not know where they were. He had no way of ascertaining what percentage of the amount paid out on his personal checks went to the benefit of the city of Helena. He could only state, in a general way, that the money was checked out by him for city purposes, but he was not able to account for the shortage in his accounts as treasurer. Myers, during all this time, was engaged in insurance business, but carried his accounts in that business under his firm name and checked it out that way. The largest part of his business account was kept in another bank.

The chancellor appointed a master, who filed a report finding the facts to be substantially as stated above. Exceptions were duly filed to the report of the master by the plaintiff. The chancellor approved the report of the master, and found the issues generally in favor of the defendants. A decree was entered of record in favor of the defendants, and to reverse that decree the plaintiff has duly prosecuted an appeal to this court.

John E. Miller and *C. E. Yingling,* for appellant.

Brewer & Cracraft and *W. G. Dinning,* for appellee.

HART, C. J., (after stating the facts). The general principle governing the bank's liability is that the officers of the bank, who know that a fund on deposit is a trust

fund, cannot appropriate that fund to the private benefit of the bank, or, where charged with notice of the conversion of the trustee, participate with him in appropriating it to his own use, without being liable to refund the money, if the appropriation is a breach of the trust. *Allen* v. *Puritan Trust Co.,* 211 (Mass.) 409, 97 N. E. 916, L. R. A. 1915C, 518; and *Blanton* v. *First National Bank of Forrest City,* 136 Ark. 441, 206 S. W. 745.

The rule itself and the reasons for it are clearly stated by the Maryland Court of Appeals in *Duckett* v. *National Mechanics' Bank of Baltimore,* 38 Atl. 983, 39 L. R. A. 84, 63 Am. St. Rep. 513. We quote from the opinion the following: "It is immaterial, so far as respects the duty of the bank to the depositor, in what capacity the depositor holds or possesses the fund which he places on deposit. The obligation of the bank is simply to keep the fund safely and to return it to the proper person, or to pay it to his order. If it be deposited by one as trustee, the depositor, as trustee, has the right to withdraw it, and the bank, in the absence of knowledge or notice to the contrary, would be bound to assume that the trustee would appropriate the money, when drawn, to a proper use. Any other rule would throw upon a bank the duty of inquiring as to the appropriation of every fund deposited by a trustee or other like fiduciary, and the imposition of such a duty would practically put an end to the banking business, because no bank could possibly conduct business if, without fault on its part, it were held accountable for the misconduct or malversation of its depositors who occupy some fiduciary relation to the fund placed by them with the bank. In the absence of notice or knowledge, a bank cannot question the right of its customer to withdraw funds, nor refuse (except in the instances already noted) to honor his demands by check; and therefore, even though the deposit be to the customer's credit in trust, the bank is under no obligation to look after the appropriation of the trust funds when withdrawn, or to protect the trust by setting up a *jus*

tertii against a demand. But, if the bank has notice or knowledge that a breach of trust is being committed by an improper withdrawal of funds, or if it participates in the profits or fruits of the fraud, then it will be undoubtedly liable."

As said in *National Bank* v. *Insurance Co.*, 104 U. S. 54: "A bank account, it is true, even when it is a trust fund, and designated as such by being kept in the name of the depositor as trustee, differs from other trust funds which are permanently invested in the name of trustees for the sake of being held as such; for a bank account is made to be checked against, and represents a series of current transactions. The contract between the bank and the depositor is that the former will pay according to the checks of the latter, and, when drawn in proper form, the bank is bound to presume that the trustee is in the course of lawfully performing his duty, and to honor them accordingly."

It results from the principles of law decided in these cases, and many others which might be cited, that a trustee may legally deposit the trust funds in a bank to his individual account and credit, and that the knowledge on the part of the bank of the nature of the fund received and credited does not affect the character of the act. The reason is that the bank has the right to presume that the fiduciary will apply the funds to their proper purposes under the trust.

The undisputed evidence in this case shows that the money in question was deposited by Myers as treasurer of the city of Helena and that the bank knew that the funds deposited belonged to the city. The deposits were made in the individual name of Myers, and were checked out in that way. In 1922 an investigation showed that Myers was short in his accounts as city treasurer in the sum of $51,618.62.

It is not claimed or proved that the bank received any benefit from the conversion of the funds by Myers. The record does not show that the bank, in any way, participated in the conversion of the funds or had any

actual knowledge that Myers was checking out the funds for his individual benefit. The officers of the bank knew, in a general way, that the funds were being checked out by Myers to pay debts owed by the city of Helena, and they did not make any investigation to see that all the amounts checked out were applied to the payment of the debts of the city.

It is sought to hold the bank liable on the theory that the attendant circumstances charge it with the knowledge that Myers was misappropriating the funds of the city. As we have already seen, the deposit by a trustee of funds belonging to the trust estate in his individual name and account at the bank is not a conversion of the trust fund. There is nothing in the present case from which it might be inferred that the bank participated in the conversion of the funds, except from the fact that it permitted Myers to draw out the funds without seeing to the proper application of them. It is insisted that the bank must have seen to the proper application of the funds, because it allowed Myers to deposit them in his individual name and to check them out that way. We do not think that this was sufficient to put the bank upon inquiry and to charge it with knowledge that Myers was misappropriating the funds belonging to the city.

In discussing this important question in *Bischoff* v. *Yorkville Bank,* 218 N. Y. 106, 112 N. E. 759, L. R. A. 1916F, p. 1059, the New York Court of Appeals said: "A bank does not become privy to a misappropriation by merely paying or honoring the checks of a depositor drawn upon his individual account, in which there are, in the knowledge of the bank, credits created by deposits of trust funds. The law does not require the bank, under such facts, to assume the hazard of correctly reading in each check the purpose of the drawer, or, being ignorant of the purpose, to dishonor the check. The presumption is, and, after the deposits are made, remains until annulled by adequate notice or knowledge, that the depositor would preserve or lawfully apply the trust funds. The contract, arising by implication of law from

a general deposit of moneys in a bank, is that the bank will, whenever required, pay the moneys in such sums and to such persons as the depositor shall direct and designate. Although the depositor is drawing checks which the bank may surmise or suspect are for his personal benefit, it is bound to presume, in the absence of adequate notice to the contrary, that they are properly and lawfully drawn. Adequate notice may come from circumstances which reasonably support the sole inference that a misappropriation is intended, as well as directly."

To the same effect see *Whiting* v. *Hudson Trust Co.*, 234 N. Y. 394, 138 N. E. 33, 25 A. L. R. 1470.

It is claimed by counsel for the plaintiff that this view is contrary to the rule in *Duckett* v. *National Mechanics' Bank of Baltimore,* 39 L. R. A. 84. We do not agree with counsel in their contention, but are of the opinion that our present view is in accord with the principles decided in that case. In that case one of the checks was received by the bank with explicit directions to deposit it to the credit of a certain named trustee. The bank, instead of depositing it in the name of the individual as trustee, deposited it to the general account of the individual. The court said that the act of marking a trust fund to the personal credit of the trustee was wrong, and that the bank must bear the consequences of allowing the trustee to draw the fund out on his personal account. There the court had under consideration a single transaction, where the bank was the first wrongdoer, and it was properly held that the whole transaction showed that the bank participated in the conversion of the funds by crediting it to the individual and allowing him to draw the fund out that way, instead of crediting the item to him as trustee, as it was directed to do. In the present case, if the bank had been directed to credit the funds to Myers as treasurer, and, instead of doing so, had allowed him to place the account in his own name and check the funds out in that way, it might be inferred that there was an intention from the beginning, participated

in by the bank and Myers, that the funds should be deposited in the individual name of Myers and checked out that way for the purpose of converting them to his own use or diverting them from their proper use. Here there is nothing from which to infer that the bank participated in any wrongdoing by Myers, except the fact that it allowed him to deposit the public funds of the city in his own name and to check them out that way. We think the better rule is to hold this to be insufficient to put the bank upon notice that Myers intended to misappropriate the funds. His account ran through a series of years, and there is nothing whatever in the record to show that the bank assisted him in misappropriating the funds of the city or had any intimation whatever that he was doing so. It is not even claimed that the conversion of the funds resulted in any benefit, directly or indirectly, to the bank. The only reason for holding it liable was that it allowed him to deposit the funds in his own name and to check them out that way. As we have already stated, we think the better view and the one more in accord with reason and justice is that this state of facts is not sufficient to put the bank upon notice that the treasurer intended to misappropriate the funds of the city.

Finally, it is insisted that such a view is contrary to the rule established in *Blanton* v. *First National Bank of Forrest City,* 136 Ark. 441, 206 S. W. 745. We do not agree with counsel for the plaintiff in this contention. In that case, under the facts alleged in the complaint and admitted by the demurrer, the cashier of the bank knew that the money belonged to the ward, and, contrary to explicit directions, he placed the amount to the individual credit of the guardian and allowed her to check out the money for her own private use. Here there was nothing whatever to put the bank upon notice that Myers intended to check out the funds for his own private use except the mere fact that it permitted him to deposit the funds in his individual name in the beginning; and, as we have already seen, this was not sufficient to establish knowl-

edge or notice on the part of the bank, that Myers intended to misappropriate the public funds of the city.

It follows that the decree was correct, and must be affirmed.

KIRBY, J., concurs.

ARNOLD v. STEPHENS.

Opinion delivered March 7, 1927.

HOMESTEAD—TRUSTEE OF EXPRESS TRUST.—A tax collector is not a trustee of an express trust within Const., art. 9, § 3, so as to subject his homestead to the lien of a judgment in favor of his sureties who were compelled to pay money which he had collected and failed to pay over to the State.

Appeal from Miller Chancery Court; *C. E. Johnson,* Chancellor; reversed.

David C. Arnold, for appellant.

Shaver, Shaver & Williams, for appellee.

MEHAFFY, J. This suit was begun in the Miller Chancery Court by the sureties on the bond of Fincher Eason, tax collector, who alleged that they were compelled to pay and did pay to the State of Arkansas the sum of $43,442.50, which said Eason had collected in taxes and failed and neglected to pay over to the State of Arkansas. It was alleged that the estate of Fincher Eason is insolvent, and that there are no lands belonging to his estate other than lot 2, block 10, in Texarkana, which, at the time of his death, was occupied by him as a homestead.

Plaintiffs had presented their claim against the estate to the administrator, who disallowed it, and then presented it to the probate court, where it was disallowed, and an appeal taken to the circuit court of Miller County; that, in the Miller Circuit Court, the sureties were given judgment for the above named sum. They alleged that the money converted by Eason was money in his hands as tax collector, and converted by him, and that they

were funds belonging to the State of Arkansas, and that, under the law, the State had a right to have its claim thereto declared a lien and charge against said homestead. The sureties asked to be subrogated to all the rights and equities of the State of Arkansas in, to, and against said homestead, and that said homestead be condemned and ordered sold and the proceeds applied to the payment in satisfaction of their claim.

David C. Arnold, guardian, the appellant here, representing the minor heirs, denies the allegations of the complaint, and denies that the State has a right against the homestead of the minors, and denies the plaintiffs are entitled to subrogation.

The chancellor held that the plaintiffs were entitled to be subrogated, and ordered that they be subrogated to all the rights, equities and privileges had and held by the State of Arkansas in and to the homestead, describing it, and ordered that the homestead be condemned and ordered sold in satisfaction of the claim. From said decree David C. Arnold, guardian *ad litem,* has appealed to this court, and, as stated by attorneys for appellees: "The sole contention of counsel for appellants is that a tax collector, in collecting and disbursing the public revenues, and while so discharging the duties imposed upon him by law, was not a trustee of an express trust within the meaning of § 3, article 9, of the Constitution. The record in this case squarely presents the question for the court's decision."

Therefore the only question is whether the tax collector was a trustee of an express trust, under article 9, § 3, of the Constitution of Arkansas. The section reads as follows:

"A homestead of any resident of this State, who is married or head of a family, shall not be subject to the lien of any judgment, or decree of any court, or to sale under execution or other process thereon, except such as may be rendered for the purchase money or for specific liens, laborer's or mechanic's liens for improving

the same, or for taxes, or against executors, administrators, guardians, receivers, attorneys for moneys collected by them and other trustees of an express trust for moneys due from them in their fiduciary capacity."

It will be observed that the homestead is not subject to sale in this case unless the tax collector is a trustee of an express trust.

"Trusts are divided in reference to their creation into express trusts, implied trusts, resulting trusts, and constructive trusts. Express trusts are also called direct trusts. They are generally created by instruments that point out directly and expressly the property, persons, and purposes of the trust; hence they are called direct or express trusts in contradistinction from those trusts that are implied, presumed, or construed by law to arise out of the transaction of the parties. They may be discretionary or imperative, absolute or on condition. As express trusts are directly declared by the parties, there can never be a controversy whether they exist or not." Perry on Trusts, vol. 1, § 24.

As was said by the Supreme Court of Oklahoma: "Express trusts are not defined by our statutes; that is, the statutes fail to prescribe or define just what acts are necessary on the part of the *cestui que trust* in order to create an express trust, but presumably look to and adopt the meaning given to the term by the commentators and courts of equity." We not only have no definition of express trust in our statutes, but nothing that would give us any idea, or, at any rate, no definition of what is meant by the use of the term "express trust" in the above provision of the Constitution. We must therefore look elsewhere to ascertain what is meant by the term in our Constitution.

"In order to constitute an express trust therefore, there must be some act on the part of the *cestui que trust* expressive of an intent to create a trust and to make a designated party trustee thereunder." *McCoy* v. *McCoy*, 121 Pac. 176.

"Express trusts are those which are created by the direct and positive acts of the parties by some writing, or deed, or will. Not that, in those cases, the language of the instrument need point out the nature, character, and limitations of the trust in direct terms, *ipsissimis verbis;* for it is sufficient that the intention to create it can be fairly collected upon the face of the instrument from the terms used, and the trust can be drawn, as it were, *ex visceribus verborum.* Implied trusts are those which are deducible, from the nature of the transaction, as a matter of clear intention, although not found in the words of the parties; or which are superinduced upon the transaction by operation of law, as matter of equity, independent of the particular intention of the parties." *Jones* v. *Byrne,* 149 Fed. 457.

In construing the Constitution, this court has said:

"The cases enumerated in each are cases of special trusts. The persons expressly designated as not coming within the homestead exemption of the Constitution of 1874 are persons who hold moneys exclusively for the benefit of others, and the relations between whom and those for whom they hold money are purely of confidence and trust; and the 'other trustees of express trust' mentioned must mean the same class of trustees. The debts excepted are those contracted by them for such moneys." *Sanders* v. *Sanders,* 56 Ark. 555, 20 S. W. 517.

This court has again said: "Express trusts are those created by the direct and positive acts of the parties, manifested by some instrument in writing, whether by deed, will, or otherwise. Implied trusts are those which are deducible from the transaction as a matter of clear intention, but not found in the words of the parties, or which are superinduced upon the transaction by operation of law as matter of equity, independent of the particular intention of the parties." *U. S. Fid. & G. Co.* v. *Smith,* 103 Ark. 145, 147 S. W. 54.

In the case last cited the agent of a railway company, in the performance of his duties, had collected certain

sums of money, and failed to account for same, and this amount was paid by appellant as surety on his fidelity bond, just as the sureties in the case at bar paid in this case, and, in the language of the court in the decision of that case we can say, "he certainly does not come within the exception of the Constitution as one of the persons mentioned therein, and we do not think that his being such agent and collecting the moneys in the performance of his duties constituted him a trustee of an express trust, so far as such money was concerned, nor that it was due from him to the railroad company in a fiduciary capacity, within the meaning of the Constitution, which would render his homestead subject to the payment of a judgment therefor. Such provision has reference only to the discharge of the duty of an express technical trust or such as is specifically mentioned in said article, and was not intended to, and does not, cover the relation of an ordinary clerk, employee, agent or servant, who has confidence reposed in him for the collection of money, and constitute him a trustee of an express trust of such moneys when collected.

"Neither could the giving of a bond for the faithful performance of the duties and payment of moneys collected in such service change the relation to one of a technical trustee of an express trust." *U. S. Fid. & G. Co.* v. *Smith,* 103 Ark. 145, 147 S. W. 54.

It would seem that the above case settles the law in Arkansas as to what constitutes one a trustee of an express trust, and rules this case. Again, it has been said by this court, after quoting with approval the former decisions as to what constitutes an express trust: "The existence of liability must spring from some breach of trust, the defalcation or indebtedness must occur and exist while the trustee is acting in a fiduciary character, and must be no mere debt, but a contract which results from the rightful possession of money that belongs to another, and which is being used for his benefit." *Carr* v. *Harrington,* 107 Ark. 535, 155 S. W. 1166.

Appellees call attention to Arkansas cases deciding that a tax collector is a county officer, and that officers were trustees, but it is unnecessary to discuss these cases further than to say that none of the cases cited by appellees hold that a county officer is a trustee of an express trust, and we think that the question of what it takes to constitute an express trust under our law is thoroughly settled by the cases to which we have called attention. The provision of the Constitution with reference to homestead exemption was adopted not only for the benefit of the owner himself, but for the benefit of his wife or widow and minor children, and the section of the Constitution referred to expressly states that it shall not be subject to sale except for the debts therein mentioned, and, among others, mentions trustees of an express trust. It does not mention county officers and it does not undertake to define what is meant by trustee of an express trust, and we therefore think that, when it used the expression, it used it in the sense and with the meaning mentioned in the authorities to which we have referred.

Since we hold that the tax collector was not a trustee of an express trust, it follows that the case must be reversed and dismissed. It is so ordered.

HODGES v. HARRELL.

Opinion delivered March 7, 1927.

1. MINES AND MINERALS—WAIVER OF FORFEITURE OF LEASE.—A provision in an oil lease for forfeiture for failure of lessee or assignee to drill a well within 5 years was waived where the lessor allowed the assignee to enter upon the lease and begin drilling a lease after the five-year period without taking any steps to prevent drilling.
2. MINES AND MINERALS—WAIVER OF PROVISION IN LEASE.—A lessor can waive a provision in the lease for his benefit.
3. DISMISSAL AND NONSUIT—REFUSAL OF PLAINTIFF TO PROCEED.—Where a suit in equity, which involved merely a matter of damages, was properly transferred to the law court, and the plaintiff,

demanding a retransfer, refused to proceed further in the law court, the case was properly dismissed.

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

STATEMENT BY THE COURT.

On the 24th day of November, 1924, the appellant, J. L. Hodges, and his wife, Birdie Hodges, filed a suit in the Union Chancery Court against B. Harrell, Humble Oil & Refining Company, O. A. Gilliland and W. H. Gilliland, in which they charged, in substance, that they were the owners of three separate and segregated tracts of land in Union County, Arkansas, and described as follows: The northwest quarter of the southeast quarter of section 6, township 16 south, range 16 west; lots four (4) and five (5) in the northeast quarter of section 1 (being the south half of the northeast quarter of said section 1, 80 acres), and the south half of the northeast quarter of section 12, township 16 south, range 17 west, or a total of 200 acres altogether; that, on the first day of October, 1919, they executed and delivered to O. Alexander an oil and gas lease on said land, which said oil and gas lease reads as follows:

"This agreement, made and entered into on this the first day of October, 1919, by and between J. L. Hodges and Birdie Hodges, his wife, of....., party of the first part, hereinafter called lessor (whether one or more), and O. Alexander, party of the second part, hereinafter called lessee, witnesseth:

"That said lessor, for and in consideration of twenty dollars ($20) cash in hand paid, the receipt of which is hereby acknowledged, and of the covenants and agreements hereinafter contained on the part of the lessee to be paid, kept and performed, have granted, conveyed, demised, leased and let, and by these presents do grant, convey, demise, lease and let unto said lessee, for the sole and only purpose of mining and operating for oil and gas, and laying of pipe lines, and of building 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 and State of Arkansas.

"Northwest quarter of the southeast quarter of section 6, township 16 south, range 16 west, and lot 5 in the northeast quarter of section 1, township 16 south, range 17 west, and lot 4 in the northeast of section 1, township 16 south, range 17 west, and containing 200 acres more or less.

"It is agreed that this lease shall remain in force for a term of five years from this date, and as long thereafter as oil or gas, or either of them, is produced from said land by the lessee.

"In consideration of the premises the said lessee covenants and agrees:

"1st. To deliver to the credit of the lessor, free of cost, in tanks or pipe line to which it may connect its wells, the equal one-eighth part of all oil produced and saved from the leased premises.

"2nd. To pay the lessor thirty dollars each year, in advance, for the gas from each well where gas only is found, while the same is being used off the premises, and lessor to have gas free of cost from any such well for all stoves and all inside lights in the principal dwelling-houses on said land during the same time, by making his own connection with the well, at his own risk and expense.

"3rd. To pay lessor for gas produced from any oil well used off the premises at the rate of.....dollars per year for the time during which said gas shall be used, said payments to be made each three months in advance.

"If no well be commenced on said land on or before the.....day of ....., 19....., this lease shall terminate as to both parties, unless the lessee, on or before that date, shall pay or tender to the lessor, or to the lessor's credit in the Merchants' & Planters' Bank of Camden, Arkansas, or its successors, which shall con-

tinue as the depository, regardless of changes in the ownership of said land, the sum of.....dollars, which shall operate as a rental and cover the privilege of deferring the commencement of a well for.....from said date. In like manner and upon like payments or tenders the commencement of a well may be further deferred for like periods in the same number of months successively. And it is understood and agreed that the consideration first recited herein, the down-payment, covers not only the privilege granted to the date when said first rental is payable as aforesaid, but also the lessee's option of extending that period as aforesaid and any and all other rights conferred.

"Should the first well drilled on the above described land be a dry hole, then, in that event, if a second well is not commenced on said land within twelve months from the expiration of the last rental period for which rental has been paid, this lease shall terminate as to both parties, unless the lessee, on or before the expiration of said twelve months, shall resume the payment of rentals in the same amount and in the same manner as hereinbefore provided. And it is agreed that, upon the resumption of the payment of rentals, as above provided, the last preceding paragraph hereof, governing the payment of rentals and the effect thereof, shall continue in force just as though there had been no interruption in the rental payments.

"If said lessor owns a less interest in the above described land than the entire and undivided fee simple estate therein, then the royalties and rentals herein provided shall be paid the lessor only in the proportion which .....interest bears to the whole and undivided fee.

"Lessee shall have the right to use, free of cost, gas, oil and water produced on said land for its operation thereon, except water from wells of lessor.

"When requested by lessor, lessee shall bury its pipe line below plow depth.

"No well shall be drilled nearer than 200 feet to the house or barn now on said premises, without the written consent of the owners.

"Lessee shall pay for damages caused by its operations to growing crops on said land.

"Lessee shall have the right, at any time, to remove all machinery and fixtures placed on said premises, including the right to draw and remove casings.

"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 after 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 to a part or as to parts of the above described lands, and the assignee or assignees of such part or parts shall fail or make default in the payment of the proportionate part of the rents 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 the said lessee or any assignee thereof shall make due payment of said rentals.

"Lessor hereby warrants and agrees to defend the title to the lands herein described, and agrees that the lessee shall have the right at any time to redeem for lessor, by payment, any mortgages, taxes or other liens on the above described lands, in the event of default of payment by lessor, and be subrogated to the rights of the holder thereof.

"And I, Bertie Hodges, wife of the said J. L. Hodges, for and in consideration of the said sum of money and the covenants and agreements above mentioned, do hereby release and relinquish unto the said lessee all

my right of dower and homestead in and to the said lands for the purpose aforesaid.

"Witness our hands and seals on this 1st day of October, 1919.

"J. L. Hodges (Seal)
"Bertie Hodges (Seal)"

That on October 21, 1922, the lessee, O. Alexander, and his wife assigned the northwest quarter of the southeast quarter of 6-16-16 to B. Harrell for a consideration of $1, and $7,000 to be paid out of 7/16th of the first oil produced on said tract of land; that on the 18th day of September, 1923, the lessee, Alexander, conveyed by assignment to O. A. Gilliland, for a consideration of $1 and other good and valuable consideration, all the right, title and interest which he owned in said 40-acre tract; that on the 23rd of November, 1922, B. Harrell assigned to the Humble Oil & Refining Company, for a consideration of $1 and other good and valuable considerations, all his rights in and to the same 40-acre tract; that on the 24th day of October, 1924, the Humble Oil & Refining Company conveyed to W. H. Gilliland an oil and gas lease to the same 40-acre tract. They further alleged that, by the covenants, terms and conditions of said original lease to said Alexander, each and all of the appellees who purchased a part of the original lease became responsible to carry out the covenants and conditions of the original lease, "that is, to drill for oil on each individual parcel or tract of land which they had purchased, or to pay annual rentals thereon each year after the first year, in order to hold said lease in force and effect for the term of five years, which payments are here admitted having been made, which kept said lease in force for a period of five years." They further alleged that appellees had failed or refused to drill on said 40-acre tract within five years, as provided in said original lease, and that, said full five years having expired on the first day of October, 1924, without any producing oil or gas well or wells on said land, their right to do so had expired, and that appellants' title

was thereby clouded, to their damage in the sum of $24,000.

They further allege that, since the first day of October, 1924, they have notified the defendants of the expiration of their rights on said land, and demanded releases, which appellees refused to do, to their damage as aforesaid; that they have been deprived and hindered from leasing said land to other parties, who had offered to pay them $12,000 for same in oil, and to drill two wells on said land at once; that said land is proved oil land, and that, by reason of their failure to drill offset wells to producing wells near said land, they have been damaged in the further sum of $10,000. They ask for a cancellation of the lease and all assignments and for judgment of $22,000 damages.

On January 14, 1925, the court, upon petition of appellees, entered an order requiring appellants to make their complaint more definite and certain. On January 21, 1925, appellee, W. H. Gilliland, filed a petition for a receiver, alleging that, before the institution of the suit, he entered upon this 40-acre tract and began the drilling of a well in search of oil and gas; that, at the time the suit was filed, said well was practically completed, and that, since the institution of the suit, he had completed said well and that same was producing approximately 400 barrels of pipe-line oil per day, and that he had been notified by the pipe-line companies they would be unable to continue running the oil produced from said well, due to the uncertainty of title, and that he was unable to erect storage tanks to care for the oil, and that, unless a receiver was appointed with authority to operate the well and protect the property from drainage, both appellants and he would suffer great injury. On the 22d day of January the court entered an order appointing a receiver, who qualified and took charge of said well.

By agreement of counsel on oral argument in this court, the record was amended to include a pleading called "amendment to complaint in equity," which was filed on February 2, 1925, but not included in the tran-

script, and which, with slight exception, is a repetition of the original complaint. By it they allege that they had been damaged in the sum of $50,000 for failure to drill offset wells to protect said land, and $24,000 for failure to clear the records of said lease and assignments.

On February 3, 1925, in compliance with the order of court to make more definite and certain, appellants filed an amendment to their complaint, describing all the land covered in said original lease, and alleging that a well—known as Hodges No. 1, had been completed on the southwest ¼ southwest ¼ northeast ¼ section 1, 16, 17, on August 1, 1923, with an initial production of 300 barrels. This well was located upon the 80-acre tract covered by the original lease in section 1, 16, 17; that Steel Oil Company and Gilliland drilled Hodges No. 1 on the northeast quarter southeast quarter northeast quarter section 12, 16, 17, beginning on July 24, 1923, and completing same on December 30, 1923, with an initial production of 15 barrels, and that said well has been abandoned, and that other wells, describing them, had been drilled on other land covered by the lease; that W. H. Gilliland drilled Hodges No. 1 on the land in controversy, permit for same having been issued on November 15, 1924, and was drilled after the term of the lease had expired.

They further allege that two parties had offered them $12,000 to be paid in oil for the 40-acre lease in question, provided the title was cleared. They further allege that a number of wells had been drilled on land near by the land in controversy, which had been in operation and producing oil for from ten days to two years; that there were about ninety-five (95) producing wells within one mile from the 40 acres in controversy, which had been producing for more than a year, and that the plaintiffs had been damaged in the sum of $10,000 for the royalty which they should have received, and which they have been deprived of receiving by reason of the fact that the oil on his land has been drained to these various other wells.

Appellees, on February 5, filed an answer admitting the ownership of the land and the making of the leases and assignments as set out in the complaint, but deny that it became the duty of any of the appellees to drill for oil on each of the individual parcels of land described in the original lease, but state that, within said five (5) year period, seven wells were drilled for oil and gas on the premises described in the original lease, and that, at the expiration of the said five (5) year period, five wells were producing oil on said premises, as set out in the amendment to the complaint filed herein, and that, by reason thereof, said lease, by its terms, continued in full force and effect, and will so continue so long as oil and gas, or either, is produced from said premises, or any part thereof. They deny that, by reason of the failure to produce oil on the said 40 acres within the five (5) year period, said lease expired on the first of October, 1924, and deny that the lease and assignments are a cloud on appellant's title. They deny that appellants have, at any time, before the filing of the suit, notified them that said 40-acre lease had forfeited or expired by virtue of the five (5) year period; that they were notified to execute releases thereto, and deny that appellants requested them or any of them to release same on the margin of the records; that appellants suggested and encouraged them to purchase the 40-acre lease in question, and that they were present at all times when preparations were being made to drill said well, which was commenced about October 8, 1924; encouraged the drilling of same, and that he continued until said well had been almost completed, when he filed this suit, without notice to either of them of his intention to do so. They enter appropriate denials to all the material allegations set out in the original and amendments to the complaint.

The action was set for trial on the 11th day of February, 1925, and on that date appellees filed a motion to transfer this cause to the law docket, for the reasons as alleged, (1), that this court is without jurisdiction to

hear the only material issue raised by the pleading, which is the alleged damages to the 40-acre tract in controversy, on account of the alleged failure to drill offset wells; (2), that only a partial breach of the original contract from appellants to Alexander is alleged, and that this court is without jurisdiction to determine that issue; and, (3), that the appellant had a complete and adequate remedy at law.

On February 13, 1925, the court made an order directing the receiver to file an accounting within 30 days, and to transfer the case to the law docket as soon as the receiver had accounted for all his acts, and appellants excepted.

Thereafter, on the 9th day of March, 1925, the receiver filed his report, which, over the objection of the appellants, was approved, and the cause was transferred to the law docket.

On March 11, 1925, appellants filed in the circuit court a motion to retransfer this cause to the court of equity, which motion was, on May 13, overruled by the court, and on November 27, 1925, appellants renewed their motion in the law court to retransfer this cause to equity, which was overruled, and counsel for appellants announced in open court that they would stand upon their motion and refuse to proceed further with the case. Thereupon the court ordered plaintiffs' complaint dismissed. From which comes this appeal.

Allyn Smith, for appellant.

Marsh, McKay & Marlin and *Powell, Smead & Knox,* for appellee.

McHANEY, J., (after stating the facts). Counsel on both sides of this case, in their very able briefs, have presented for our consideration some very interesting questions. Appellants contend that, where a lease is executed to several tracts of land by the terms of which the lessee is required to drill a well on said lands within a certain specified time, and thereafter the lessee assigns one of said tracts to another person, the assignee or the original lessee is bound, either by the express

or implied covenants contained in the original lease, to drill a well on such tract within such time, regardless of the fact that the original lessee or his assignees has drilled one or more wells on the other portions of the land contained in the original lease.

Appellants further contend that, in such a case, they may maintain an action in a court of equity to cancel such portion of the lease and the rights of all assignees claiming thereunder after the expiration of the time limited in the lease contract for drilling a well, on the ground that such tract has been segregated from the original lease by assignment, and is in the same situation as if such tract had been covered by a separate lease agreement between the lessor and original lessee.

Counsel for appellees contend that this is not true; that the drilling of a well by the original lessee or any assignee on any part of the lands originally leased, within the time limited in the lease, protects the whole of the leased premises and every part thereof, from forfeiture and cancellation for failure to drill on any other part of the leased premises that may have been assigned by the original lessee, and that therefore a suit in equity to cancel the 40-acre lease in controversy here, same being one of the three tracts originally leased, containing 200 acres, cannot be maintained, as it is a suit to cancel a part of the lease, and that therefore appellants' suit states no cause of action cognizable in equity, and that whatever cause of action he had remaining would be one at law for damages.

But we find it unnecessary in this case to decide these interesting questions. In the plaintiff's amended complaint filed on February 3, 1925, in compliance with the order of the court requiring the complaint to be made more definite and certain, it is alleged "that W. H. Gilliland drilled Hodges No. 1 on the northwest quarter of the northeast quarter of the southeast quarter of section 6, township 16 south, range 16 west, permit having been issued on November 15, 1924, and same having

been drilled after the term of the lease had expired," which is on the land in controversy.

It will therefore be seen that the appellants themselves say, on the face of their complaint, that the appellee, W. H. Gilliland, had drilled a well on the 40-acre lease in question after it is claimed by the appellants that the lease had expired. Without deciding in this case whether, under the terms of the lease, the appellee, W. H. Gilliland, who claimed title thereto through mesne conveyances from the original lessee, O. Alexander, was required to drill a well on this particular 40 acres within the five-year period limited in the lease, we think it would be manifestly unjust and inequitable for appellants to stand by, after October 1, 1924, and permit appellee Gilliland to enter upon the land and drill a well under the belief that he had the right to do so. The original complaint in this case was filed on November 24, 1924, nine days after they say the permit for the drilling of said well was issued, and manifestly after the drilling of a well on said 40 acres had been begun by Gilliland.

The lease was dated October 1, 1919, and the five-year period for drilling a well, if he was required to drill one on this particular 40 acres within that period of time, expired October 1, 1924. This was a provision in the lease for the benefit of the lessor, and one which he could waive. By permitting appellee, Gilliland, to enter upon said lease and begin the drilling of a well without taking any steps to prevent him from doing so, we hold that appellants waived the right to insist upon a forfeiture and a cancellation of the lease as to this particular 40 acres.

In the case of *Friar* v. *Baldridge*, 91 Ark. 137, 120 S. W. 991, this court said: "The law will strictly enforce the agreement of the parties as they have made it; but, in order to find out the scope and true effect of such agreement, it will not only look into the written contract which is the evidence of their agreement, but it will look also into their acts and conduct in the carrying out of the

agreement, in order to fully determine their true intent. It is a well-settled principle that equity abhors a forfeiture, and that it will relieve against a forfeiture when the same has, either expressly or by conduct, been waived. The following equitable principle formulated by Mr. Pomeroy has been repeatedly approved by this court: 'If there has been a breach of the agreement sufficient to cause a forfeiture, and the party entitled thereto, either expressly or by his conduct, waives it or acquiesces in it, and he will be precluded from enforcing the forfeiture, and equity will aid the defaulting party by relieving against it, if necessary.' 1 Pomeroy Eq. Jur. 452; *Little Rock Granite Co.* v. *Shall,* 59 Ark. 405; *Morris* v. *Green,* 75 Ark. 410; *Banks* v. *Bowman,* 85 Ark. 524; *Braddock* v. *England,* 87 Ark. 393." And this rule applies to lease contracts. The case of *Wales-Riggs Plantations* v. *Banks,* 101 Ark. 461, 142 S. W. 828, was a suit to cancel a lease contract entered into between the parties on the alleged ground of breach of various covenants in the lease between appellant and appellee. This court quoted from *Little Rock Granite Co.* v. *Shall, supra,* as follows: "Where there has been a breach of a contract of lease sufficient to cause a forfeiture, and the party entitled thereto, either expressly or by his conduct, waives it, equity will relieve the defaulting party from a forfeiture, unless the violation of the contract was the result of gross negligence, or was willful and persistent."

Inasmuch as the decision of this case rests upon the matters stated in the complaint, we have examined same carefully and failed to find any allegation that appellants notified appellee Gilliland that, unless he drilled a well on this 40-acre lease prior to October 1, 1924, he would declare the lease forfeited. Nor is there any allegation in the complaint that, prior to the time that appellee began drilling a well upon said lease, he warned him against doing so, on the ground that the time had expired, or any other ground. Appellants content themselves by alleging that, since the first day of October, 1924, they have notified the appellees that their

right to said lease had expired and notified them to execute proper releases to be filed and recorded, or to enter proper releases on the margins of the records upon which said leases and assignments had been recorded, and that defendants refused to do so. But this is far from saying that they gave them any notice prior to the beginning of drilling operations. The complaint was filed on November 24, and they may have given them notice the day the complaint was filed, as the allegation does not state any date the notice was given, except that it was since October 1, 1924.

But, even if appellants had given the notice prior to the expiration of the lease, or prior to the beginning of the drilling of a well, and thereafter, with knowledge of the fact, suffered the appellee, Gilliland, to enter upon said lease and begin the drilling of a well without doing anything more to prevent it, they should be held to a waiver of the right to insist upon a forfeiture.

The complaint therefore stated no cause of action cognizable in equity. It was a suit for damages in the law court. The chancellor properly transferred the cause to the circuit court, and the circuit court was correct in refusing to remand it to chancery, and, when appellants refused to proceed with the prosecution of their case in the circuit court, the court was right in dismissing the cause for want of prosecution.

The judgment of the circuit court is correct, and it is therefore affirmed.

Mr. Justice KIRBY dissents.

TAYS v. JOHNSON.

Opinion delivered March 7, 1927.

1. INFANTS—AGE—EVIDENCE.—Evidence *held* to show that a female plaintiff seeking to cancel deeds executed during minority was only 14 years old at the time first deed was executed.
2. INFANTS—REMOVAL OF DISABILITIES—INVALIDITY.—Under Crawford & Moses' Dig., § 5744, providing that disabilities of a female

minor under the age of 16 years cannot be removed, *held* that, where the evidence showed that plaintiff was less than 16 years of age when she executed two deeds, a previous order of court removing her disabilities was unauthorized, and she had a right to rescind and disaffirm the deeds at her majority.

3. INFANTS—RESTORATION OF CONSIDERATION.—A female minor seeking to cancel deeds executed by her when she was under 16 years of age need not restore the consideration received by her.

4. INFANTS—DISAFFIRMANCE OF DEEDS—RECOVERY OF RENTS.—In a suit by a minor to disaffirm her deeds executed during minority, she is entitled to rents from date of disaffirmance, which was the commencement of the suit.

5. INFANTS—DISAFFIRMANCE OF DEEDS—RIGHT OF GRANTEE TO TAXES AND IMPROVEMENTS.—In a suit by a minor to cancel deeds executed during minority, the grantee was entitled to set off taxes, repairs and improvements against plaintiff's claim for rents, and if the amount of such taxes, repairs and improvements is in excess of the rents, the grantee will be entitled to a judgment for the excess.

6. INFANTS—DISAFFIRMANCE OF DEEDS—VALUE OF IMPROVEMENTS.—The measure of the value of betterments is not their actual cost but the enhanced value they impart to the land, without reference to the fact that they were desired by the owner, or could not be profitably used by him.

Appeal from Woodruff Chancery Court, Southern District; *A. L. Hutchins,* Chancellor; reversed.

STATEMENT BY THE COURT.

Appellant is the daughter of W. V. Watson, who died intestate on or a short time prior to the 24th day of December, 1907, and is his only child and heir at law. Her mother died prior to the death of her father, in January, 1907. Her father was the owner of a house and ten acres of land in the Southern District of Woodruff County, which appellant inherited on his death. In her complaint she states that she was born on June 3, 1904, near Cotton Plant, Arkansas, and that, after her father's death, she lived with one T. J. Hanley, until a short time before she married her husband, Rodney Tays; that the appellee, P. S. Johnson, on the 21st day of June, 1918, when she was but fourteen years of age, procured her to execute to him a warranty deed to the

lands which she inherited from her father, and that the appellee, on the 18th day of August, 1920, when she was but sixteen years of age, procured her to execute another deed to him to the same lands; that there was no consideration for same, and that she was a minor when she executed each of said deeds, and that same are void and a cloud upon her title. She asks for a cancellation of the deeds and judgment against appellee for the use of the lands in the sum of $500 per year from June 21, 1918. The defendant entered a general denial, and alleged that the appellant was born on the 3d day of June, 1902; denied that appellee procured the execution of the deed in 1918, but that appellant solicited and procured the defendant to purchase the property under certain conditions set out in the answer; that, prior to the execution of said deed on June 21, the appellant secured the removal of her disabilities before the circuit court in the Eastern District of Craighead County, at Lake City, on petition of appellant, setting up all the necessary allegations to secure an order of removal of disabilities; that the court granted the petition and removed her disabilities as a minor and clothed her with authority to transact business, and that thereafter she executed the deed to the property in controversy for a consideration of $3,000, which was actually paid to her; that the appellant, if her complaint is true, practiced a fraud upon the appellee, and, through such fraud, procured from him the sum of $3,000 which was paid to her. Appellee made his answer a cross-complaint, and states that the property purchased by him was in a bad state of repair, and that the rental value thereof would barely pay the taxes and keep up the repairs; that, for the years he has been in possession as owner of the property, he had paid out approximately the sum of $450 in taxes, and that he has expended by way of improvements on same not less than $1,500, making a total of $1,950, which he is entitled to recover from appellant in the event she is successful in this suit.

Later appellee filed an amendment to his answer, which is not necessary to set out here.

Appellant was adopted by Mr. and Mrs. T. J. Hanley shortly after her father's death, and lived with them until she was married to a man named Tays. She was not related to the Hanleys, and, being very young when they took her, she apparently had no recollection of what transpired prior to her adoption by these people. The principal question presented for decision in this case is, was the appellant born on June 3, 1904, or June 3, 1902? Since this is to be determined only from an examination of the evidence, we will now proceed to do so.

Appellant testified that she was born on June 3, 1904, basing her statement upon what others had told her, including her uncle and aunt.

Mrs. Donnie Mitchell, the widow of Doc Mitchell, who was an uncle of appellant, testified that appellant's mother had died prior to the death of her father, and that appellant was born on June 3, 1904; that she was living about two miles from Mr. Watson when appellant was born, and that she had a daughter, Bessie, who was born just two months later, on the 3d of August; that she was at appellant's home a few hours after her birth, and naturally remembered that her daughter, Bessie, was born just two months to a day later; that both families were living on the York place, near Cotton Plant, at the time of her birth, about two miles apart; that her daughter, Bessie, was 20 on the 3d of August; that she has a family record of the birth of that daughter which shows her age; that they had a family Bible in which her husband, who had been dead about five years, had written the names and ages of their children; that, before appellant's father died, he sent them his family Bible, and that her husband wrote in this Bible the names and ages of appellant and her brothers and sisters; that these pages show that Bessie Lee Mitchell was born August 3, 1904, and that Birdie Lou Watson, appellant, was born June 3, 1904.

It is not denied that Doc Mitchell wrote the names and ages of these children in the Bible, and his handwriting was identified, nor that he had been dead about five years.

Mrs. R. R. Terry testified that she is the widow of J. M. York, on whose plantation appellant's father was married and appellant was born. She says that she knew appellant's father intimately before his marriage, as he was working there on the place for her husband, and he continued to live on the place after he was married; that, at the time appellant was born, she had rented the place to Mr. Watson, and was living in Forrest City; that she was not present at the birth, but was there a short time later, and spent two weeks. She testified positively, in answer to a question if she remembered when she was born, that "she was born in June, I don't know the day of the month, it was in June, 1904."

Carrie Williams, appellant's aunt by marriage, states that she had been living near Cotton Plant for many years, and that, at the time appellant was born, she was living on the York place about one mile from the Watsons; that appellant was born on June 3, 1904, and she remembers the date because her aunt had a daughter born two months to the day later. Her aunt was Mrs. Donnie Mitchell, the wife of Doc Mitchell, with whom she lived, and that she remembered the date of Bessie's birth to the hour; that she has seen the handwriting of Doc Mitchell in the family bible, and knows that he wrote the names and ages of his children and of Will Watson's, as shown therein.

Mark Carter testified that the appellant was born in 1904, in the spring or summer; that he does not remember the day or day of the month; that he was able to remember on account of his oldest boy being born in the fall after she was born in the spring; that he was living on the Squire Davis farm at the time of her birth, about five miles from Will Watson's home.

D. I. Carter testified that he had been living around Cotton Plant for the last thirty-five years, worked for

Will Watson for three years before appellant was born, and worked for him shortly afterwards; that appellant was born in 1904; that he made a crop there in 1903, left and moved up in Monroe County, came back to Cotton Plant and worked with his father, and went down to Mr. Watson's house in July, 1904, to get a job with him, which he did, and that appellant was a small baby, about a month old, at that time.

In addition to this, on the 24th day of April, 1911, T. J. Hanley filed a petition to be appointed as guardian for Birdie Lou Watson, in which he stated that she was six years of age, and in the bond accompanying the petition is the statement that Birdie Lou Watson was six years of age. This petition was filed on the 24th day of April, 1911, in the office of the clerk of the Woodruff Probate Court, and approved on that date. There is in evidence another petition signed by T. J. Hanley to be appointed guardian of appellant, dated the 16th day of April, 1908, in which he swore that she was only three years of age. It also appears in evidence that letters of guardianship were issued by the clerk of the Woodruff probate court to M. Z. Mitchell, in which it is stated that appellant was under five years of age, and this is dated January 6, 1908.

The testimony of appellee on this question, first by T. J. Hanley, who testified that he had known appellant since 1907, was living at Hunter at the time he obtained her from Doc Mitchell, and that Doc Mitchell told him at the time he got her she would be five years old the 3d day of June, and that Col. Decatur York went with him to Mitchell's to get her, and told him she was five years old on her birthday; that, about two years after this, he was appointed her guardian; that she went to school two years, two seasons, and after that he moved to Monette, where she went to school four straight years, and after that went to Paragould, where she went to school two years, and from Paragould to North Little Rock, where they stayed only four months, and from North Little Rock they went to Faulkner, Mississippi,

and stayed three months, and then bought a place and stayed there nearly four years; that he went from Paragould to Tuckerman, where she went to school eight months, and went back to Paragould, where she finished up her schooling, the last time, a year; that he moved to Mississippi in December, 1918, from North Little Rock, and from Mississippi back to Monette, and visited around about a year from one place to another. Appellant went to school at Faulkner, Mississippi, one year, and after she got out of school there she went to Calgabet Agricultural School, where she went three years, graduated, and received her diploma. After this she went to normal at Corinth one time, and at Booneville one time. These normals were six weeks.

Mrs. T. J. Hanley testified that they were living at Hunter at the time appellant came to live with them, and that, apparently, when she came there, she was five years old; she looked to be five, anyway, and that she was large enough to go to school one year from the time they got her. With respect to her schooling and the different places they lived, her testimony is somewhat corroborative of that of her husband, T. J. Hanley.

On cross-examination she testified that Col. York told them appellant was five or six years old about the time they took her; that, after they took her, they kept her two years behind her actual age because they wanted to keep her as long as they could, and never told her her age until this lawsuit came up; that she always thought she was born in 1904 until this matter came up.

Mr. O. H. Hurst, an attorney at Monette, testified that he was employed by Mr. Hanley to have appellant's disabilities removed, so that she could execute a deed to the appellee to the lands involved in this action, which was in 1918; that the data upon which he based the petition, which he later filed, was given by members of the family. She said at the time she was 16, but, at the time her petition was filed, she was past 16. When the petition was filed the appellant, Mr. and Mrs. Hanley, were all present. The court examined all of them, and the

petition was granted and her disabilities were removed by the order of the court. Witness thought she was telling him her correct age when she stated she was 16.

Appellee, P. S. Johnson, testified that he knew Will Watson, father of appellant, and that he rented the place in controversy from him and moved on the property on the 18th day of March, 1907, and at that time appellant was a good-sized child running around the place, and that he would judge her to have been five or six years old.

Bogle & Sharp, for appellant.

Roy D. Campbell, for appellee.

McHANEY, J., (after stating the facts). This is substantially all the evidence on either side regarding the age of appellant, and we are convinced that the overwhelming weight of the evidence shows that appellant was born on June 3, 1904, and that therefore appellant was only fourteen years of age when she signed the first deed in question, June 21, 1918, and that it is voidable at her instance, unless the circuit court had the right to and did remove her disabilities.

Section 5744 of Crawford & Moses' Digest provides that circuit courts shall have the power to remove the disabilities of a female person who is a resident of the county, and above the age of sixteen years.

The judgment of a circuit court removing the disabilities of a female minor under the age of fourteen years is void and is open to collateral attack. *Doles* v. *Hilton,* 48 Ark. 305, 3 S. W. 193.

Referring to the decision in *Doles* v. *Hilton, supra,* this court, in *Dalton* v. *Bradley Lumber Co.,* 135 Ark. 392, 205 S. W. 695, said: "The necessary effect of this decision is that no testimony could have been heard or showing made which would have authorized the court to remove the disabilities of these minors, and the action of the court in doing so was *coram non judice.* The proceeding is as void as if there had been no statute on the subject, because the statute has no application to minors under the age of fourteen."

The statute has, since this decision, been changed to fix the age limit of females at sixteen years, at which their disabilities may be removed.

We cannot therefore agree with appellee in stating that the facts and circumstances shown by the testimony in this case, when viewed from any reasonable and impartial standpoint, disclose conclusively that the appellant was not less than sixteen years of age when her disabilities of minority were removed, but, on the contrary, we are convinced that the overwhelming weight of evidence was to the effect that she was only fourteen years of age, and that the act of the circuit court in removing her disabilities at such age was "*coram non judice.*"

If therefore the act of the circuit court in making an order removing her disabilities when she was only fourteen years of age was void, which we now hold, it follows that the deed she executed on the 21st day of June, 1918, was voidable, as was also the second deed she executed on the 18th day of August, 1920, for on that date she was only sixteen years, two months and fifteen days old, and that therefore she had the right to rescind and disaffirm her deeds to said property, which she did by the bringing of this action within the time prescribed by law, after arriving at her majority.

The next question for determination is whether appellant must restore the purchase price of $3,000 on the cancellation of her deeds. We hold, under the evidence in this case, she is not required to do so. This court, as was said in the case of *Arkansas Reo Motor Car Co.* v. *Goodlet,* 163 Ark. 35, 258 S. W. 975, is firmly committed to the rule "that an infant may disaffirm his contracts, except those made in the course of his necessities, notwithstanding the other parties may be unaware of the infant's disabilities, and without requiring the infant to return the consideration received, except such part as may remain in specie in his hands."

In the case of *Bickle* v. *Turner,* 133 Ark. 536, 202 S. W. 703, this court said: "It is insisted, however, that, even if the court erred in this respect, the relief asked for by

appellant should not be granted unless there is a restoration of the consideration. The evidence shows that the infant had spent the money received by him for the land, and if he should be required, under such circumstances, to restore the consideration as a prerequisite to avoid the contract, the protection given to an infant by the disabilities of minority would be seriously impaired and might often be destroyed. The reason that the contracts of a minor are voidable is because he is supposed to be improvident and likely waste what he has received." *Beauchamp* v. *Bertig*, 90 Ark. 531, 119 S. W. 75, 23 L. R. A. N. S. 659; *St. L. I. M. & S. R. Co.* v. *Higgins*, 44 Ark. 239; *Stull* v. *Harris*, 51 Ark. 294, 11 S. W. 104; *Fox* v. *Drewry*, 62 Ark. 316, 35 S. W. 533; *Tobin* v. *Spann*, 85 Ark. 556, 109 S. W. 534, 16 L. R. A. N. S. 672; *Barker* v. *Fuestal*, 103 Ark. 312, 147 S. W. 45.

The only remaining question for consideration, in addition to the cancellation of the deeds executed by her while she was yet a minor, is the matter of an accounting between appellant and appellee as to the rents and profits due to her, and the taxes, repairs and improvements paid out by him. As was said by this court in *Tobin* v. *Spann*, 85 Ark. 556, 109 S. W. 534: "The contract of an infant is not void, but only voidable. He is therefore only entitled to a judgment for rents from the date of his disaffirmance of the contract. In this case the disaffirmance was the date of the commencement of the action."

This is likewise true in this case. Appellant is only entitled to the rents from the date of her disaffirmance of the deeds, which was the date of the commencement of this action. *Brown* v. *Nelms*, 84 Ark. 404, 112 S. W. 373; *Beauchamp* v. *Bertig*, 90 Ark. 371, 119 S. W. 75; *Arkansas Reo Motor Car Company* v. *Goodlett*, 163 Ark. 39, 258 S. W. 975.

As was also held in *Tobin* v. *Spann*, and in numerous other cases, under the betterment act, appellee is entitled to taxes, repairs and improvements, and he may offset these with rents accruing since the bringing of this suit.

The decree of the chancery court is therefore reversed, and the cause is remanded with directions to enter a decree canceling the deeds executed by appellant on the 21st day of June, 1918, and upon the 18th day of August, 1920, and to determine the amount of rents accruing since the bringing of this action, and to offset same with the taxes, repairs and improvements expended by him on said property.

McHANEY, J., (on rehearing). We adhere to our original opinion in this case, but counsel suggests that the opinion should be so modified as to more clearly state the rule governing the right of appellee to recover for repairs, taxes and improvements.

We thought we had made it definite and certain in the original opinion, but, in order that there may be no misunderstanding, we state it here again, that the appellant is entitled to recover rents from the date of her disaffirmance of the deeds, which was the date of the commencement of this action; and that the appellee is entitled to recover all of the taxes he has paid, repairs and improvements; and if the amount of taxes, repairs and improvements is in excess of the rents, appellee would be entitled to a judgment against appellant for the excess. As to what is meant by the term "repairs and improvements," this court has said, in the case of *Greer* v. *Fontaine*, 71 Ark. 608, 77 S. W. 57, that "the measure of the value of betterments is not their actual cost, but the enhanced value they impart to the land, without reference to the fact that they were desired by the true owner, or could not be profitably used by him." Bouvier's Law Dictionary. Continuing, the court said: "This definition is that given substantially in all jurisdictions having statutes like ours. Sometimes we say the improvements must be permanent, and not merely temporary. The idea seems to pertain that the improvements are such as will add to the value of the land as it shall come into the occupancy and use of the true owner, for he is the person required to pay for them, although they have been made without his consent."

The lower court will therefore determine the amount appellee is entitled to for taxes, repairs and improvements, and subtract from that the amount appellant is entitled to for rents, and render judgment for appellee for the excess.

The petition for rehearing is denied.

STATE EX REL. ATTORNEY GENERAL v. CHICAGO LAND & TIMBER COMPANY.

Opinion delivered March 7, 1927.

1. CORPORATIONS—REGULATION BY STATE.—The State has the right to prescribe the terms on which foreign corporations may do business in the State by making them subject to regulations, limitations and liabilities imposed on domestic corporations, as provided by Const., art. 12, § 11.
2. TAXATION—VALIDITY OF CORPORATION FRANCHISE TAX.—A foreign corporation authorized to do business in the State may be required to pay a franchise tax in a suit by the State, though the corporation was not actually doing business in the State.
3. TAXATION—FRANCHISE TAX NOT PROPERTY TAX.—The franchise tax upon foreign corporations doing business in the State, being based on the proportion of their capital stock represented by property owned and used in business transacted in this State *held* not a tax upon corporate property.
4. TAXATION—FOREIGN CORPORATION—AMOUNT OF FRANCHISE TAX.—A foreign corporation, having a capital stock of $450,000, may be taxed on the basis of such capital stock, though its total property was of the market value of $92,500, where all of its property was situated within the State, under Crawford & Moses' Dig., § 9804, imposing a franchise tax based on the amount of subscribed and outstanding capital stock of the corporation represented by property owned and used in business transacted in the State, and it is immaterial that the capital stock exceed the value of the corporation's property.

Appeal from Saline Chancery Court; *W. R. Duffie,* Chancellor; reversed.

H. W. Applegate, Attorney General, *W. H. Childers,* and *Sam M. Wassell,* special counsel, for appellant.

Brouse & McDaniel, for appellee.

McHANEY, J. This is an action by the State of Arkansas, on relation of her Attorney General, to recover the amount of franchise tax due the State by appellee for the years 1920, 1923, 1924 and 1925. The complaint alleges that the defendant is a foreign corporation organized under the laws of the State of Illinois; that, many years ago, the defendant was authorized to transact business in this State as a foreign corporation, and paid all the corporation franchise taxes up to and including the year 1919; that the defendant filed its report for the year 1920, and was assessed with a franchise tax of $450 for that year, but did not pay same; that for 1921 and 1922 the tax was paid; that for the years 1923, 1924 and 1925 the defendant failed and refused to file a report, failed to pay the amount of tax, and that a penalty of twenty-five per cent. on the amount of tax due, $450 for each of said years, has attached by reason of the failure to pay, and as provided by law, for which it asks judgment, and that same be declared a lien on the property of the defendant, that same be foreclosed, and the charter of the defendant revoked.

Appellee filed an answer, denying that it was a foreign corporation under the laws of the State of Illinois, but it admits that, some years ago, it was authorized to do business in the State of Arkansas, and it admits that it paid all franchise taxes except for the years 1920, 1923, 1924 and 1925, as alleged in the complaint, but denies that it was doing business in the State of Arkansas during said years, or that there were any franchise taxes due to the State for said years.

Further answering, the defendant stated that it is a corporation organized under the laws of the State of Delaware, and that all of the property owned by it in the State of Arkansas did not, for any of said years, exceed in value the sum of $92,500, and that the taxes sought to be imposed are excessive, without authority of law, would amount to a confiscation of defendant's property without due process of law, and is in violation of both the Constitution of the State of Arkansas and of

the United States; that its capital stock has been reduced by payment of dividends and expenses so that its only property in this State and its only assets of any character outside of this State consist of lands in Grant, Jefferson and Cleveland counties, Arkansas, not exceeding $92,500, so that its capital stock is now only worth said sum, and that to impose taxes as asked would deprive defendant of its property without due process, in violation of article 5, and § 1 of article 14, of the amendments to the Constitution of the United States, and § 31 of article 5 of the Constitution of Arkansas, and to annul its license or collect such tax would do it an injustice, in violation of § 6, article 12, of the Constitution of Arkansas, and such tax would also violate § 5 of article 16 of the Constitution of Arkansas, all of which are pleaded in bar of plaintiff's action; that the taxes sought to be imposed are not equal and uniform throughout the State, and are in violation of § 5, article 16, of the Constitution of the State of Arkansas; that the defendant erroneously paid the franchise taxes for the years 1921 and 1922 in the sum of $450 each year, when it did not owe the State such taxes, or, if it did, the taxes for said years should not have exceeded $92.50 each, and, on account of that, the State is indebted to the defendant in the sum of $357.50 for each of said years, for which defendant is entitled to a credit upon whatever taxes it may owe, if any, or to a judgment against the State. It prays that the complaint be dismissed for want of equity, for an offset as aforesaid, if the court should find that there is a franchise tax due by it on the value of its property, and for a judgment against the State upon any amount found to be due by virtue of its overpayment.

The case was tried on agreed statement of facts, which is as follows:

"That the Chicago Land & Timber Company is a foreign corporation organized and existing under the laws of Delaware and domesticated in this State in 1915; that its authorized capital stock for the years 1920, 1923, 1924 and 1925 is and has been $450,000. The amount of

capital stock subscribed $450,000, amount of capital stock issued and outstanding $450,000, the amount of capital stock paid up $450,000; that all of the assets of the defendant are located in the State of Arkansas. The market value of all the property of the defendant is $92,500. It is further agreed that the defendant has not been actively engaged in business, and its property consists largely of cutover land lying and being situated in Cleveland, Grant and Jefferson counties, and said land is for sale by the defendant, and that the company has no agents in Arkansas authorized to sell said lands, and the lands which have been sold were sold and conveyed from Chicago, Illinois.

"It is agreed that the defendant filed franchise tax report for the year 1920, and the tax was assessed by the State Tax Commissioner at the sum of $450, which has not been paid (and) it became delinquent. That for the years 1923, 1924 and 1925, the defendant has failed to make the franchise tax report. That for the years 1923 and 1924 the tax is assessed at the rate of one-tenth of one per cent. of the issued and outstanding stock, and for the year 1925 the statute prescribes tax of eleven hundredths of one per cent. on the capital stock issued and outstanding for the year 1925. That on February 24, 1917, the defendant sold the timber from its land at $267,500, and the timber was thereafter cut and the proceeds of said timber were distributed among the stockholders of the defendant company. The defendant also made a few other minor sales from time to time since then, which sales were consummated at Chicago, Illinois, at or about the same time of the timber sale in the year 1917. The defendant also sold the sawmill, the railroad and equipment which it had acquired, and since that time its actual assets have been said amount of $92,500, and since that time, where reports have been filed, the property has been valued at said sum of $92,500. That for the years 1915, 1916, 1917 and 1918 the defendant paid tax, and settlement was had in 1920 covering the franchise tax for all of said years; that the defendant filed reports for

1920, 1921, and the tax was assessed at $450 for each year, and the tax paid for 1921 and 1922.

"Copy of charter introduced in evidence."

The court found that the defendant was a foreign corporation under the laws of Delaware, and domesticated in this State in the year 1915; that the defendant is not engaged in business in the State of Arkansas, and therefore is not required to file reports or pay any franchise tax whatever in the State of Arkansas, and has not been so required during any of the periods set out in the complaint herein. A decree was entered dismissing the plaintiff's complaint for want of equity, from which comes this appeal.

It is the contention of appellee that this appeal presents two questions: (1) Was the appellee doing business in the State of Arkansas? (2) If so, what amount of tax is due?

It admits that it had a franchise or authority to do business in this State for the years mentioned, but denies that it did any business under said franchise within the meaning of the act requiring foreign corporations to make report and pay the tax.

Section 9802 of Crawford & Moses' Digest reads as follows:

"Each foreign corporation doing business in this State, for profit, and owning or using a part or all of its capital or plant in this State, and subject to compliance with all other provisions of law, and, in addition to all other statements required by law, shall make a report in writing to the Arkansas Tax Commission annually, on or before June 1. Act March 3, 1913, p. 518, No. 4."

This section was amended by § 5 of act 236, in 1925, so as to require the making of the report on or before March 1, instead of June 1. By § 9803 the form of the report is provided for. By § 9804 the Railroad Commission is directed to determine from the report the proportion of the authorized capital stock of the corporation represented by its property and business in this

State on or before July 1, and shall report the same to the Auditor of State, or shall charge and certify to the Treasurer of State on or before July 10, for collection, "annually from said corporation, in addition to the initial fee otherwise provided by law, for the privilege of exercising its franchise in this State, a tax of one-tenth of one per cent. each year upon the proportion of the subscribed, issued and outstanding capital stock of the corporation represented by property owned and used in business transacted in this State. Act February 15, 1917, p. 392, § 2."

By § 9810 it is provided that such tax shall be due and payable on or before August 10, each year. It is further provided in said section that, if any corporation shall refuse to pay, on or before the 10th of August, the taxes assessed against it, the Treasurer shall certify a list of the delinquents to the Auditor of State, who shall add to the tax a penalty of twenty-five per cent. thereon, and certify same to the Attorney General, who shall proceed forthwith to collect the same.

By § 9812 the taxes and penalties required to be paid by the provisions of this act shall become a first lien on all the property of the corporation, and by § 9813 it is provided that "if a corporation organized under the laws of Arkansas, or any foreign country authorized to do business in this State for profit, and which is required to file the record (report) and pay the tax as prescribed in this act, fails or neglects to make any such report, or to pay such tax, for thirty days after the expiration of the time limited by this act, and such default is willful and intentional, the Attorney General * * * shall bring an action in the circuit court of Pulaski County, or any other county in this State, * * * to forfeit and annul the charter of such corporation. If the court is satisfied that such default is willful and intentional, it shall revoke and annul such charter."

It will thus be seen that a foreign corporation is required, "for the privilege of exercising its franchise in this State," to pay a franchise tax of "one-tenth of

one per cent. each year upon the proportion of the subscribed, issued and outstanding capital stock of the corporation represented by property owned and used in business transacted in this State."

Section 11 of article 12 of the Constitution of the State of Arkansas provides: "Foreign corporations may be authorized to do business in this State, under such limitations and restrictions as may be prescribed by law. Provided, that no such corporation shall do any business in this State except while it maintains therein one or more known places of business and an authorized agent or agents in the same, upon whom process may be served; and, as to contracts made or business done in this State, they shall be subject to the same regulations, limitations and liabilities as like corporations of this State, and shall exercise no other or greater powers, privileges or franchises than may be exercised by like corporations of this State, nor shall they have power to condemn or appropriate private property."

The State has the right to prescribe the terms and conditions upon which foreign corporations may be authorized to do business in this State, "subject to the same regulations, limitations and liabilities as like corporations of this State, and shall exercise no other or greater powers, privileges or franchises than may be exercised by like corporations of this State." *Hartford Insurance Co.* v. *State,* 76 Ark. 312, 89 S. W. 42.

In the case of *St. Louis S. W. Ry. Co.* v. *State,* 106 Ark. 326, 162 S. W. 112, this court said: "Our court has held that a corporation owes its existence to the State, and the right to enjoy this privilege is a subject of taxation, and that upon the power of the Legislature to impose such a tax there exists no restriction in our Constitution. In the case of a foreign corporation, the tax or license is paid for the privilege of exercising its corporate powers in the State;" citing *Baker* v. *State,* 44 Ark. 138, and cases cited therein.

It is not contended by the appellee that the act authorizing and directing the collection of a franchise tax

is unconstitutional, but its contention is that it is not doing business in the State, and therefore is not subject to the tax. The answer to that proposition is that the tax is not based upon the doing of business in the State, but the right or privilege of doing business in the State. And it is further urged by the appellee that it is a tax upon its corporate property. In the case just cited the court said: "In the case of *Standard Underground Cable Company* v. *Attorney General,* 46 N. J. Eq. 270, 19 Am. St. Rep. 394, the question as to whether a certain license tax imposed upon the corporation was a tax upon corporate property was involved. The corporation insisted that the tax was a violation of that provision of the Constitution of New Jersey which provides 'that all property shall be assessed for taxation under general laws and by uniform rules according to its true value.' The court said: 'The fault of this position is the assumption that this tax is one upon property. Such, manifestly, is not the case. The law in question imposes a tax on certain corporations by way of a license for exercising corporate franchises. It is declared to be such tax by the act, and, although it is laid on this class of corporations with respect to the capital stock, the tax possesses the legal quality of a license or franchise tax;' " citing cases.

We are therefore of the opinion that the tax in question was a valid exercise of the powers of the State, and was intended to be a tax on "the privilege of exercising its franchise in this State" and is to be based on "the proportion of the subscribed, issued and outstanding capital stock of the corporation represented by property owned and used in business transacted in this State." It is agreed that the issued, outstanding and paid-up capital stock of appellee was, at all times, $450,000, and that it was all invested in property in the State of Arkansas, and that no part of its capital was invested outside of the State of Arkansas. Therefore the appellee was liable to pay the State a franchise tax based upon this amount of capital stock.

Appellee urges that, since it is agreed that the total value of its property owned in this State is the sum of $92,500, its franchise tax, if any should be assessed, should be based upon this amount, and not upon the amount of its authorized, issued and outstanding capital as shown by its articles of incorporation. But the answer to this is that the State has fixed another basis for the determination of its franchise tax, and it is immaterial to the State whether its property is of the value of its capital stock. The State cannot be required to appraise the property holdings of a corporation to determine whether the value of its holdings is equal to or in excess of its capital stock.

If the appellee desires to avoid the payment of its franchise tax in this State, it may do so by surrendering to the State its franchise or right to do business herein, and either hold its property in its own name, or transfer it in trust to another to be held for it. But, so long as it holds its franchise and has from the State of Arkansas the right to do business herein, it is liable for the tax. Having failed to pay same within the time provided by law, it became liable to the State therefor, plus the the penalty of twenty-five per cent. as provided in the statute, and the State has a lien upon all of its property in this State to enforce the collection of same.

The decree of the chancery court is therefore reversed, and remanded with directions to enter a decree in accordance with the prayer of the complaint. It is so ordered.

HARRIMAN NATIONAL BANK v. POPE COUNTY.

Opinion delivered March 14, 1927.

1. COUNTIES—WARRANTS NOT NEGOTIABLE.—County warrants are evidences of the indebtedness of a county, being orders on the county treasurer to pay out of county funds, but are not negotiable instruments in the sense of the law merchant, and the transferee takes them subject to defenses existing in the hands of the payee.
2. COUNTIES—EFFECT OF CANCELLATION AND REISSUANCE.—Since county warrants are not negotiable instruments, the cancellation of warrants originally issued and substitution of others therefor do not change their character.
3. COUNTIES—FACE OF WARRANT AS NOTICE.—The face of a county warrant is notice to the holder that its validity depends upon the validity of its issue.
4. COUNTIES—EFFECT OF ALLOWANCE OF CLAIMS.—A county court, in the allowance of claims against the county, acts judicially, and its judgments are not open to collateral attack except for fraud or lack of jurisdiction.
5. COUNTIES—WARRANTS IN PAYMENT OF INTEREST.—County warrants issued in payment of interest on debts of the county, evidenced by county warrants, were issued contrary to Const., art. 16, § 1, prohibiting issuance of interest-bearing evidences of debt, and were illegal and void.
6. COUNTIES—WARRANTS—INNOCENT HOLDER.—There can be no innocent holder of paper issued by a county in violation of law, or where the county was without power to issue it.

Appeal from Pope Circuit Court; *J. T. Bullock*, Judge; affirmed.

STATEMENT OF FACTS.

Pursuant to an order of the county court of Pope County, calling in all outstanding warrants for reissuance, the Harriman National Bank presented county warrants Nos. 47 and 48, each for the sum of $1,000, for reissuance. These warrants were disallowed and ordered canceled by the county court, and the Harriman National Bank duly prosecuted an appeal to the circuit court.

According to the testimony of the county judge of Pope County, holders of county warrants of Pope County, of the face value of $48,000, presented the same to the county court to be reissued on November 2, 1923. Forty-

five thousand dollars of these warrants were reissued by the county court as being valid claims against the county. Warrants of the face value of $3,000 were ordered canceled on the ground that they had been illegally issued in the first place. Warrants in the sum of $3,000 had been issued as a payment of interest for one year on the warrants of the face value of $45,000 which had been legally issued. The warrants for $2,000 involved in this suit are a part of the warrants issued for interest on the $45,000 indebtedness of Pope County. The warrants in question are Nos. 47 and 48, and the county judge knew that they were two of the warrants given as a payment of interest on the $45,000 indebtedness.

The circuit court found the facts substantially as above stated, and held that the county was not liable. Judgment was accordingly rendered in favor of the county, and the claim of the Harriman National Bank was dismissed. To reverse that judgment the Harriman National Bank has duly prosecuted an appeal to this court.

Abner McGehee, for appellant.

Hays, Priddy & Rorex, for appellee.

HART, C. J., (after stating the facts). The judgment of the circuit court was correct. Under article 16, § 1, of our Constitution, counties are expressly prohibited from issuing any interest-bearing evidence of indebtedness except in certain cases which are not necessary to a decision of the issues raised by the present appeal. County warrants are evidences of the indebtedness of a county. They are orders upon the treasurer of the county to pay out of its funds for county purposes, not otherwise appropriated, the amount specified. They are not negotiable instruments in the sense of the law merchant, and the transferee takes them subject to all legal and equitable defenses which exist to them in the hands of such payee. The cancellation of the warrants originally issued and the substitution of others in their place does not change their character. The face of the warrant is notice to the

holder that its validity depends upon the legality of its issue. *Vale* v. *Buchanan,* 98 Ark. 299, 135 S. W. 848; *Wall* v. *Monroe County,* 103 U. S. 74; and *Bank of Commerce* v. *Huddleston,* 172 Ark. 199, 291 S. W. 422. This court has also held that a county court, in the allowance of claims against the county, acts judicially, and its judgments are not open to collateral attack, except for fraud or lack of jurisdiction. *Monroe County* v. *Brown,* 118 Ark. 524, 177 S. W. 40.

The circuit court was justified, under the evidence adduced, in finding that the warrants involved in this appeal were issued in payment of interest on the $45,000 indebtedness of the county, evidenced by county warrants. The warrants in question were therefore issued in contravention of the section of the Constitution above referred to, and were illegal and void. Under the authorities cited there can be no innocent holder of paper issued by a county without power or in violation of law. The reason for the rule is that counties derive all their powers from public law, and persons taking their paper must, at their peril, ascertain the extent of their contracting powers and the limitations upon them.

The result of our views is that the warrants in question were illegal and void, and the circuit court properly sustained the judgment of the county court refusing to reissue them. The judgment will therefore be affirmed.

SELZ *v.* PAVING DISTRICT NO. 1 OF MCGEHEE.

Opinion delivered March 21, 1927.

1. MUNICIPAL CORPORATIONS—PRELIMINARY PETITION FOR IMPROVEMENT.—The foundation of a municipal improvement district is a petition of ten owners of real property situated in the proposed district, and the provisions of the statute relative thereto are mandatory.
2. MUNICIPAL CORPORATIONS—VALIDITY OF PRELIMINARY PETITION.—A proceeding for a paving improvement was not rendered invalid because the first petition asked that the cost of the improve-

ment be assessed by the front foot rule, as such request was surplusage.

3. MUNICIPAL CORPORATIONS—NECESSITY OF PRELIMINARY PETITION FOR IMPROVEMENT.—The statutory requirement that the preliminary petition for a municipal improvement district be signed by ten owners of real property and describe the boundaries of the district, so that it may be easily distinguished, is essential to the jurisdiction of the city council.

4. MUNICIPAL IMPROVEMENT—MODE OF ASSESSING BENEFITS.—Assessment of benefits for paving improvements cannot be made by the front foot rule, but all proper elements of benefits, including frontage of the property, should be considered by the assessors.

5. MUNICIPAL CORPORATIONS—IMPROVEMENT DISTRICT—NOTICE TO PROPERTY OWNERS.—A proceeding for an improvement is not void because the notice to the property owners of the filing of the second petition was signed by the mayor and attested by the recorder, instead of being signed by the recorder alone.

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

STATEMENT OF FACTS.

Appellants brought a suit in equity against Paving District No. 1 of McGehee, one of the appellees, to enjoin it from proceeding further in the matter of the sale of bonds or with the work of constructing the improvement. Appellants brought a similar suit against the Curb and Gutter, Storm Sewer and Street Crossing District No. 1 of McGehee. The same issues are involved in the two suits, and they were consolidated for the purposes of trial.

It is alleged that the establishment of the improvement district was void because the first, or preliminary, petition contains the provision that the cost be assessed against the real property in the district on a front-foot basis. It is further alleged that the notice to the property owners required to be given by the statute was signed as follows: "P. L. Neville, mayor. Attest: Mrs. E. E. Durain, recorder," when it should have been signed merely by the recorder or city clerk. Each appellee admitted in its answer these allegations of the complaint. They also set up a state of facts showing that they had

complied with the statutes in all substantial respects in forming the improvement districts. It further alleged a state of facts showing that all proper elements of benefits were given due consideration in the assessment of benefits.

Appellants filed a demurrer to the answer, which was overruled. Thereupon appellants announced that they would stand upon their demurrer, and refused to plead further. Whereupon the court found that the complaint in each of said cases should be dismissed for want of equity. It was decreed that the complaint in each case should be dismissed for want of equity, and the case is here on appeal.

Charles Jacobson, for appellant.

P. S. Seamans, Robinson, House & Moses and *A. A. Poff,* for appellee.

HART, C. J., (after stating the facts). This court has held that the foundation of the improvement is the petition of ten owners of real property situated in the proposed district, and that the provisions of the statute are mandatory and jurisdictional. *Board of Improvement District No. 60* v. *Cotter,* 71 Ark. 556, 76 S. W. 552; *Kraft* v. *Smothers,* 103 Ark. 269, 146 S. W. 505; *Smith* v. *Imp. Dist. No. 14 of Texarkana;* 108 Ark. 141, 156 S. W. 455, 44 L. R. A. N. S. 696; and *Bell* v. *Phillips,* 116 Ark. 167, 172 S. W. 864.

Under the averments of the answer, which are admitted by the demurrer, the provisions of the statute with regard to the filing of the preliminary, or first, petition were complied with, but it is contended that the proceeding was rendered void because the first petition asked that the cost be assessed against the property on a front-foot basis, which is contrary to our Constitution on the subject, as construed in *Little Rock* v. *Katzenstein,* 52 Ark. 107, 12 S. W. 198, and later decisions of this court. We do not agree with counsel in this contention. It is true that the provision of the statute requiring the preliminary petition to be signed by ten owners of real property and to describe the boundaries of the district, so that it may

be easily distinguished, is essential to the jurisdiction of the council in laying out the district, and that these facts must appear or the proceedings will be void. The provisions of the statute are in the nature of conditions precedent to the right to lay off the improvement district, and must be obeyed or the proceedings will be adjudged invalid, when properly brought before the courts for review. The statute under consideration does not contain any requirement as to how the assessment of benefits shall be made. Under our Constitution, the assessment of benefits cannot be made on what is commonly called the front-foot rule, but all proper elements of benefits, including the frontage of the property, its valuation, including the valuation of the buildings, etc., must be considered by the assessors in compliance with the principles of law laid down in *Kirst* v. *Street Imp. Dist. No. 120,* 86 Ark. 1, 109 S. W. 526, and later decisions of this court.

According to the averments of the answer, in assessing the benefits, the fact that the first petition asked that the benefits be assessed according to the front-foot rule should be treated as surplusage. It had no proper place in the first petition, and was not in any sense essential to be alleged in order to give the council jurisdiction to lay out the improvement district. It was the duty of the council to lay out the district when the preliminary, or first, petition required by the statue was filed with it. It knew that the Constitution provided in what manner the benefits should be assessed, and that the provision of the Constitution could not be disregarded in assessing benefits. Therefore the provision of the Constitution would be considered as controlling in the premises, and the allegation of the petition that the benefits should be assessed according to the front-foot rule would be of no avail. It had no proper place in the preliminary petition for the improvement, for the reason that the statute prescribed what its contents should be, and anything not required to be stated should be treated as surplusage. *Deane* v. *Moore,* 112 Ark. 254, 165 S. W. 639.

Again, it is insisted by counsel for appellants that the decree should be reversed because the notice to the property owners was signed by the mayor and attested by the recorder, when the statute provides it should be given by the recorder. The object of the statute in giving notice to the property owners that the second petition, which is required to be signed by a majority in value of the owners of real property in the district, is for the benefit of the property owners. It notifies them that the second petition will be presented to the council, and gives them an opportunity to oppose it. The requirement of the statute that the city clerk or recorder shall publish the notice was doubtless made because it was the duty of such clerk to keep the records of the city council, and, as the custodian of such records, he would be the proper person to give the notice. In the case at bar, the notice was signed by the mayor and attested by the city clerk. This was a substantial compliance with the statute. It was not necessary for the mayor to sign the notice, but the fact that he did sign it did not vitiate it, and it should be treated as surplusage. The notice was mandatory and jurisdictional, as held in *Crane* v. *Siloam Springs,* 67 Ark. 30, 55 S. W. 955, but it was substantially complied with when it was signed by the clerk. When it was so signed, this imported verity to it, and the property owners would be bound by what it contained, notwithstanding the fact that it was also signed by the mayor.

The result of our views is that the decree of the chancery court in each case was correct, and it will therefore be affirmed.

BACHARACH v. SPRIGGS.

Opinion delivered March 21, 1927.

1. EXECUTORS AND ADMINISTRATORS—POWER TO SELL LAND.—An executor derives his power from the will, and, if it authorizes him to sell lands, he may do so without an order of the probate court.
2. EXECUTORS AND ADMINISTRATORS—AUTHORITY OF FOREIGN EXECUTRIX.—An executrix qualified and acting under authority of a will executed in another State *held* authorized to sell land in Arkansas as directed by the will.
3. SPECIFIC PERFORMANCE—WHEN DENIED.—When a foreign executrix exercised a power under the will to sell Arkansas lands, the chancellor properly dismissed, for want of equity, a complaint for specific performance of a contract made by a local administrator for the sale of such lands.
4. DISMISSAL AND NONSUIT—RETAINING JURISDICTION FOR COMPLETE RELIEF.—Where parties, suing for specific performance of a local administrator's contract to sell real property, secured a deed from the administrator, which constituted a cloud on defendant's title, the court properly retained jurisdiction, on dismissing the complaint, to cancel such deed as prayed in the cross-complaint.
5. CANCELLATION OF INSTRUMENTS.—Devisees, conveying their interest in realty by warranty deed, could proceed with a cross-bill for cancellation of an administrator's deed from a local administrator, in a suit for specific performance of the latter's contract of sale.

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

STATEMENT OF FACTS.

E. M. Bacharach and L. K. Grauman brought this suit against Ed Spriggs, as administrator with the will annexed of the estate of W. L. Scott, deceased, Laura Walton, Charlotte Tyler and Ruby Lee Scott, for the purpose of obtaining specific performance of a contract for the sale of real estate situated in the city of Helena, Phillips County, Arkansas. The defendants, Laura Walton, Charlotte Tyler and Ruby Lee Scott, filed an answer, in which they asserted title in themselves, and, by way of cross-complaint, asked to cancel and set aside a deed of conveyance from Ed Spriggs, administrator as aforesaid, to the plaintiffs in the suit.

The record shows that W. L. Scott died testate in the State of Colorado, and, at the time of his death, owned certain real estate in the city of Helena, Phillips County, Arkansas. Under § 4 of his will, his property in the city of Helena, in Phillips County, Arkansas, is specifically described, and the section concludes as follows: "It is my will that all of this property be sold to the best advantage, and that my beloved wife, Ruby Lee Scott, have one-third of the net proceeds in money, and that my sister, Charlotte Tyler, have one-third of the net proceeds in money, and that my stepdaughter, Laura Walton, have one-third of the net proceeds in money." The fifth clause of the will is as follows: "I hereby make, constitute and appoint my beloved wife my executrix in this my last will and testament, and authorize her to act in the same without having to give any bond."

Ruby Lee Scott was the wife, Laura Walton the daughter, and Charlotte Tyler, the sister, of W. L. Scott, deceased. Ruby Lee Scott, his widow, qualified as executrix under the will in the State of Colorado, and is still acting as such executrix. Subsequently to the filing of this suit, Ruby Lee Scott and Charlotte Tyler, for a valuable consideration, conveyed their interests in the Helena property to George Walton, husband of Laura Walton.

Ed Spriggs was appointed administrator with the will annexed of said estate by the probate court of Phillips County, Arkansas, and duly qualified as such administrator. He entered into a written contract, as such administrator, with E. M. Bacharach and L. K. Grauman, whereby he gave them an option to purchase the Helena property in question for the sum of $4,000, and they paid him the sum of $50. Subsequently, within the life of the option, Bacharach and Grauman demanded a deed in accordance with the terms of their optional contract, and, upon the refusal of Spriggs to execute the deed, they brought this suit against him and the devisees under the will for specific performance of the optional contract. When they demanded the deed, they tendered

the balance of the purchase price, as provided in the optional contract. Subsequently Ed Spriggs, as such administrator, executed a deed to the plaintiffs to said property. The facts above stated were established by evidence, as well as admitted by the pleadings.

E. M. Bacharach was the principal witness for himself. According to his testimony, the conditions and terms specified in the optional contract signed by Ed Spriggs, as administrator with the will annexed of the estate of W. L. Scott, deceased, were agreed to by Ruby Lee Scott over the telephone. Bacharach also knew that A. M. Coates, an attorney, who represented Spriggs, as administrator, had a power of attorney from Charlotte Tyler, authorizing him to sell and convey her interest in said property. His testimony was corroborated by that of Ed Spriggs. Spriggs also testified that he had a letter from Ruby Lee Scott authorizing him to sell the property on the terms stated in the contract. Spriggs also saw a letter from Laura Walton to Ruby Lee Scott, stating that she would accept the offer as set forth in the optional contract. A. M. Coates testified that he agreed to the contract for Charlotte Tyler, and knew that the contract was satisfactory to Ruby Lee Scott, for the reason that she came to his office many times and signified her willingness to sell the property to Bacharach and Grauman for $4,000. Laura Walton lived in Denver, Colorado, and denied writing a letter to Ruby Lee Scott giving her consent to the sale of the property. After the present suit was brought, her husband, George Walton, bought the undivided interest of Ruby Lee Scott and Charlotte Tyler. Ruby Lee Scott testified that she never told Ed Spriggs unconditionally that she would sell her interest in the property. She testified that she told him that she would sell her interest provided Laura Walton would sign the deed. She admitted visiting Coates' office and asking for her part of the money, but she did this upon the condition that Laura Walton would sign the deed. Other facts will be stated or referred to in the opinion.

The chancellor found that the defendant, Ed Spriggs, neither as administrator with the will annexed, nor as agent, nor as attorney in fact for the defendants, Ruby Lee Scott, Charlotte Tyler and Laura Walton, had the authority to bind said defendants by the optional contract entered into by him as such administrator with E. M. Bacharach and L. K. Grauman. It was therefore decreed that the complaint of the plaintiffs be dismissed for want of equity, and that the warranty deed executed by Ed Spriggs, as administrator with the will annexed of the estate of W. L. Scott, deceased, to E. M. Bacharach and L. K. Grauman, be canceled and set aside.

To reverse that decree the plaintiffs have duly prosecuted an appeal to this court.

W. G. Dinning, for appellant.

Moore, Walker & Moore, for appellee.

HART, C. J., (after stating the facts). The record shows that W. L. Scott died testate in the State of Colorado, owning property in the city of Helena, in Phillips County, Arkansas. By the terms of his will he directed that this property be sold to the best advantage and the net proceeds be divided equally between his wife, Ruby Lee Scott, his daughter, Laura Walton, and his sister, Charlotte Tyler. No one was appointed by the terms of the will to make the sale, but the fifth clause of the will appointed his wife as executrix and authorized her to act without giving any bond.

An executor derives his powers from the will, and, if it authorizes him to sell lands, he may do so without the order of any court. *Ludlow* v. *Flournoy,* 34 Ark. 451. In *Heiseman* v. *Lowenstein,* 113 Ark. 404, 169 S. W. 224, Am. Cas. 1916C, 601, it was held that no particular form of words is necessary to create a power to sell in the will, and that, if the executor is directed by will or bound by law to see to the application of the proceeds of the sale, then such power of sale is conferred on the executor by implication. In a case-note to 32 L. R. A. (N. S.), at page 679, it is said that an executor named in a will which

either expressly or impliedly directs real estate to be sold, and the proceeds distributed in a certain manner, by necessary implication has power to sell and convey the real estate without express powers having been conferred. Numerous cases from numerous State courts of last resort are cited which support the text. To the same effect see 24 C. J., page 157, § 637 (b); and 11 R. C. L., page 398, § 480.

In the application of this principle of law to the facts presented by the record, it may be stated that Ruby Lee Scott, as executrix of the last will of W. L. Scott, deceased, alone had the authority to sell the property in question and distribute the proceeds as directed by her testator in his will.

But it is insisted that she qualified and was acting as executrix under the will in the State of Colorado, and could not sell property situated in the State of Arkansas. In *Apperson* v. *Bolton*, 29 Ark. 418, this court expressly held to the contrary, as will appear from the following quotation: "Wade H. Bolton, by his will, appointed Apperson his executor, and empowered him to sell his real estate in Tennessee or in other States. When the will was properly probated in Tennessee and letters granted to him, the will was his authority to sell land there, and not his letters; they were merely evidence of his authority to execute the power conferred upon him by the will, but he could not sell Arkansas land by the power conferred upon him by the will until the will was admitted to probate in this State under our laws, and, when so admitted to probate and recorded, it was not necessary for him to take out letters here in order to sell the Arkansas land."

Counsel for the plaintiffs contend that this case is not applicable because in that case no administrator with the will annexed was appointed and qualified under the laws of the State of Arkansas, and that for this reason it was held that the executor in Tennessee had the authority to convey the title. It is plainly apparent from

the authorities above cited that such is not the case. The authority to sell, as we have already seen, arises by necessary implication. In 11 R. C. L., page 405, § 490, it is said that an executor appointed in one State has no authority, as such, to make a sale of land in another State, but may do so in virtue of a power given in the will, and in so doing he acts as donee of a power and not under an authority conferred by the probate court. *Newton* v. *Bronson*, 13 N. Y. 587, 67 Am. Dec. 89, is cited to support the text.

Hence it is apparent that, if the executrix named in the will had refused to carry out the power of sale conferred by implication upon her by the terms of the will, the administrator with the will annexed in the State of Arkansas could not have sold the land without an order of the probate court, and, as a necessary consequence, could not have made a binding executory contract for the sale of it. The record not only shows that the executrix under the will, appointed by its terms, did not refuse to execute the power to sell, but, on the contrary, did exercise it by selling her own interest and causing another of the devisees to sell her interest to the husband of the third devisee, who had agreed to the sale and who did not wish her interest in the property sold. Under these circumstances the chancellor properly held that the complaint of the plaintiffs should be dismissed for want of equity.

But it is insisted by counsel for the plaintiffs that the chancery court erred in granting relief to the defendants on their cross-complaint. This contention is based upon the fact that plaintiffs had asked for their complaint to be dismissed before a trial of the case. This was not done, however, until the plaintiffs had secured a deed to the property in controversy from Ed Spriggs, as administrator with the will annexed of the estate of W. L. Scott, deceased. This deed cast a cloud upon the title of the defendants, and the court properly retained jurisdiction of the case in order to cancel this deed, if, under

the facts established, it should be warranted in so doing. The court properly held that this deed was a cloud upon the defendants' title, and should be canceled. It is true that Ruby Lee Scott and Charlotte Tyler conveyed their interest in the property to George Walton, the husband of Laura Walton, but they executed a warranty deed to him, and, for this reason, had a right to proceed with the suit. This sale and conveyance was made pursuant to an agreement with Laura Walton, who wished to retain her interest in the property, and who did so in lieu of receiving one-third of the proceeds derived from the sale of it. Hence, in any event, she would have had a right to have the administrator's deed from Spriggs to the plaintiffs set aside; and, if set aside at her instance, it would inure to the benefit of her codefendants, and the plaintiffs, having failed in their suit, could not be prejudiced by this action of the court. Therefore the decree will be affirmed.

CHICAGO, ROCK ISLAND & PACIFIC RAILWAY CO. v. SIMS.

Opinion delivered March 21, 1927.

1. CARRIERS—CARRYING PASSENGER BEYOND STATION—EVIDENCE.—In an action against a railway company for injuries to the health of a passenger walking to her destination over a wet, muddy road at night, after being carried beyond her station and brought back, plaintiff's testimony that she had made arrangements with her son-in-law and daughter to meet her *held* not inadmissible as hearsay; being a statement of facts explaining how she knew of arrangements with them to transport her to destination.
2. CARRIERS—NEGLIGENCE.—Testimony *held* sufficient to sustain verdict for passenger against railroad company on issue of negligence in allowing her to board train without informing her that it would not stop at her station.
3. CARRIERS—DUTY TO NOTIFY PASSENGER OF INABILITY TO STOP—INSTRUCTIONS.—In an action against a railway company for injuries to a passenger resulting from its failure to stop its train at her station, instructions that it was the duty of defendant's employees to notify plaintiff, when she undertook to board the train, that it did not stop at her station, *held* authorized by evidence.

4. CARRIERS—FAILURE TO NOTIFY PASSENGER—DAMAGES.—Failure of defendant railway company to notify plaintiff, when she undertook to board the train, that it did not stop at her station, *held* to entitle her to recover the damages proximately caused thereby.
5. CARRIERS—MODIFICATION OF INSTRUCTIONS.—In an action for injuries to passengers as the result of a failure to stop the train at her station, refusal of defendant's request for instructions that the conductor was not required to stop the train there, though he and brakeman promised plaintiff to do so, if it was not scheduled to stop, and that it was plaintiff's duty to find out whether it stopped there before boarding the train, and giving such instructions as modified by the provisos, "or had not been accustomed to stop there," and "unless she already had this information" *held* not prejudicial error.
6. CARRIERS—DAMAGES EXCESSIVE WHEN.—A verdict for $400 for injuries to a passenger carried beyond her station, and thereby forced to walk over a wet road at night, *held* excessive by $200, in absence of proof that it was necessary to take the walk that night.

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

George B. Pugh, for appellant.

D. D. Glover, for appellee.

WOOD, J. This action was instituted by the appellee against the appellant to recover damages for personal injuries. The appellee alleged that she was a passenger on appellant's train from Reyburn to Opitz; that the appellant, through the negligence of its agents, servants and employees, carried her by her destination, which was Opitz, on to Haskell, and that, after some delay at Haskell, the appellant brought her back to Opitz. On the occasion mentioned the appellant was going to Opitz, a station on appellant's line, to visit a sick man who lived about two miles from Opitz; that, on account of the delay occasioned by being carried by her station, when she finally reached Opitz it was night-time, and she could make no arrangements for transportation to the home of the sick man, and had to walk there, over a road that was wet and muddy, causing her to be ill, and resulting in damage to her in the sum of $1,500, for which she prayed judgment. The answer was a denial of all the material allegations of the complaint.

The testimony, giving it its strongest probative force in favor of the verdict, is substantially as follows: The appellee was 64 years of age, and had been afflicted for about two years with high blood pressure and a nervous ailment. High blood pressure is not itself a disease, but a symptom of some other disease. Any exercise on the part of a person 64 years old would elevate the blood pressure and increase the nervous condition. Excitement and exercise are injurious to a person having high blood pressure. Absolute rest, so far as possible, is essential to one in that condition. On the occasion of the alleged injury the appellee was a passenger on appellant's train from Reyburn to Opitz, going to see a sick man by the name of Westbrook, who was related to her family. He was sick unto death, and died during this illness. Appellee had been going there before this visit to him. A nephew of the appellee by marriage was with her. When the train stopped at Reyburn the auditor came out to receive them, and asked where the appellee was going. She replied "Opitz," the auditor said "Opitz," and the appellee replied, "Yes sir." The auditor then took appellee by the arm, led her up the steps, and she went in the car and took her seat. Her nephew was going to Haskell. He got on the train behind the appellee. After "some little bit" the train official came along and asked appellee where she was going, and she told him to Opitz, and he took her fare to Opitz, 28 cents. He went on, and, after "some little bit," came back and said, "I can't put you off at Opitz." The appellee protested, and told the official that she was going to see a sick man, and it would be after dark if they took her on to Haskell. They carried her on to Haskell, and there appellee tried to get some connection with her folks by telephone, but could not do so. The appellant kept appellee at Haskell about an hour, and then brought her back to Opitz. When she arrived at Opitz it was dark. After getting off the train, appellee went up to Mrs. Opitz' house to 'phone to see if she could get in touch with her son-in-law, who lived in the neighborhood of the sick man, but she could not get

him. Then she went to a man's house by the name of Smith, and tried to 'phone her son-in-law from there, but failed. They had a telephone at the sick man's home, but had plugged the same, as he was very low. Appellee was accompanied by her nephew. It was dark, had been raining, and was muddy. If appellee had been put off at Opitz, as she contemplated, she would have had some one to meet her there. After the train had passed her people had gone to the sick man's house to sit up with him that night. Appellee had had high blood pressure for about two or three years. Before this occurred she had been some better. The walk she had to take exhausted her. She had to give up, and was nervous, and had to go to bed shortly after she arrived at the house of the sick man. Since then her condition has been a whole lot worse. She has been reduced in weight, and had been treated ever since, and had to take medicine all the time. She suffered pain on account of the walk. If appellant's trainmen had told her when she started to get on the train that they could not put her off at Opitz, she would not have boarded the train at all.

Appellee's nephew corroborated substantially the testimony of the appellee as above set forth, and, in addition, he testified that the train they boarded at Reyburn that day was being run in the motor car's place. It was not a fast train, and stopped anywhere. It was a dark night, the road was muddy, and holes were in the road. When they arrived at Westbrook's, that night, the appellee was "played out" and had to lie down. On cross-examination this witness testified that he had been going to Opitz every Sunday night for a month. He knew that the train would stop there, whether it was scheduled to stop or not. The train that evening was making the same connection that the motor-car did. It would have required about a minute or two to put the appellee off at Opitz.

The conductor of the appellant's train on this occasion testified to the effect that it was not his regular run. It was a local passenger train on this run, because the

motor-car was being held for repairs. This train was runing on the motor-car schedule. It was supposed to stop at every place that the motor-car stopped. Witness was standing right there on the platform when the appellee got on, and he had a man there whose business it was to load the passengers. It was the brakeman's duty to load the passengers on the proper train, and it was his duty, if the train didn't stop at Opitz, to keep the appellee from getting on for that station, and the brakeman did not do this. Appellee got on. The train should have stopped every place the motor-car stopped. Opitz was not a regular stop, but witness stopped the train as an accommodation for the traveling public. It would have taken about five minutes to stop and start the train. This witness stated that he told appellee, when she told him she wanted to go to Opitz, that Opitz was not a stop for that train, and the best that he could do for her would be to take her on to Haskell and to return her to Opitz on the next train, and that he would only charge her the one fare from Reyburn to Opitz. Witness stated that the appellee said "All right," but requested witness to stop at Opitz, if possible, and witness told appellee he would do so if he could, but he looked at his time card and found that he was making a close connection with another train, and the best he could do was to carry her on to Haskell and bring her back.

The brakeman testified, and corroborated the testimony of the conductor of the train. He testified that the train was not scheduled to stop at Opitz, and they could not stop on that particular day for accommodation because the train was late, and they had to make connection at Haskell with two other trains. He denied that this particular train had stopped at Opitz, and denied that the motor-car stopped there.

Witnesses Mr. and Mrs. Opitz testified that Mrs. Sims came to their house on the night mentioned to get transportation to Westbrook's, but they were unable to take her. One of them also testified that it was suggested to appellee that she might get a car over there at the church, where they were having a singing.

The appellee, over the objection of the appellant, testified that she had made arrangements with her son-in-law and daughter, who were going back about that time, to meet her at Opitz, or to telephone them. They had told her at any time she would come, get on the train and telephone, they would come to meet her. After the train didn't stop at Opitz, appellee's daughter went on over to the sick man's house, and, when appellee got to the sick man's house, her daughter was there.

The court instructed the jury, in effect, over the objection of appellant, that it was the duty of the appellant's agents, servants and employees in charge of the train to have notified the appellee, when she undertook to board the train, that it did not stop at Opitz, unless they intended to stop for her to get off there, and, if they negligently failed to perform that duty and appellee was damaged by reason of their negligence in failing to stop the train and let her off, the verdict should be in favor of the appellee. The court refused appellant's prayer for a directed verdict, to which appellant duly excepted.

The appellant asked the court to instruct the jury, in effect, that, if the train was not scheduled to stop at Opitz, the conductor was not required to stop the same there, even if the conductor and brakeman had promised the appellee to do so. The court granted prayers to this effect, after modifying same, and instructed the jury, in effect, that the conductor was not required on this occasion to stop the train at Opitz if the same were not scheduled to stop there or had not been accustomed to stop there. The appellant asked the court to further instruct the jury that it was the duty of the passenger to find out whether the train stopped at a given destination before boarding the train. The court, over the objection of appellant, modified this instruction, and instructed the jury that it was the duty of the appellee, as a passenger, to inquire where the train stopped, unless she already had this information beforehand. The jury returned a verdict in favor of the appellee in the sum of $400. Judgment was entered in her favor for that sum, from which is this appeal.

1. It was not error to permit the appellee to testify that she had made arrangements with her son-in-law and daughter to meet her at Opitz; that they told her to telephone them and they would come to meet her. This was not in the nature of hearsay testimony, but was the statement of facts, explanatory of how she knew she had made arrangements for them to transport her to her destination.

2. The undisputed testimony by appellant's own conductor is that it was the duty of appellant's brakeman not to permit the appellee to board the train at Reyburn for Opitz if the train was not allowed to stop at the latter station. The testimony shows that the brakeman did this after the appellee had notified the officials that she wished to stop at Opitz. The negligence in this particular consisted in allowing the passenger then to go upon the train without informing her that the train would not stop at Opitz. It is unnecessary to discuss the testimony on the issue of negligence. The testimony is sufficient to sustain the verdict on that issue.

3. The court did not err therefore in giving appellee's prayers for instructions telling the jury that it was the duty of appellant's employees in charge of the train to have notified the appellee, when she undertook to board the train, that the train did not stop at Opitz. The undisputed evidence, as we have seen, shows that appellee had notified appellant's employees before she boarded the train that she wished to stop at Opitz. In view of the undisputed testimony proving negligence on the part of the appellant, which was the proximate cause of some injury and damage to appellee, she was entitled to recover. There was no prejudicial error in the rulings of the court in refusing appellant's prayers for instructions as asked and in modifying and giving the same as modified.

4. While appellee was entitled to recover some damages, yet, under the circumstances developed by the proof, the verdict was clearly excessive. It occurs to us, from the amount of the judgment, that the jury enhanced

the damages beyond what she was entitled to receive by reason of the fact that the night was dark and the road was muddy. But there is nothing in the proof to warrant the seemingly irresistible impulse of the appellee to walk the distance between Opitz and where her sick friend lived, in the dark and through the mud, rather than to wait overnight at Opitz and make the journey the next morning, under more favorable conditions.

The proof does not disclose that her presence in the sick-room that night would have been even necessary, much less indispensable. To be sure, appellee was entitled to compensation for the actual damages which she sustained by reason of appellant's negligence, but, under the proof, we are convinced that the sum of $200 would be most liberal compensation for all her actual damages, both physical and mental, growing proximately out of the negligence of appellant in permitting her to board its train for Opitz.

The judgment will therefore be reversed, and remanded for a new trial, unless appellee enters a *remittitur* in ten days of $200. In that case the judgment will be affirmed for that sum.

MISSOURI STATE LIFE INSURANCE COMPANY v. BROOKS.

Opinion delivered March 21, 1927.

1. INSURANCE—PAYMENT OF PREMIUM—JURY QUESTION.—In an action on a life insurance policy, under evidence that insured remitted a cash payment and extension note for the balance of the premium, in conformity with the insurer's offer to extend time of payment of premium, the issue as to whether the insurer received the cash and note before the policy lapsed for nonpayment of the premium was properly submitted to the jury.
2. APPEAL AND ERROR—CONCLUSIVENESS OF VERDICT.—A verdict on conflicting evidence is conclusive on appeal.
3. INSURANCE—FORFEITURE—WAIVER.—In an action on a life policy, evidence from which the jury might have found that, after lapse of a policy for nonpayment of the second premium, the insurer received cash in part payment thereof and that insured

mailed an extension note for the balance, together with an application for reinstatement, which were retained by the insurer for several months without complaint until after insured's death, *held* to present the issue whether the insurer waived a forfeiture of the policy for nonpayment of the premium.

4. INSURANCE—FORFEITURE—ESTOPPEL.—Any agreement, declaration or course of action on the insurer's part which leads insured to believe that, by conformity therewith, a forfeiture will not be incurred, followed by conformity therewith, will estop the insurer from insisting on a forfeiture.

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

Allen May and *Rose, Hemingway, Cantrell & Loughborough,* for appellant.

D. D. Glover, for appellee.

WOOD, J. On July 2, 1924, the Missouri State Life Insurance Company, hereafter called the appellant, issued its policy in the sum of $1,000 to one Ora Brooks on which she paid the annual premium of $17.42. The next premium on the policy was due July 2, 1925. T. B. Brooks, the husband of Ora Brooks, also carried a policy with the appellant. These policies were taken out at Mangham, Louisiana, where they lived. The agent of the appellant at that place was Alex Watson. In May, 1925, Brooks made application to appellant through its agent at Mangham for permission to pay a part of the next premium due on the policy of Ora Brooks and to give a note for the remainder. On May 14, 1925, the agent wrote the company as follows:

"T. B. Brooks wishes to give his note to cover premiums on policies of himself and wife, Ora Brooks. His personal address is Malvern, Arkansas." In answer to this letter the company wrote Ora Brooks on May 19 to the effect that she would have until August 2, 1925, to make settlement of the premium and inclosed in the letter an extension note for her to sign in the sum of $13.46, which note was to become due January 22, 1926, and appellant requested in the letter that, if she was unable to pay the amount of the premium in cash on August 2, 1925, she sign the note and inclose a remittance of $3.96. T. B.

Brooks signed the extension note for his wife, and returned it to the company in May, 1925. This note recites, in part, that "although the annual premium due the second of July, 1925, had not been paid, the insurance was continued until midnight of the due date of the note, January 2, 1926." It further recites that, if the note were paid on or before that date, such payment, together with the cash, will then be accepted by the company as a payment of the premium, and that all rights under the policy would be continued, the same as if the premium had been paid when due, and, if the note were not paid when due, it should cease to be a claim against the maker, and the company would retain the cash as a compensation for the earned premium for the extended insurance granted to the assured up to the date of the maturity of the note. The company kept the note from May until August 21, 1925. A letter was written to the company by Brooks on August 15, 1925, in which he states that he is inclosing money order for $6.50 in half payment of Ora Brooks' policy, and that he had overlooked the fact that the premium was due July 2, and thought it was due August 2, and that he would sign up his notes and his wife's note and would pay in full with interest on October 15, 1925. On August 21, 1925, the company wrote Mrs. Brooks, stating in substance that it had received the remittance of $3.96 in cash, with the signed note, and that it was sending her a new note to be signed by her, instead of her husband, and also inclosing the original note. The letter further stated as follows: "Since this policy is in a lapsed condition at this time, we are inclosing an application for reinstatement. This matter will have our immediate attention upon receipt of the application for reinstatement and the note properly signed and witnessed. Kindly give the above your immediate attention." On the same day the company also wrote Brooks, in which letter it stated that it had received the remittance from him of $6.50 and that it was deducting $3.96 for the policy on the life of Mrs. Brooks, leaving the sum of $2.24 to apply on Brooks'

individual policy. In addition to the $3.96 that had been sent in May, the $6.50 was sent to the appellant to pay on the policy of Mrs. Brooks. There is a postal money order in the record, dated August 12, 1925, for $6.50.

Mrs. Ora Brooks died on November 1, 1925. After her death, Brooks reported the same to the appellant. Appellant sent to Brooks a check for $3.96 on the First National Bank of St. Louis, dated Oct. 21, 1925, payable to the order of Ora Brooks. Brooks received this check between the 6th and 8th of November. The appellant also, on the 28th of December, 1925, wrote Brooks a letter in which it inclosed to him checks for $13.96 and $3.96, which he, at the suggestion of his counsel, had sent the appellant after the death of Ora Brooks, and in this letter the appellant stated that it had sent its check for $3.96 in the letter of October 26, 1925, prior to the death of Mrs. Brooks, and its files in the matter were closed at that time, and appellant further stated that the policy had no value whatever and that it was not liable thereon. There were cashiers' checks in the record on the First National Bank at Malvern, Arkansas, dated December 21, 1925, for $13.96 and $3.96, respectively, in favor of the appellant. These checks, as stated, were sent by Brooks to the appellant. The company had never paid anything on the policy.

This action was instituted by T. B. Brooks, hereafter called appellee, as administrator of the estate of Ora Brooks, against the appellant, to recover on the policy. The appellant answered, denying liability, and the above are substantially the facts in favor of the appellee, which the testimony, giving its strongest probative force, tended to prove. The cashier of the appellant testified in substance that the second annual premium on Mrs. Ora Brooks' policy was due July 2, 1925; that he wrote on May 14, 1925, as above set out, notifying the appellant that Brooks wished to give his note to cover the premium on the policies of himself and wife, and he identified the further correspondence set out above between the appellant and Brooks. He stated that the policy on the

life of Mrs. Brooks lapsed on August 2, 1925, and that the first appellant heard from any one concerning the policy was the letter of August 15, 1925, written by appellee to the appellant, inclosing the money order for $6.50. This letter was thirteen days after the expiration of the period of grace. This letter also contained the extension note which was signed by T. B. Brooks. The note was returned in the appellant's letter of August 21, 1925, referred to above, and appellant had heard nothing further from either of them with reference to Mrs. Brooks' policy. After a policy lapsed it required an application for reinstatement submitted to the company, which could only be approved by a committee appointed at the home office. Appellant sent letters to Mrs. Brooks on September 8, 1925, and again on September 18, 1925, calling her attention to the fact that the appellant had not received the new note which was to be signed by her and the application for reinstatement, and notifying her that her policy was in a lapsed condition, and requesting her to give an early reply advising the company as to what she intended to do. The witness stated that a properly executed note by Ora Brooks and her application for reinstatement was never received at the home office, and therefore the policy was never really reinstated. The $3.96 which Ora Brooks had sent to the appellant was not accepted by the appellant as a consideration for reinstatement, but was held by it awaiting a properly signed note and application for reinstatement. The money was not received at the home office until August 17, 1925, and appellant returned the same to Mrs. Brooks October 26, 1925, by a check payable to her order, issued from the home office of the appellant, in this letter of October 26, 1925.

The court told the jury, in its first instruction, in substance, that, if it found that Ora Brooks, during her lifetime, complied with the conditions of the policy, and that the same was a valid policy at her death, the verdict should be in favor of the plaintiff, appellee. In other instructions the court further submitted to the jury the

issue as to whether or not the appellant had accepted in cash a part of the second premium due on the policy and an extension note for the balance, after the policy lapsed for the nonpayment of the second premium, and told the jury, if they so found, their verdict should be in favor of the plaintiff, appellee. The court submitted to the jury the issue as to whether or not, after the time for the payment of the second premium, the appellant had not waived a forfeiture of the policy by acceptance of a part of the premium in cash and the signing and returning to the appellant of an extension note for the balance of the premium in accordance with appellant's instructions. Instruction No. 5 is as follows:

"You are instructed that, if you should find that the policy sued on had at any time lapsed, and you further find that the defendant company sent her an application for reinstatement, and that she filled it out, as required by the forms sent her, and that she paid part of the premium in money, and signed a note for the remainder of the premium, and that it was accepted by it, then you are told and instructed that the plaintiff would be entitled to recover in this suit."

The appellant duly excepted to the rulings of the court in the granting of appellee's prayers for instructions and in refusing the appellant's prayer for a directed verdict. The jury returned a verdict in favor of the appellee in the sum of $1,000. Judgment was entered in appellee's favor for that sum, from which judgment is this appeal.

1. The provision in the policy as to reinstatement is as follows: "If any premium is not paid on the date when due or within the period of grace, and this policy has not been surrendered, the company will reinstate the policy of said due date at any time thereafter, upon evidence of insurability satisfactory to the company, and payment of all arrears of premium, with interest at the rate of six per cent. per annum."

The jury might have found from the testimony, *supra,* that the appellant, as early as May 19, 1925,

offered to extend the time of the payment of the second premium if the assured would remit the sum of $3.96 and sign an extension note for the balance of $13.96, due January 2, 1926; that the assured attempted to comply with this request by remitting the cash of $3.96 and a note signed by her husband for the balance. There is a decided conflict in the evidence on this point. The testimony of the appellee tends to prove that he signed the note for his wife, which the company sent to her to be signed, and returned the same, and that this was done in May, 1925. His testimony and the testimony of his daughter tends to prove that the note was signed by him and sent back immediately. The testimony of the appellee also tends to prove that he mailed to the appellant the sum of $3.96 in cash in compliance with the appellant's request about that time. The testimony of appellant's cashier tends to prove that, after writing the letter of May 19, 1925, the appellant did not hear anything further concerning Ora Brooks' policy until August, 1925. While the cross-examination of the appellee disclosed some indefiniteness and uncertainty as to whether the money was sent by postoffice order, check or cash, he finally testified that he sent $3 in greenbacks and the rest in stamps and through the mail about the time he mailed the letter with the extension note signed by himself for his wife, which was in May. The jury therefore might have found from the testimony on behalf of the appellee that the appellant received a part of the second premium in cash and the extension note for the balance before the policy lapsed because of the nonpayment of premium due August 2, 1925, and that the policy had not lapsed, and was therefore not forfeited at that time. The court correctly submitted this issue to the jury.

2. The jury might have found, from the testimony of the appellee, that the appellant kept the first extension note signed by him for his wife from May, 1925, till August, 1925, before it requested that another note be executed by Mrs. Brooks individually, and before it requested her to sign an application for reinstatement.

The testimony of the appellee tends to prove that this request of the appellant was promptly complied with by Ora Brooks signing the new extension note and application for reinstatement, and by having the same witnessed, and then mailing the same to appellant in the self-addressed envelope furnished Mrs. Brooks for that purpose. In the meantime, on the 15th of August, 1925, the appellee wrote to the appellant remitting the sum of $6.50, which he states was half the premium on Ora Brooks' policy. The appellant, in its letter of August 21, 1925, acknowledged the receipt of that amount and credited the sum of $3.96 on premium due on Ora Brooks' policy and the balance on T. B. Brooks' policy. In this letter of August 21, 1925, the appellant likewise admits that it had received the note signed by Brooks for his wife, and states that it was returning a new extension note and application for reinstatement to be signed by Mrs. Brooks, and that the policy was in a lapsed condition at that time. Again the testimony is conflicting. Brooks and his daughter testified that Ora Brooks signed the new extension note and application, and that same was witnessed as requested by the appellant, and that the letter inclosing this new extension note and application was properly mailed to the appellant in an envelope self-addressed, while the appellant's cashier testified that neither the note nor the application for reinstatement had ever been received at the home office. And, again, appellant's cashier testified that, on September 8, 1925, appellant properly mailed a letter addressed to Mrs. Brooks, notifying her that it had not received the extension note and application for reinstatement signed by her, and requesting her to sign and return the same immediately, and another letter to the same effect on September 18, 1925, and, having received no answer, the appellant wrote the letter of October 26, 1925, to Ora Brooks, inclosing to her a check for $3.96, and concluded by stating that appellant would be glad to reinstate her policy upon receiving satisfactory application for reinstatement, together with a settlement of arrears. But the appel-

lee, Brooks, testified concerning these letters that, after he had written the letter of August 15, 1925, he never heard from the appellant any more. He stated that, prior to the death of his wife, there was no complaint from the appellant concerning the extension note she had sent to the company; that she died believing that her policy was valid. Appellee testified that the appellant had never returned the $6.50 which he had sent to the appellant to pay on Mrs. Ora Brooks' policy. But the testimony for the appellant tended to prove that the appellant accounted for that amount by crediting $3.96 on the policy of Mrs. Brooks and the balance on T. B. Brooks' premium.

Now, the jury have settled the above conflicts in the testimony in favor of the appellee, and the verdict of the jury on these issues of fact is conclusive here. The jury might have found from the above that, after the time had elapsed when the payment of the second premium was due, the appellant received of Ora Brooks the sum of $6.50 in cash as a part of the premium due on her policy, and that she executed an extension note for the balance, which would not be due until January 2, 1926; that she inclosed this extension note, with the application for reinstatement, in an envelope self-addressed to the appellant, which it had sent her for that purpose, and stamped and mailed the same, and that appellant made no complaint thereafter, as long as she lived, that the extension note had not been properly signed, and that Ora Brooks died believing her policy was valid and in force; that the $3.96 which Ora Brooks had sent in cash to the appellant in May as a part payment on the second premium was not returned by appellant and received by the appellee before the death of Mrs. Brooks, and that appellant had never returned the $6.50 in cash which the appellee had sent appellant in the letter of August 15, 1925, and that the extension note signed by the appellee and sent through the mail to the appellant had never been returned to the appellee.

Therefore it was for the jury, under the evidence, to determine whether or not the policy had lapsed because of the failure of Ora Brooks to pay the second premium, and whether or not the rights of the appellee thereunder, as administrator of Mrs. Brooks, had been forfeited. The court submitted these issues under instructions in which there are no prejudicial errors to the appellant.

In *American Life Association* v. *Vaden,* 164 Ark. 75, 261 S. W. 20, we said: "The doctrine is firmly established by the highest courts in this country, and approved by us in numerous cases, that 'forfeitures are not favored in law,' and that '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." See also *American Ins. Union* v. *Benson,* 172 Ark. 1043, 291 S. W. 1007.

The above doctrine is applicable to the facts as found by the jury under the evidence. There was evidence to sustain the verdict. The trial court therefore did not err in refusing appellant's prayer for a directed verdict, and its judgment entered in favor of the appellee is correct, and it is affirmed.

AMERICAN RAILWAY EXPRESS CO. v. REEVES.

Opinion delivered March 21, 1927.

1. LIMITATION OF ACTIONS—COMMENCEMENT OF SUIT.—Under Crawford & Moses' Dig., § 1049, both the filing of a complaint and the issuance of summons thereon are necessary to the commencement of an action.
2. LIMITATIONS OF ACTIONS—TRANSPORTATION ACT.—A cause of action under the Transportation Act (Act Cong. Feb. 28, 1920, § 206a) which accrued in 1920, was barred by limitation where summons was not issued until 1925.

Appeal from Craighead Circuit Court, Jonesboro District; *G. E. Keck,* Judge; reversed.

E. L. Westbrooke, Jr., and *E. L. Westbrooke,* for appellant.

T. A. Turner and *Denver L. Dudley,* for appellee.

WOOD, J. On the 2d, 13th and 23d of February, 1920, J. I. Kratzmeyer delivered to the American Railway Express Company, hereafter called Express Company, three separate lots of furs for shipment from points in Arkansas to St. Louis, Missouri. On January 15, 1921, an action was instituted in the circuit court styled "J. R. Reeves, trustee of the estate of J. I. Kratzmeyer, bankrupt, plaintiff, against the Express Company, defendant." The complaint alleged that Kratzmeyer, on May 8, 1920, had filed a voluntary petition in bankruptcy, and that J. R. Reeves had been appointed trustee by the creditors of Kratzmeyer. It was alleged that there was a loss in the shipment caused by the defendant in the total sum of $632.25, for which the plaintiff prayed judgment. An answer was filed on September 7, 1921, denying the material allegations of the complaint. On September 6, 1921, the attorney for the plaintiff filed a motion in which he suggested that J. R. Reeves had departed this life and that J. D. Reeves had been appointed trustee to succeed him, and moved that the cause be revived in the name of J. D. Reeves, trustee. On September 5, 1923, the Express Company filed a motion to dismiss the suit, alleging that the real party in interest had not sued as plaintiff. Attached to the motion was a certified copy of the

record of the Federal court of the Eastern District of Arkansas, showing that no trustee in bankruptcy had been appointed. The court heard the motion on the same day, September 5, 1923, and sustained the motion, and dismissed the cause as to J. D. Reeves, trustee. The court noted in its order that "the complaint was amended by making J. I. Kratzmeyer a plaintiff, and the cause continued for service."

On the 12th of February 1925, a summons was issued out of the Craighead Circuit Court commanding the sheriff to summon the express company to appear at the next September term of the First Division of the Craighead Circuit Court, Jonesboro District, to answer the complaint of J. D. Reeves, trustee of the estate of J. I. Kratzmeyer, bankrupt, and J. I. Kratzmeyer. The Express Company was duly served with summons on February 13, 1925. On March 24, 1925, the Express Company appeared and moved the court to require the plaintiffs to make their complaint more specific. On the 5th of September, 1925, an answer was filed, denying the material allegations of the complaint and setting up in defense the statute of limitations. On September 8, 1925, the Express Company filed a motion setting up the various steps that had been taken in the cause, and moved the court to declare that the action was instituted on February 12, 1925, and that same was barred by the statute of limitations, and therefore asked the court to enter a judgment in its favor. The plaintiff thereupon moved the court to enter a judgment in its favor, which request the court granted, and entered a judgment in plaintiff's favor, from which is this appeal.

The only question presented by this appeal is whether or not the plaintiff is barred from maintaining the action by the statute of limitations. The statute of limitations applicable to appellees' alleged cause of action which accrued on the 2d, 13th and 23d of February, 1920, § 206 (a), (Fed. Statutes Ann. Supplement 1920, Act, approved February 28, 1920. The appellant was being operated under Federal control during the time the

alleged loss occurred. The Government control terminated on March 1, 1920. The statute of limitations, in part, provides as follows: "Such actions, suits or proceedings may, within the periods of limitation now prescribed by State or Federal statutes, but not later than two years from the date of the passage of this act, be brought in any court which, but for Federal control, would have had jurisdiction of the cause of action had it arisen against such carrier." Act of Congress Feb. 28, 1920, § 206 (a), Fed. Statutes Ann. Supplement 1920, page 77).

The contract of carriage under which the shipments were made provides, in part, that "suits for loss, damage or delay shall be instituted only within two years and one day after delivery of the property, or, in case of failure to make delivery, then within two years and one day after a reasonable time for delivery has elapsed." The record shows that the original complaint in this action was filed January 15, 1921. The appellant moved to dismiss on September 5, 1923, on the ground that the real party in interest had not sued as plaintiff. The court granted this motion on the same day, in the following order: "On this day, September 5, 1923, motion filed to dismiss for defective parties. Motion heard and sustained, and dismissed as to J. D. Reeves, trustee for estate of J. I. Kratzmeyer, bankrupt, as plaintiff. Complaint amended by making J. I. Kratzmeyer plaintiff, and cause continued for service." The record shows that a summons was issued on February 12, 1925, in which the sheriff was commanded to summon the appellant to answer the complaint against it by J. D. Reeves, trustee of the estate of J. I. Kratzmeyer, and J. I. Kratzmeyer, and to make due return of the summons on the first of September, 1925. The summons was returned duly served February 13, 1925.

As we construe the order of September 5, 1923, it was tantamount to the dismissal of the action of J. D. Reeves, trustee for the estate of Kratzmeyer in bankruptcy, and then there was substituted as plaintiff J. I. Kratzmeyer.

It was an original action so far as Kratzmeyer was concerned, and was equivalent to filing a complaint on that day by Kratzmeyer against the appellant and continuing the cause for service on the appellant. The summons was issued and served on the appellant as if on an original complaint.

Under our statute, § 1049, C. & M. Digest, a civil action is commenced by filing in the office of the clerk of the proper court a complaint and causing a summons to be issued thereon. An action is commenced when the complaint is filed and summons issued thereon. The mere filing of a complaint is not the commencement of a civil action. It takes both the filing of the complaint and the issuance of a summons thereon to commence a civil action. *Burleson* v. *McDermott,* 57 Ark. 229, 21 S. W. 222; *Railway Co.* v. *Shelton,* 57 Ark. 459, 21 S. W. 876; *Wilkins* v. *Worthen,* 62 Ark. 401, 36 S. W. 21; *Barker* v. *Cunningham,* 104 Ark. 627, 150 S. W. 153; *Clemmons* v. *Davis,* 163 Ark. 452, 260 S. W. 402.

In the last case the cause of action arose under the Transportation Act, and the appellant in that case contended that the action was barred unless commenced within the two-year period of limitation. We sustained the contention of the appellant, saying:

"In the case of *Hallum* v. *Dickinson,* 47 Ark. 120, 14 S. W. 477, it was decided that the filing of a complaint does not constitute a commencement of an action, but that a process must also be issued, and that, until then, the running of the statute of limitations is not arrested." Therefore, in the case at bar, the action of J. I. Kratzmeyer against the appellant was not commenced until the summons was issued on the 12th day of February, 1925. That was more than two years after March 1, 1920. It follows that the trial court erred in not holding that the appellee, Kratzmeyer, was barred by the statute of limitations, and in not entering a judgment in appellant's favor, dismissing the complaint.

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

PLETNER v. SOUTHERN LUMBER COMPANY.

Opinion delivered March 21, 1927.

1. WILLS—CONSTRUCTION—TESTATOR'S INTENTION.—The intention of a testator must be ascertained from the language of the will, and must be given effect unless at variance with the recognized rules of law.
2. WILLS—CONSTRUCTION AS A WHOLE.—In ascertaining the intention of a testator, the will must be construed as a whole.
3. WILLS—TECHNICAL WORDS.—Generally, technical words in a will should be construed in their technical sense.
4. WILLS—PRESUMPTION.—It is presumed that the testator intended to dispose of his entire estate unless the language of the will shows to the contrary, and that he intends to vest the estate at the earliest possible moment.
5. WILLS—LIFE ESTATE.—A devise to a wife of a homestead with all the stock and household goods for life "and, if that is not sufficient, out of the remainder of my estate, for her own special benefit," *held* to be a devise to her of a life estate in all of the testator's property, both real and personal, excepting a specific bequest.
6. WILLS—REMAINDER—CONSTRUCTION.—A devise to a wife for life with remainder to another and her bodily heirs *held* to create a fee simple estate in the remainderman after the wife's death; Crawford & Moses' Dig., § 1499, relating to fees tail, not being applicable.

Appeal from Bradley Chancery Court; *E. G. Hammock,* Chancellor; affirmed.

B. L. Beasley, for appellant.

Fred L. Purcell, for appellee.

WOOD, J. This is an action instituted September 15, 1925, by Gillis Pletner, Moree Herring, Catherine McNew and Sam Bob Herring (hereafter called appellants) against the Southern Lumber Company (hereafter called appellee) to quiet the title to a tract of land in Bradley County. John C. Gillis was the owner of the land. He executed a will, which, omitting formal parts, is as follows: "I wish my wife, Artemus F. Gillis, to have the benefit of the homestead, together with all the stock and household goods, during her life, and, if that is not sufficient, out of the remainder of my estate for own special

benefit. And the one thousand dollars in gold now in the hands of S. W. Godfrey to go to Mary Elmira Godfrey, with the remainder of my estate to the said Mary Elmira Godfrey and her bodily heirs, and should the said Mary Elmira Godfrey die leaving no bodily heirs, I wish that portion of my estate to be turned over to my nephew, John M. Gillis, and his children, of Perry County, Alabama, Marion P. O."

The land in controversy was sold for the nonpayment of taxes for the year 1894, and was purchased by W. R. Watson, who, by mesne conveyances, transferred the same to the appellee. It was alleged in the complaint that the appellants are the bodily heirs of Mrs. Mary E. Herring, who is still living; that the tax sale under which the appellee claims through mesne conveyances is void, and that the deeds based on such sale were likewise void and clouds upon the appellants' title; that the appellants are the owners of a remainder interest in the lands as the heirs of Mrs. Mary E. Herring; that Mrs. Gillis died in 1911, leaving Gillis Pletner, who was born November 16, 1897; Moree Herring, who was born January 29, 1899; Catherine McNew, who was born May 18, 1904; and Sam Bob Herring, born August 12, 1915; that the deeds based on the tax sale be canceled, and that the appellee be restrained from cutting timber thereon, and that they be allowed to redeem the lands.

The answer admitted that John G. Gillis was the owner of the lands and that he executed the will above set forth, which was duly probated. The answer denied that the appellants were remaindermen under the will of Gillis, and denied that they had any right to redeem the land from the tax sale under which the appellee claims title. The appellee alleged that, on August 6, 1902, a confirmation decree was entered confirming the title to the lands in Hackney & Hume, under whom appellee claimed by warranty deed. The appellee further alleged that the will created a life estate in the lands of Artemus F. Gillis, the wife of John C. Gillis, and that a fee simple title passed, under the will, to Mary Elmira

Godfrey, now Mary E. Herring, who was living at the death of Mrs. Artemus F. Gillis in the year 1911. The appellee further alleged that, before Mrs. Gillis died, she terminated her life estate by selling to Mrs. Mary Elmira Godfrey such estate in 1897. The appellee further alleged that it, and those under whom it claimed, had paid taxes under color of title continuously since the tax sale in 1895. Appellee alleged that the appellants had not, before bringing the suit, filed an affidavit setting forth that they had tendered the amount of the taxes, costs and interest paid by the appellee for the land prior to the tax sale, nor the amount paid by it for taxes since the sale, with interest thereon, and had not tendered to the appellee the value of the improvements made thereon, and that same had been refused by the appellee.

There was a stipulation in the record to the effect that Mrs. Mary Elmira Godfrey is the same person as Mollie E. Herring; that Mollie E. Herring and the heirs of her body are the only lineal descendants of John C. Gillis, the testator; that Artemus F. Gillis was the wife and widow of John C. Gillis; that the lands in controversy were assessed in the name of Mrs. Fannie Gillis, and were forfeited for the taxes of 1894 and sold in 1895; that, in 1897, an agreement was entered into whereby, in consideration for a certain sum of money, Mrs. Artemus F. Gillis sold to Mollie E. Herring, the mother of plaintiffs, all her interest in the estate held by Mrs. Gillis under the will of her husband, and terminated such interest. It was agreed that the appellee acquired title to the land under mesne conveyances from those who purchased at the tax sale, and that the taxes had been regularly paid by the appellee on the lands since the sale, and that the lands were wild and unimproved. It was agreed that the record of wills and the confirmation decree should be considered in evidence. It was further agreed that the tax sale was void.

The cause was heard upon the pleadings, the stipulation, the exhibits to the pleadings, and the record and documentary evidence, and the trial court entered its

decree in favor of the appellee against the appellants, from which is this appeal.

The following are familiar rules in the construction of wills which have been often recognized by this court: The intention of the testator must be ascertained from the language of the will, and such intention, unless at variance with recognized rules of law, must govern and be given effect. In ascertaining the intention of the testator, the will must be taken and construed as a whole. Technical words used in a will should be construed generally in their technical sense. The presumption will be indulged that the testator intends to dispose of his entire estate in his will, unless something in the language of the will shows to the contrary. It will also be presumed, in the absence of language to the contrary, that it is the intention of the testator to vest the estate disposed of by the will at the earliest possible moment. See *Gregory* v. *Welsh*, 90 Ark. 152, 118 S. W. 404; *Fields* v. *Cline*, 161 Ark. 418, 256 S. W. 355; *Wooldridge* v. *Gillman*, 170 Ark. 163, 279 S. W. 20; *Gaines* v. *Arkansas National Bank*, 170 Ark. 679, 280 S. W. 993.

Mr. Alexander, in his commentary on Wills, vol. 2, page 1408, says: "Practically every will is dictated under the influence of family relationship, and the courts, in construing wills, lay hold of slight circumstances to raise a gift in favor of children rather than impute to the testator the intention of leaving them unprovided for. * * * In every instance all the facts and the provisions of the will are to be considered, and the intention of the testator will prevail if not contrary to the established principles of law and public policy, and such intention is at least inferentially expressed."

Now, applying these familiar rules to the language of the will under review, it appears that it was the intention of the testator, in the first clause, to dispose of all the "earthly goods of which God had blessed him," and evidently he used the terms "goods" in the sense of all his possessions, both real and personal. In the first sentence of the second clause he expresses the purpose

to give his wife, specifically, the homestead, with all the stock and household goods, evidently meaning the livestock, and the personal effects of the household, *i. e.*, all personal property connected with the housekeeping. Then, apprehensive that this provision might not be sufficient to properly care for his wife, he concluded the bequest to her as follows: "And, if that is not sufficient, out of the remainder of my estate for her own special benefit." This provision, made for the benefit of his wife, was to continue "during her life."

It occurs to us therefore that the testator intended by this first sentence of the second paragraph of his will to bequeath to his wife a life estate in all his property, real and personal, except the one thousand dollars in gold mentioned in the next sentence as a specific bequest to Mary Elmira Godfrey.

This brings us to the construction to be given the second sentence of the second paragraph of the will, in which the testator makes a specific bequest of $1,000 in gold to Mary Elmira Godfrey, and makes the further devise to her and her bodily heirs of the *remainder* of his estate. This court has often ruled that, where land is conveyed, or devised, to a person and the heirs of the body, children, or issue of such person, such conveyance or devise creates an estate tail in the grantee or devisee, which, under our statute (§ 1499, C. & M. Digest) becomes an estate for life only in the grantee or devisee and a fee simple absolute in the person to whom the estate tail would first pass, according to the course of the common law, by virtue of such devise, grant or conveyance. *Horsley* v. *Hilburn*, 44 Ark. 458; *Wilmans* v. *Robinson*, 67 Ark. 517, 55 S. W. 950; *Wheelock* v. *Simons*, 75 Ark. 19, 86 S. W. 830; *McDill* v. *Meyer*, 94 Ark. 615, 128 S. W. 364; *Watson* v. *Wolff-Goldman Realty Co.*, 95 Ark. 18, 128 S. W. 581, Ann. Cas. 1912A, 540; *Rogers* v. *Ogburn*, 116 Ark. 233, 172 S. W. 867; *Georgia St. Savings Assn.* v. *Dearing*, 128 Ark. 149, 193 S. W. 512; *Gray* v. *McGuire*, 140 Ark. 108, 215 S. W. 693; *Bell* v. *Gentry*, 141 Ark. 486, 218 S. W. 194; *Eversmeyer* v. *McCollum*, 171 Ark. 117, 283 S. W. 379.

But this familiar doctrine cannot have application here, for the reason that the estate is not devised to Mrs. Mary Elmira Godfrey and her bodily heirs, creating a life estate in her and a fee simple estate in her bodily heirs under the statute *supra*. The life estate, as we have seen, was previously devised to Mrs. Artemus F. Gillis, and the *remainder* of the estate, after such life estate, was devised to Mary Elmira Godfrey and her bodily heirs.

If the testator had intended to vest only a life estate in Mrs. Mary Elmira Godfrey, to take effect immediately upon the death of Mrs. Gillis, he doubtless would have designated the estate to be thus cast on Mrs. Godfrey as a "life estate" instead of as a "remainder." After he had carved out of the fee a life estate, and then vested the "remainder" in Mrs. Godfrey, he evidently meant to devise to her what remained of the estate in fee simple, which was all of it. The fee took it all, and there was nothing left to devise. To construe the will so as to vest the life estate in Mrs. Gillis and a life estate also in Mrs. Elmira Godfrey would be to make these clauses of the will repugnant and inconsistent. This could not have been the intention of the testator, and such construction must therefore be avoided in order to effectuate his purpose. Therefore, construing all the provisions of the will, it occurs to us that the testator intended to vest in Mrs. Gillis a life estate at his death, and at that time to vest in Mrs. Godfrey an estate in remainder (using the latter term in its technical sense), and, by so doing, to dispose of his entire estate.

Mr. Washburn, in his great work on Real Property, defines a remainder as "an estate or interest in lands or tenements to take effect in possession or enjoyment immediately upon the termination of a prior estate, which is created at the same time and by the same act or instrument and upon which such first-mentioned estate is made to depend." 2 Washburn on Real Property, p. 504. Further along the learned author says: "Whether vested or contingent, it is essential to a remainder * * *

and is an imperative rule of law, that it should take effect immediately on the termination of the prior estate, the particular estate and remainder together forming one continuous ownership. * * * From the doctrine above stated, that the particular estate and remainder form together, when united, but one estate of the extent or duration of the two, it follows that, while ever so many remainders in succession may be carved out of a fee simple if each is less than a fee, no remainder can be limited after a fee; for, when a fee has once been created, there can be nothing left by way of remainder to give away."

We are convinced, from a consideration of the language of the whole will, that it was the intent of the testator to vest a life estate, as mentioned, in his wife, Artemus F. Gillis, and the remainder or fee simple estate in Mary Elmira Godfrey. The term "remainder," as used in the clause containing the devise to Mary Elmira Godfrey, must be construed in its technical sense to prevent repugnancy and to carry out the manifest intention of the testator to dispose of his entire estate, vesting a life estate in his wife and the *remainder* in fee simple in Mary Elmira Godfrey. The will, in other words, should be construed in legal effect as if it read, "I give, devise and bequeath to my wife, Artemus F. Gillis, for her life, my entire estate, except $1,000, and, at her death, the remainder to Mary Elmira Godfrey." If such were the plain language of the will, it would clearly mean that the testator vested a life estate in his wife, Artemus F. Gillis, and in Mary Elmira Godfrey at the same time a vested estate in the remainder, which bequests and devises disposed of his entire estate. Under this construction of the will, the life estate ended with the death of Mrs. Gillis, at which time Mary Elmira Godfrey took the fee as remainderman. As is said in *Bell* v. *Gentry, supra,* "we are led to the conclusion announced, not only by a consideration of the language set out above, but by the settled rule of construction, that the law favors the vesting of estates as early as possible, and we think

the construction given this will effectuates the intent of the testator." The undisputed testimony shows that Mrs. Herring is still living. She is the only party in interest, and is not made a party to this action. The conclusion we have reached makes it unnecessary and improper to discuss, much less to decide, the other questions presented in the interesting briefs of counsel. The decree of the trial court is in all things correct, and it is affirmed.

SIMPSON v. FIRST NATIONAL BANK OF DEWITT.

Opinion delivered March 21, 1927.

MORTGAGES—REGISTRATION IN WRONG DISTRICT.—Where plaintiffs, residing in the Northern District of Arkansas County, executed chattel mortgages which were recorded in the Southern District, defendant mortgagee was not liable for the statutory penalty under Crawford & Moses' Dig., § 7396, for failure to satisfy them when paid, as the mortgages constituted no lien on plaintiff's property, even as against persons with actual notice.

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

Botts & O'Daniel, for appellant.

John L. Ingram, for appellee.

SMITH, J. Appellants are farmers and stock raisers, and resided in the Northern District of Arkansas County. On August 13, 1921, they borrowed $433.90 from the First National Bank of DeWitt, and, to secure the payment thereof, executed a chattel mortgage on a lot of cattle owned by them. Payments were made on the indebtedness thus secured, and upon each renewal of the note a new chattel mortgage was taken. In this manner a fifth chattel mortgage to the bank was executed on June 23, 1923, to secure the balance then remaining unpaid. In each case there was a failure to cancel and satisfy of record the prior mortgage upon the execution of the subsequent one, so that, when the indebtedness secured by

the last mortgage was paid, none of them had been satisfied of record.

Appellants made demand that the bank satisfy and cancel of record these mortgages, pursuant to § 7396, C. & M. Digest. This section reads as follows: "If any person thus receiving satisfaction do not, within sixty days after being requested, acknowledge satisfaction as aforesaid, he shall forfeit to the party aggrieved any sum not exceeding the amount of the mortgage money, to be recovered by civil action in any court of competent jurisdiction." The demand to satisfy was not complied with, and this suit was brought to recover damages for this failure.

Appellant offered testimony tending to show that they had been damaged in a very substantial amount on account of their inability to sell the mortgaged cattle, which they were unable to do because of the outstanding mortgages.

There was a verdict and judgment in appellant's favor for the sum of $12.50, and they seek by this appeal to reverse that judgment upon the ground that the undisputed evidence shows that they sustained damages in a very much larger amount.

The briefs discuss the question whether the statute quoted is penal or remedial, the significance of that issue being that, in one case, the statute of limitations is two years and in the other three years. We find it unnecessary to decide this question, for reasons hereinafter stated.

By act No. 63, Acts 1913, page 192, Arkansas County was divided into two judicial districts, which were designated as the Northern and Southern districts, and it was there provided that, for all the purposes of the act, these districts should be considered as separate and distinct counties. The clerk and recorder is required by the act to maintain an office in each district and "to record all deeds and other instruments in writing required by law to be recorded in their respective offices."

As we have said, appellants reside in the Northern District of Arkansas County, and the mortgages executed by them to the bank were filed for record in the Southern District of that county. This being true, the mortgages were not recorded instruments within the meaning of the statute under which this suit was brought.

In the case of *Beaver* v. *Frick Co.*, 53 Ark. 18, 13 S. W. 134, a *per curiam* opinion reads as follows: "The mortgagor resided in the Western District of Carroll County. The court found that the plaintiff's mortgage was never recorded or filed in that district. It was therefore not a lien on the property of the mortgagor as against a subsequent mortgage filed and recorded in the district where the mortgagor resides. Under the act creating separate districts for the record of deeds and mortgages in Carroll County (act March 12, 1883), the two districts stand in that respect as separate counties."

Section 7381, C. & M. Digest, provides that "every mortgage, whether for real or personal property, shall be a lien on the mortgaged property from the time the same is filed in the recorder's office for record, and not before; which filing shall be notice to all persons of the existence of such mortgage."

The mortgages to the bank were therefore not recorded, and it is settled law that an unrecorded mortgage constitutes no lien upon the mortgaged property as against strangers, even though they have actual notice of its existence. *Smead* v. *Chandler*, 71 Ark. 505, 76 S. W. 1066; *Ruddell* v. *Reves*, 146 Ark. 259, 225 S. W. 316.

Not having been properly recorded, the mortgages in favor of the bank were not liens on the property, even as against persons having actual notice thereof, and, for this reason, we conclude that the statute sued on does not create a cause of action in appellants' favor.

Appellee has not cross-appealed, but asks that the judgment be affirmed, and it is so ordered.

INTER-OCEAN CASUALTY COMPANY v. WARFIELD.

Opinion delivered March 21, 1927.

1. INSURANCE—ACCIDENT POLICY—DWELLING HOUSE.—A quarter-boat used by government employees, while engaged in river improvement work, as a place of abode where they ate and slept, was a "dwelling house" within the meaning of a policy insuring an employee against loss of time from work by burning of a dwelling house.
2. INSURANCE—STATUTORY PENALTY—FOREIGN POLICY.—The penalty of 12 per cent. and attorney's fee should not be allowed in a judgment on a policy written and maturing outside the State.

Appeal from Chicot Circuit Court; *Turner Butler*, Judge; modified.

William Kirten, for appellant.

W. W. Grubbs, for appellee.

SMITH, J. Appellee resides in Chicot County, Arkansas, but for some years has been employed by the United States Government in its improvement work on the Mississippi River. Appellee and other men similarly employed lived, during the time of their employment, in a boat known as a quarter-boat, which was so equipped that the men ate and slept therein. As the name of the boat indicates, it was the living "quarters" of the men employed by the Government, and was their home during the period of their employment. The quarter-boat in question was stationed or anchored against the bank about eight miles north of Greenville, on the Mississippi side of the river.

Appellee read in a newspaper the advertisement of an accident and casualty company, having a local agent at Memphis, Tennessee, and he applied for a policy of insurance in the company. The application for the policy was transmitted by the local agent at Memphis to the home office of the company in Cincinnati, Ohio, where, on March 7, 1922, a policy was issued to appellee, it being mailed to him at his home address in Chicot County.

The policy insured the holder thereof against loss of time from work in the sum of $10 per week, for a period

not to exceed three months, resulting from injury received in the following manner, to-wit: "By the burning of a dwelling-house, hotel, theatre, office building, lodge room, club house, school building, store, church or barn, while the insured is therein, and provided the insured is therein at the beginning of the fire, and is burned by such fire, or suffocated by the smoke therefrom, but this clause shall not apply to nor cover the insured while acting as a watchman, policeman, or a volunteer or paid fireman."

On December 14, 1924, while the policy was in force, appellee was employed by the Government and was living in the quarter-boat, wherein he ate his meals and slept at night. The boat caught fire, and appellee was severely burned, and he brought suit to recover the indemnity provided for in the policy. He recovered judgment for the sum sued for, together with a 12 per cent. penalty and an attorney's fee. No question is made as to the amount recovered, except the penalty and attorney's fee, if the insurer is liable under the policy.

The liability of the insurer depends on the answer to the question whether the quarter-boat was a dwelling-house within the meaning of the policy.

In 19 C. J., 843, many definitions are given of the word "dwelling" or "dwelling-house," under that title, and many cases are cited holding that certain structures were or were not dwelling-houses. It is there said: "Many definitions have been given in adjudicated cases, and they are not entirely harmonious. The usual line of demarcation has been the use to which the building is devoted as a habitation for man; but the particular meaning intended to be expressed by it, when used in a given instance, may be rendered obvious by the context or attending circumstances; and usually resort must be had to those aids to interpretation to ascertain what is meant. * * * The term has been defined as one which is wholly or in part usually occupied by persons lodging therein at night, although other parts or the greater part may be occupied for an entirely different purpose; one

designed to be occupied as a place of abode by night as well as by day, and which is constructed with a special reference to that object; a house usually occupied by a person lodging therein at night; a house or other edifice usually occupied by persons lodging therein at night; any house in which a person sleeps at night; any house where any person habitually sleeps; a house in which one regularly and habitually sleeps in the night-time; any house within which some person habitually sleeps or eats his meals; a house intended for human habitation; any house inhabited by man; an inhabited house; any house in which people dwell; the house in which one dwells; a house or structure in which people dwell; a house in which human beings usually stay, lodge or reside; a house designed to be occupied as a place of abode; * * * the building in which one lives; a habitation for man, usually occupied by some person lodging in it at night."

In the case of *Davis* v. *The State*, 38 Ohio State Reports, 505, it is said: "Whether a building is or is not a dwelling-house depends upon the use to which it is put. A barn may be converted into a dwelling-house, or a dwelling-house into a barn, by a change of uses; so an infirmary may or may not be a dwelling-house, depending in no wise upon the question of its ownership or the purposes of its original construction, but upon outside facts and circumstances."

In the case of *State of Iowa* v. *Mullen,* 35 Iowa 199, it was held that the words "house of ill-fame," as used in the statute punishing the keeping thereof as a nuisance, included a boat on the Mississippi River when used as a habitation for such purposes. The court there said: "It is suggested that the keeping of a boat or vessel of ill-fame does not constitute the crime of nuisance as defined in § 1411 of the Revision, which punishes the keeping of *houses* of ill-fame for the purpose of prostitution and lewdness. But the point seems not to be relied upon with any degree of confidence, and it needs but a passing notice. The evidence shows that the structure in ques-

tion is a flatboat with a cabin built on it, well finished and protected from the water; that men and women lived in it, and that the defendant and others ate and slept there. The following is Webster's definition of a house: 'In a *general sense,* a building or shed intended or used as a habitation or shelter for animals of any kind; but *appropriately,* a building or edifice for the habitation of man; a dwelling-place, mansion or abode for any of the human species. It may be any size, and composed of any materials whatever.' "

In the case of *Corey* v. *Schuster,* 62 N. W. 470, the Supreme Court of Nebraska said: "The second argument is that the building on the homestead premises was and is not a 'dwelling-house' within the meaning of the statute. We think this argument wholly without merit. The law does not contemplate, by the words 'dwelling-house,' any particular kind of house. It may be a 'brownstone front,' all of which is occupied for residence purposes, or it may be a building part of which is used for banking or business purposes, or it may be a tent of cloth. All that the law requires on the subject is that the homestead claimant and his family should reside in this habitation or dwelling-house, whatever be its character, on the premises claimed as a homestead."

We conclude therefore that the quarter-boat, being a place of abode for appellee and other employees during their employment, was, during that time, a dwelling-house within the meaning of the policy. The structure was designed and used for the purpose of abode, and its character as such was not destroyed by the fact that it was floated up or down the river as the work of the Government required.

Appellant insurance company insists that it was error to allow the insured the statutory penalty and attorney's fee, under § 6155, C. & M. Digest, and we concur in this view. Upon this point the case is ruled by the decision in the case of *Business Men's Accident Assn.* v. *Cowden,* 131 Ark. 419, 199 S. W. 108. In that case, as in

this, the policy sued on was written by a foreign insurance company, and the accident in each case upon which liability was predicated occurred in another State. It was there said: "* * * we hold that the statute (§ 6155, C. & M. Digest) was not intended to penalize a company on policies which were written and which matured in another State."

The judgment of the court below will therefore be modified by striking out the allowance of the penalty and attorney's fee, and, as modified, will be affirmed.

NIX v. KIRKLAND.

Opinion delivered March 21, 1927.

1. FRAUD—EVIDENCE.—Evidence *held* to support a finding that a valuation of $4,000 put on land by the owner at the time of exchanging it for other land was not fraudulent, though the land subsequently sold for less than $2,000.
2. FRAUD—RELIANCE ON REPRESENTATION.—One who, in negotiating for an exchange of lands, had his own agent to make inspection and report as to its value, cannot complain of fraudulent misrepresentation as to such value by the other party, since he did not rely upon such representations.
3. EXCHANGE OF PROPERTY—DEFICIENCY JUDGMENT ON FORECLOSURE.—In an exchange of lands, one who transferred an equity in land and $2,000 which he borrowed, giving a mortgage on the land which he transferred, *held* not entitled to personal judgment against the transferee, who took subject to the mortgage, for an amount of a deficiency judgment against the former when the land was subsequently sold to satisfy the mortgage.

Appeal from Arkansas Chancery Court, Northern District; *H. R. Lucas,* Chancellor; reversed in part.

T. W. M. Boone and *John L. Ingram,* for appellant.

A. M. Dobbs, for appellee.

HUMPHREYS, J. Appellant owned property in Fort Smith, Arkansas, consisting of equities, notes and unincumbered lands, of the total value of $4,000.

Appellees owned a farm of 80 acres near Stuttgart, Arkansas, valued at $4,000, upon which a loan had been

approved for $2,000 by the Missouri Life Insurance Company. Negotiations for an exchange of the properties were commenced between said parties on February 26, 1923, and agreed upon the next day, provided appellees could complete the loan and would pay appellant the money which they procured and convey the farm to him subject to the mortgage.

Appellant required appellee, Frank Kirkland, to make an affidavit as to the value of the farm, which he did, placing the value at $4,000.

On the night of the 27th appellant telephoned to J. W. McCuen, at Little Rock, to go over and inspect the farm. He paid McCuen's expenses. McCuen made a report to him. On February 28, 1923, deeds carrying out the exchange were executed and placed in escrow in the First National Bank, Fort Smith. The deeds were delivered on March 14, 1923. The proceeds of the loan, amounting to $2,000, were paid by appellees to appellant on April 13, 1923. The interest on the mortgage loan to the Missouri Insurance Company fell due in January, 1924, and appellant carried on quite a correspondence with the company in an effort to get it to include the interest and make a new loan on the farm. The effort proved futile. Appellant then sold his equity in the farm to Fred W. Loy for $100. On February 24, 1925, the Missouri Life Insurance Company instituted foreclosure proceedings against the farm, and asked for a personal judgment against appellees, J. F. and Annie L. Kirkland. It made appellant, Fred Loy, his grantee, and S. Kirkland, to whom appellees executed a gas and oil lease, parties defendant. No defense was interposed to the foreclosure suit. Appellees filed a cross-complaint against appellant, seeking to recover any deficiency judgment they might have to pay, in the event that the farm did not sell for enough to pay the mortgage debt. Appellant filed an answer to the cross-bill of appellees, denying liability on account of any deficiency judgment, and a cross-bill against him for $2,000 damages on account of

alleged fraud and deceit practiced upon him in the exchange of properties. Fred W. Loy and S. Kirkland filed disclaimers of any interest in the farm.

The mortgage was foreclosed, and the farm ordered sold to satisfy the mortgage indebtedness. The sale was made pursuant to the order, but the amount realized was insufficient to pay the indebtedness, the deficiency amounting to $470.78, which appellees paid.

The issues between appellant and appellees arising out of their respective cross-bills and answers were submitted to the court upon the testimony introduced by each, which resulted in the dismissal of appellant's cross-bill for want of equity and a judgment in favor of appellees on their cross-bill for payment of $470.78, the amount of the deficiency judgment appellees were compelled to pay to the Missouri Insurance Company, from which is this appeal.

Appellant contends for a reversal of the decree on the ground that the weight of the testimony discloses that he was defrauded by appellee, Frank Kirkland, in the exchange of the properties in the sum of $2,000. The only possible support in the testimony for such a contention arises out of the value placed on the farm in the affidavit made by Frank Kirkland. Frank Kirkland is strongly supported as to the value he placed upon the farm by the loan which was negotiated at the time the deal was made. The Missouri Insurance Company did not make loans upon real estate for over 50 per cent. of the value thereof. It loaned $2,000 upon this farm after appraisement. Several other witnesses testified that the farm was worth $4,000 at the time the deal was made. It is true that a number of witnesses testified that the farm was not worth $4,000 at that time, and, when sold under mortgage, it did not bring as much as $2,000. We are not inclined to attach much importance to the last circumstance, because property often brings much less than its actual or market value at forced sale. Values upon real estate are largely

matters of opinion. We are unable to say, after a careful reading and consideration of the testimony, that the finding of the chancellor was contrary to a clear preponderance of the evidence upon this point. There is another reason, however, why the chancellor was correct in dismissing appellant's cross-bill against appellees. Appellant did not rely upon the statement contained in the affidavit of Frank Kirkland. He telephoned to his agent at Little Rock to inspect the property, and received a report from him before the deeds were finally delivered. Even if deceit and fraud had been practiced upon him in the exchange of the property, he must have relied upon the representations in consummating and completing the deal before he could recover damages.

Appellant also contends for a reversal of the deficiency judgment of $470.78 rendered against him in favor of appellees by way of subrogation to the alleged rights of the Missouri Insurance Company. The Missouri Insurance Company had no right to recover against appellant on account of the mortgage indebtedness. It did not ask for a personal judgment against him, although he was made a party defendant to its suit. The farm was purchased by appellant from appellees subject to the mortgage. The deed so recited. If Kirkland had purchased the mortgage from the Missouri Insurance Company and had attempted to foreclose the same upon the theory that the loan was procured by appellant through them, they could not have recovered a personal judgment against him, for the reason that the $2,000 obtained on the mortgage was a part of the consideration paid by them for the Fort Smith properties. According to the records, appellees obtained $4,000 or more out of the Fort Smith properties. The effect of the exchange was that appellees paid $2,000 in cash and an equity in the farm for Fort Smith properties of the value of $4,000. Having gotten $4,000 out of the Fort Smith properties, they certainly could not be heard to say they were also entitled to a personal judgment against appel-

lant for $2,000 which they paid as a consideration for the Fort Smith properties. Appellees argued that this deficiency judgment must be affirmed under the doctrine announced in the case of *Kay* v. *Castleberry*, 99 Ark. 619, 139 S. W. 645. The facts in the instant case are materially different from the facts in the Kay case. In the Kay case an even exchange of properties was made. After the deal was closed, Castleberry, at the request of Kopelman, his grantee, negotiated a loan of $3,000 on property he had traded to Kopelman, and Castleberry and his wife signed the notes and mortgage for the loan. Kopelman received the money, which amount was in addition to the consideration in the deal and not a part of the consideration for the deal, as in the instant case.

The trial court committed reversible error in rendering a personal judgment against appellant on the cross-bill of appellees. The decree is therefore affirmed in dismissing appellant's cross-bill against appellees, and reversed in adjudging a deficiency judgment in favor of appellees against appellant in the sum of $470.78.

BEASLEY v. HORNOR.

Opinion delivered March 21, 1927.

1. HIGHWAYS—COLLECTION OF IMPROVEMENT TAXES.—Since Acts 1921, p. 573, relating to the collection of delinquent highway improvement taxes, does not outline the method of procedure to foreclose liens for the taxes, it did not impliedly repeal Acts 1921, p. 296, which provided that such taxes should be collected in the manner provided by Acts 1909, pp. 844-847, § 23, 24.
2. HIGHWAYS—FORECLOSURE OF TAX LIEN—COMPLAINT.—A complaint seeking the foreclosure of a tax lien in a road improvement district which alleged briefly the organization of the district and the nonpayment of the tax, with a description of the delinquent land and the amount due thereon, *held* sufficient, under § 24 of Act 279 of Acts of 1909.
3. HIGHWAYS—FORECLOSURE OF TAX LIEN.—Under Acts 1921, p. 573, a road improvement district could sue for delinquent road taxes,

though the collector had not filed the delinquent list, and though a copy thereof was not made a part of the complaint.

4. HIGHWAYS—REDEMPTION FROM TAX SALES.—The act of March 23, 1921, fixing the period of redemption from sales for delinquent road taxes, was not repealed by act of March 26, 1921, No. 534; there being no repugnancy between the two acts.

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

J. G. Burke, for appellant.

Brewer & Cracraft, for appellee.

HUMPHREYS, J. Appellant and appellee have made statements in their respective abstracts and briefs of the substance of the pleadings as well as the facts, much of which we will appropriate word for word, on account of the correctness and brevity contained therein, in making a complete statement of the case before us on appeal.

This is a suit involving the title to lot 13, block 74, in the city of West Helena, Phillips County, Arkansas. Appellee, Fannie M. Hornor, claims the title to said property by virtue of a deed from the commissioner in chancery, dated and approved March 24, 1925, which deed was issued by the commissioner in compliance with a decree entered in a cause pending in the chancery court under the style of *Road Improvement Dist. No. 2 of Phillips County, Arkansas,* v. *Delinquent Lands.* The decree was based upon the following complaint, omitting caption and other formal parts:

"Comes the plaintiff, Road Improvement District No. 2 of Phillips County, Arkansas, by its attorney, Skipwith Adams, and for its cause of action herein states: That Road Improvement District No. 2 of Phillips County, Arkansas, was duly created and organized by the county court of Phillips County, on the ..... day of ....., 1918, under and by virtue of an act of the General Assembly of the State of Arkansas, approved March 30, 1915, which said act, among other things, authorized an assessment of benefits on all of the real property and railroads situated within the boundaries of said district for the purpose of improving and constructing a desig-

nated road within said district. That, pursuant to the provisions of said act, the commissioners of said district caused an assessment of benefits to be made, which would accrue to the various tracts and parcels of land and railroads situated within said district, and caused said book of assessments to be filed in the office of the county clerk of Phillips County, Arkansas, and afterwards delivered to the sheriff and collector of said county, for the purpose of collecting the taxes due on each tract of land within said district for the years 1920 and 1921. That the sheriff and collector of Phillips County, pursuant to act No. 534 of the General Assembly of the State of Arkansas for the year 1921, duly certified to the clerk of the chancery court of said county a list of the lands so delinquent for the said taxes for the years 1920 and 1921, showing the amount of taxes due and penalty due on each tract or parcel therefor. That the clerk of the chancery court of said county, as is provided by said act No. 534, certified to the commissioners of said improvement district No. 2 a list of delinquent lands so certified to him by the sheriff and collectors of said county and remaining unredeemed, which said certified lists of delinquent lands are filed herewith; the list showing the said lands delinquent for the taxes for the year 1920 being marked Exhibit A, and the list showing the lands delinquent for the taxes for the year 1921 being marked Exhibit B, and made a part of this complaint, said lists showing the amount of taxes and penalty of each tract and parcel of land and railroad, agreeable to law."

The appellant is the owner of the record title to said lands, having acquired title by and through one Jim Simms, who was the owner of said property at the time of the institution of said suit by the Road Improvement District No. 2 to foreclose its tax lien thereon. Prior to the filing of the suit for delinquent taxes, Jim Simms had mortgaged said property to the appellant, which mortgage was afterwards foreclosed by proceedings in chancery, and, at the commissioner's sale in the foreclosure

proceedings, the appellant became the purchaser thereof, and was the legal owner of the record title at the time of the execution of the deed to appellee. On the 11th day of November, 1925, appellee, Fannie M. Hornor, filed a petition in the Phillips Chancery Court, praying the court that a writ of assistance be issued against the appellant and his tenants to place her in possession of the property in controversy. The appellant filed his response to the petition of the appellee, and also asked that he be made a party to the proceedings, for the purpose of redeeming the lot from the said alleged tax sale, and tendered into court the necessary amount to perfect the redemption. The response filed by appellant alleges that the proceedings brought by Road Improvement District No. 2 to foreclose its lien for the nonpayment of taxes for the year 1920 were void in that the said road improvement district elected to prosecute its suit under the terms and provisions of act 534 of the Acts of the General Assembly at its session for the year 1921. That the requirements of act 534 were mandatory in order to give the chancery court jurisdiction.

The appellant, in his pleadings, also prayed that he be permitted to redeem from said alleged tax sale, for the reason that the deed from the commissioner to Fannie M. Hornor was prematurely executed and confirmed by the court, for the reason that he, as the owner of said lands, had five years from the date of sale within which to redeem said property. The appellee moved to dismiss the response filed by the appellant, for the reason that it was predicated on a right to collaterally attack the decree upon which the sale was predicated and the commissioner's deed subsequently issued. The appellee further moved to dismiss the intervention to redeem the lot because of the fact that the two-year statute of redemption applied, instead of five years, and that the two years had passed. The motion to dismiss was overruled, to which action the appellee duly excepted, and, upon a hearing of the causes, she presented the complete record in the foreclosure proceedings, consisting of the original com-

plaint, heretofore set out, with the delinquent list attached, the notice of the pendency of the cause, proof of publication, decree ordering sale of the lands, notice of sale, proof of publication of same, report of sale, order of confirmation of sale, and the commissioner's deed to said appellee. Appellant introduced in evidence the list of delinquent lands for the year 1920, as certified to by the sheriff, and the certificate of the chancery court showing the recording of same, which revealed that the list of delinquent lands was not filed by the collector within the time and manner required by § 1 of said act 534. Act 338 of March 30, 1915, under which said district was created and organized, appears as § 5399, Crawford & Moses' Digest, *et seq.* Section 5540 of Crawford & Moses' Digest, which is a part of act 338, provides the time for redemption as one year from the date of sale. Said act 338, under which Road Improvement District No. 2 was organized, specifically repealed all acts in conflict with it. Sections 5642 to 5644 of Crawford & Moses' Digest, which were a part of act 43 of the General Assembly of 1915, approved February 9, 1915, enacted nearly two months before the passage and approval of said act 338, provides the time for redemption as five years from the date of sale.

Appellant's first contention for a reversal of the decree is that the proceedings brought by Road Improvement District No. 2 to foreclose its tax lien were irregular and void, because the collector failed, on or before the second Monday in June of 1920, to make out and file with the clerk of the chancery court a list of the delinquent lands, including the lot in question, and that the list so filed was not supported by the collector's affidavit, and that the said list was not recorded by the chancery clerk in a book kept for that purpose, on or before the first day of July following. The contention is based upon the theory that act 534 of the Acts of 1921 repeals by implication all prior acts with reference to foreclosing liens for delinquent taxes in road improvement districts, and that a failure to comply with said act in any partic-

ular renders the sale void. The act does not outline the method of procedure to foreclose liens for taxes, hence it did not repeal act No. 223 of the Acts of the General Assembly of 1921, which made provision for the foreclosure and collection of delinquent taxes in road improvement districts in the manner provided by § § 23 and 24 of act 279 of the Acts of 1909. Section 24 of said Act 279 reads as follows:

"In such suits it shall be sufficient to allege generally and briefly the organization of the district and the nonpayment of the taxes, setting forth a description of the lands proceeded against and the amount chargeable to each tract, with prayer for foreclosure."

By reference to the complaint of Road Improvement District No. 2, copied at length herein, it will be seen that it is broad enough to meet the requirements of the statute. The fact that it alleges a compliance with said act 534 and that the allegations were not sustained by the proof, does not render the sale void, unless the requirements were jurisdictional. The requirements of said act were before this court in the case of *Moore* v. *Long Prairie Levee District,* 153 Ark. 85, 239 S. W. 380, and it was alleged that the filing of the delinquent list by the collector and the furnishing thereof to the clerk to be attached to the complaint was not a condition precedent to the right to sue. The court had jurisdiction of the subject-matter and parties, under act 223 of the Acts of 1921, so that failure to comply with said provision under act 534 of the Acts of 1921, not being jurisdictional, could not have the effect of defeating the foreclosure judgment for delinquent taxes on collateral attack; such irregularities could only be corrected, if necessary to correct them at all, under a direct attack. *McCarter* v. *Neil,* 50 Ark. 188, 6 S. W. 731; *Collier* v. *Smith,* 132 Ark. 309, 200 S. W. 1098.

Appellant's second and last contention for a reversal of the decree is that the court erred in ruling that the two-year statute of limitations applied, and denying his offer to redeem the lot. The sale occurred on the 17th day of

February, 1923, and the petition to redeem was not filed until November 23, 1925, more than two years after the date of the sale. Appellant concedes that, unless act 223 of the Acts of 1921 was repealed by act 534, passed at the same session, the right to redeem only existed for two years from the date of the sale. As stated before, no period of redemption was provided in the latter act, hence there is no repugnancy between it and act 223. We think upon this point the instant case is ruled by the case of *Northern Improvement District* v. *Meyerman,* 169 Ark. 383, 275 S. W. 762.

No error appearing, the decree is affirmed.

FULTON FERRY & BRIDGE COMPANY *v.* HUCKINS.

Opinion delivered March 21, 1927.

1. FERRIES—RATES.—While ferries are established for the accommodation of the public rather than for the gain and advantage of persons operating them, the rates fixed by the county court must be reasonable.
2. FERRIES—RATES—JURY QUESTION.—The reasonableness of ferry rates is a question solely for the courts.
3. FERRIES—REASONABLENESS OF RATES.—Other courts cannot interfere with the rates or tolls of ferries fixed by the county court unless they are unreasonable.
4. FERRIES—REASONABLENESS OF RATES—PRESUMPTION.—The burden is on a party complaining of ferry rates fixed by the county court to show their unreasonableness, the presumption being that they are reasonable.
5. FERRIES—REASONABLENESS OF RATES—VALUE OF PROPERTY.—In fixing ferry rates, the value of the property devoted to public use should be considered and determined as of the time when the inquiry is made regarding the rates.
6. FERRIES—REASONABLENESS OF RATES—LOSSES AND PROFITS.—Past losses cannot be used to enhance the value of the property or to support a claim that rates for the future are confiscatory, nor can past profits be used to sustain confiscatory rates for the future.
7. FERRIES—REASONABLENESS OF RATES.—Consideration of the increased value of a ferry as a going concern since the organiza-

tion of a corporation taking it over for capitalization at a certain figure *held* not warranted in fixing toll rates, where it was a going concern when incorporated, and no circumstances are shown establishing an increase of value.

8. FERRIES—REASONABLENESS OF RATES—RENTAL VALUE.—It was not error, in determining the reasonableness of ferry rates, to exclude from consideration any additional rental value of the ferry franchise since the ferry was incorporated, in view of the official reports of the corporation showing the cost of construction and reproduction.

9. FERRIES—REASONABLENESS OF RATES—COST OF INSURANCE.—The cost of carrying liability insurance was properly excluded where no such insurance was being carried, and no occasion for carrying it was shown.

10. FERRIES—RATES—AMORTIZATION OF PLANT.—In fixing toll rates, a ferry company should have been allowed a yearly amount sufficient to cover the amortization of the plant during the next three years, when it was shown that the ferry would be displaced by a bridge.

11. FERRIES—RATES—EXPENSE OF MAINTENANCE.—In fixing ferry rates, a reasonable amount for emergency work in reconditioning the shifting river bank after overflows for the landings should have been allowed as a necessary expense of operation, though no charge had theretofore been made by the company's president and ferry manager for such work by teams from his plantation.

12. FERRIES—RATES—SUSPENSION OF TRAVEL IN OVERFLOWS.—Suspension of travel because of periodic overflows *held* not so probable as to warrant allowance for loss of tolls thereby.

13. FERRY—FIXING RATES.—In fixing ferry rates it is immaterial that the ferry was paid for out of excessive profits from high toll rates in past years, as the law, in protecting the owner in the enjoyment of the property, does not consider the source of the purchase money, but only its use in rendering service.

14. FERRIES—RATES—EVIDENCE.—Evidence *held* to establish that day ferry rates of 50 cents per automobile and per ton of trucks, instead of 35 cents fixed by the county court, and a night rate of 75 cents for automobiles and per ton of trucks, instead of 70 cents, would be reasonable.

Appeal from Miller Circuit Court; *James H. McCollum*, Judge; reversed.

STATEMENT BY THE COURT.

This appeal comes from a judgment of the Miller Circuit Court affirming the judgment of the county court

fixing rates of tolls or ferriage for the ferry operated across Red River at Fulton by the Fulton Ferry & Bridge Company.

The ferry company made application to the Miller County Court, in December, 1925, for license to continue operation of a public ferry at Fulton for the next year, from the expiration of its license on the 31st of December. Paul J. Huckins *et al.* were permitted to intervene as taxpayers and residents of Miller County, using the ferry and paying the tolls, and alleged that the tolls collected by the ferry company were unreasonable and exorbitant, and prayed the court to put into effect reasonable and fair rates of toll for ferries.

The ferry company, on May 6, 1926, wrote the county clerk, inclosing its check in payment for the license and fees, and a schedule of tolls or rates fixed by the county court for former years and rates fixed by the Hempstead County Court for the present year, stating: "While the rates allowed us $1 for crossing a two-horse team and wagon and same amount for crossing an automobile, we do not charge more than 75c for one-way passage and $1 for round trip. Making the rate $1, we are protected from people who load up their automobiles and wagons with foot passengers to avoid paying ferriage. The schedule also gives us a night rate that would give us a chance of coming out on. Will you please explain these matters to the court. Dated May 6, 1926."

This schedule showed:

Automobiles	$1.00
Trucks (per ton)	$1.00

The ferry company responded, denying that the tolls set forth in its schedule are unjust, exorbitant or excessive; alleged that they are reasonable, and necessary to allow a reasonable rate on the investment, and similar to those charged by ferries in the State of Arkansas, especially in Miller County, where anything like similar services to those offered by respondent are maintained, and, because of the character of the river banks, the ferry

landing and approaches are unstable and have to be changed from time to time during high waters, causing large expenditures in keeping and maintaining such approaches in a safe condition for operation of the ferry.

The court, on July 12, fixed the license fee, and continued the matter of making rates and fixing schedule of tolls, and, on August 16, found the rates suggested in the schedule of the ferry company excessive and unreasonable, and fixed a schedule of rates for ferriage over Red River for Miller County as follows:

Sheep and goats	$0.05
Hogs	.08
Loose cattle	.12
Horses and mules	.10
Persons on foot	.10
Man and horse	.15
Single buggy and horse	.25
2-horse team and wagon	35
4-horse team and wagon	.60
6-horse team and wagon	1.00
8-horse team and wagon	1.25
Automobiles	.35
Trucks (per ton)	.50

"The night rate shall be double the rates above set forth, which are to be collected during the day."

The ferry company appealed from this order, and petitioned the circuit court to suspend the rates fixed by the county court; alleged that they were unreasonable and confiscatory, and prayed that they be permitted to charge, pending the appeal, the same rates as were allowed to be charged for travel from the Hempstead County side of the ferry, showing a schedule the same as that inclosed to the county court with the application for license, in which the rate for automobiles was $1 and trucks (per ton) $1. The important and controlling rate or toll is the rate on automobiles.

The testimony shows that, for more than forty years prior to June, 1922, the Fulton Ferry had been owned

and operated by J. B. Shults of Fulton, or members of his family; that, at that time, he sold a one-half interest in the ferry to the Conways for $15,000. An Arkansas corporation, the Fulton Ferry & Bridge Company, appellant, was organized June 1, 1922, and took over the ferry and its assets, issuing stock therefor to members of the Shults and Conway families in the sum of $30,000.

Later, without additional capital being paid in, the capital of the company was increased from $30,000 to $150,000, and stock issued in that amount. No dividends were ever paid after the stock was increased, all profits being consumed in paying bonds and interest and salaries to the officials of the corporation.

During the spring of 1926 George T. Conway, who had previously sold for $7,500 a fourth interest in the ferry to Joe Chatfield, only delivering him $25,000 in stock therefor, bought it back for $5,000.

In the spring or summer of 1923 George T. Conway and J. B. Shults secured from the county courts of Miller and Hempstead counties franchises to construct a toll bridge across Red River near Fulton, and in November J. B. Shults and George T. Conway, president and vice president of the Fulton Ferry & Bridge Company, sold these franchises, which had been obtained from the county courts of said counties for nothing, to their bridge company for $100,000, themselves being two of the three directors of the corporation, and Brooks Shults, son of the president, J. B. Shults, being the third. No tolls or rates for ferriage had been fixed by the Miller County Court since the formation of the corporation, the schedule as last made by it, April 5, 1922, allowing $1 for automobiles and $1 for trucks (per ton), when Shults owned the ferry, as attached to the petition for the license, was the same as the schedule of rates fixed by the Hempstead County Court, and had been kept posted by the Ferry Company, which was charging 75c for carrying automobiles in the daytime and $1.50 for ferriage at night.

The gross receipts of the ferry for the calendar year 1922, the year prior to the formation of the corporation, were $20,927.09. The appellant's fiscal year ends May 31, and increase of traffic and income is reflected in the gross receipts for the fiscal years since its formation as follows:

Year ending May 31, 1923	$26,078.60
Year ending May 31, 1924	28,626.64
Year ending May 31, 1925	42,408.87
Year ending May 31, 1926	56,836.56
For five months of the fiscal year that will end May 31, 1927, being the months of June to October, 1926, inclusive	31,013.69

While the income had increased about 300 per cent., rates in effect had not been changed until the present order of the county court. According to exhibits made from appellant's books since its organization, income had been paid out in salaries, dividends, interest on bonds and bonds (those issued for the bridge franchises granted by the county courts as already stated), attorney's fees and expenses of the bridge litigation, to the amount of $122,904.25.

The company kept no capital or depreciation account, but every item of improvement or addition to equipment was charged to the expense account, the same as wages paid the employees of the corporation, and the plant, in cash and usable value, is now worth more than the value at the time it was taken over by the corporation.

This ferry crosses Red River at Fulton on the main highway from St. Louis, north, and Memphis, east, through Little Rock and Texarkana, into Texas, United States Highway No. 67. The ferry at Garland, on the river below Fulton, is on the main highway from Texarkana through the Arkansas oil fields to Pine Bluff. These two ferries have a monopoly of the traffic on these improved roads, and each has been charging 75c ferriage for automobiles. The rates of toll on other ferries on

Red River below the Fulton Ferry, where no good roads have been built at public expense and the traffic is light, are, for crossing automobiles:

Dooley's Ferry	50c
McClure's Ferry	35c
Nottingham's Ferry	50c
Blanton's Ferry at Spring Bank	25c

The value of the corporation's property is placed at $30,000 in its exhibit No. 15, and was rated for taxes for the year 1925 at $4,000 value, and the total tax paid by it on all property, real and personal, in Arkansas for the year 1925 was $129.48. On the annual return for the corporation for the year ending January 1, 1926, the value of its personal property was fixed at $15,000 by the secretary, and on the return made to the Arkansas Railroad Commission for the value of the personal property for June 1, 1926, was placed by Brooks Shults, secretary, at $6,000. The total value of all personal property as estimated and appraised by Crawford and McClure, witnesses for appellees, was $6,412 in October, 1926.

The net income of the ferry company, as shown by exhibits made by its secretary, Brooks Shults, as reflected by its books, after paying interest on bonds, office expense of J. B. Shults, office expense of George T. Conway, the salaries allowed to J. B. Shults and George T. Conway, same being allowed in equal amounts until the beginning of this litigation, and the fees paid attorneys and expenses of the bridge litigation, is as follows:

For year ending May 31, 1923	$13,003.08
For year ending May 31, 1924	7,684.61
For year ending May 31, 1925	14,966.38
For year ending May 31, 1926	28,430.84
For five months of the present fiscal year, a net income of	14,407.32

W. J. Paulk, an expert accountant, after an examination of the books of the appellant company from its organization June 1, 1922, to November 1, 1926, made an exhibit of such audit, using the figures from the books of

gross income and actual expenditures, showing the earnings of the ferry for the fiscal years ending on May 31 were as follows:

Year 1923	$13,002.07
Year 1924	11,184.61
Year 1925	24,771.38
Year 1926	35,685.42
Earnings for 5 months of 1927, the months of May to October, 1926, inclusive	14,686.76

Witness stated that $50 a month each for office expense had been paid to J. B. Shults and George T. Conway since May 31, 1923, and salaries of equal amount to these two, varying from year to year, except for the five months of the year ending May 31, 1927, when a salary at the rate of $500 a month was paid Shults and $250 a month to Conway. No capital account being carried, all items for renewals or additional equipment were being charged to expense account, the same as salaries paid employees. The supplies and equipment purchased and charged to this account during this period, with disbursements in dividends, salaries, bonds and interest, attorney's fees and cost of bridge litigation, all itemized, amounted to $122,904.25.

This witness also made a schedule C, showing the estimated gross and net income of the appellant company at the reduced rate on automobiles, explaining his method of arriving at the gross income, and stated the rates put in effect by the county court would give one-half the present gross income. Leaving the expenses exactly as they are, except for a slight reduction for income taxes, with a reduction of gross income as above set forth, the net profit at the 35c rate would have been as follows:

For the fiscal year ending May 31, 1923	$ 4,012.77
For the fiscal year ending May 31, 1924	3,445.29
For the fiscal year ending May 31, 1925	7,249.42
For the fiscal year ending May 31, 1926	11,464.84
And after 5 months of the present fiscal year	7,335.76

Witness allowed no salaries to J. B. Shults and George T. Conway on this estimate, and to Brooks Shults, the bookkeeper, only the amount as shown on the books of the company, deducted other items charged to expense account, and made no allowance for amortization nor for liability insurance, casualty insurance, fire insurance or marine insurance, none being paid by the corporation.

Brooks Shults, secretary of the company, stated the method used by him in arriving at the gross amount that would be received at the 35c rates, and that it would have been, for the 5-months period, $14,472.85, an amount $712.67 less than the amount reached by Paulk, $15,185.52 under his estimate. Paulk claimed that Shults' method was wrong in that he multiplied the whole number of cars ferried by the 35c rate, when the number crossing at night paid 70c, the night rate, and that the number crossing at night should have been multiplied by 35c and added to the other amount.

The court held the rates fixed by the county court were reasonable, and from its judgment affirming the order of the county court this appeal is prosecuted.

J. D. Head and *Rose, Hemingway, Cantrell & Loughborough,* for appellant.

Henry Moore, Jr., for appellee.

KIRBY, J., (after stating the facts). The rates of tolls for ferriage fixed by the Miller County Court are by this proceeding challenged as unreasonable and confiscatory, depriving appellant of its property without just compensation.

It appears that no rates of toll or ferriage whatever had been fixed by the county court after the organization of the appellant corporation and the taking over by it of the Shults ferry, operated across Red River at Fulton, the last rates fixed by the county court having been made in 1922. Under that schedule $1 was allowed to be charged as toll for ferriage of automobiles and $1 for trucks per ton. No complaint is made of any of the rates fixed in the present schedule except those relating to

automobiles and trucks, which are controlling and produce over 90 per cent. of the revenues of the ferry.

The county court is given authority, for the protection of the public, to fix the rates of tolls for ferries, and, while it is true that ferries are established for the accommodation of the public, rather than for the gain and advantage of persons operating them, it is also true that the rates fixed must be reasonable, and the question of the reasonableness of ferry rates is one solely for the courts. *State* v. *Arkadelphia Lumber Co.,* 70 Ark. 330, 67 S. W. 1011; *Kelly* v. *Altemus,* 34 Ark. 184, 36 Am. Rep. 6; *Ex Parte Grayson,* 169 Ark. 986, 277 S. W. 538; *Covington* v. *St. Francis County,* 77 Ark. 258, 91 S. W. 186.

The courts cannot interfere with the rates or tolls of ferries fixed by the county court unless same are unreasonable, and the burden is on the complaining party to show the unreasonableness of the rates attacked, the presumption being in favor of the reasonableness of such rates. *Arkadelphia Electric Light Co.* v. *Arkadelphia,* 99 Ark. 178, 137 S. W. 1093.

The value of the property devoted to the public use should be considered and determined as of the time when the inquiry is made regarding the rates. *Port Richmond & Bergen Point Ferry Co.* v. *Board of Chosen Freeholders of the County of Hudson,* 264 Fed. 998; *San Diego Land & Town Co.* v. *National City,* 174 U. S. 739, 19 S. Ct. 804, 14 L. Ed. 1154; *Smyth* v. *Ames,* 169 U. S. 466, 18 S. Ct. 418, 42 L. Ed. 819; *Minnesota Rate Cases,* 230 U. S. 352, 33 S. Ct. 729, 57 L. Ed. 1511, 48 L. R. A. N. S. 1151, Ann. Cas. 1916A, 18.

"Past losses cannot be used to enhance the value of the property or to support a claim that rates for the future are confiscatory. * * * Profits of the past cannot be used to sustain confiscatory rates for the future." *Board of Public Utility Commrs.* v. *New York Telephone Co.,* 271 U. S. 23, 46 S. Ct. 363, 70 U. S. Law. ed. 808.

The value of the Fulton Ferry was fixed at $30,000 when a half interest therein was sold to the Conways for

$15,000, and that such was its reasonable value was recognized upon the organization of the appellant corporation taking it over for capitalization at that figure.

Appellant, in its argument here, uses this amount, although he does call it the "barebone value," and insists that a going concern value of $6,000 should be added, but it was a going concern when it was taken over and capitalized, has continued such ever since, and is better equipped now than then, after payment of all operating expenses, profits and dividends. It is true the secretary of the company puts the present value of the personal property of the corporation at $30,000, but it was returned by him for the year 1925 for taxation at only $4,000 and only paid taxes of $129.48 on all real and personal property in Arkansas for that year. The value of its personal property was placed at $15,000 by the secretary of the corporation, in its annual return for the year ending January 1, 1926, and on its return made to the Arkansas Railroad Commission the value of the personal property was reported as of January 1, 1926, at $6,000. An inventory and appraisement of its personal property was made by Crawford and McClure, witnesses for appellees, in October, 1926, placing the value at $6,412. Under all the circumstances, no such showing is made as warrants the consideration of an increased value as a going concern.

Neither was error committed in not allowing or considering any additional rental value of the ferry site owned by the corporation, as contended for. The value of the ferry site was evidently included in the capitalization of the corporation, as correctly indicated by the sale of a one-half interest in the Shults Ferry, a going concern, to the Conways, for the price of $15,000, and the organization of the appellant company taking it over for continued operation as its entire capital at a $30,000 valuation, recognized this to be true. This view is strengthened also by the testimony showing various official reports thereafter made by appellant corporation, placing the value of its personal property at one-half,

or even a lower sum than one-half, of the $30,000, and the other testimony relating thereto showing the cost of construction and reproduction.

Appellant's contention that the circuit court should have allowed or considered the cost of liability insurance as expense of operation is also without merit. No such insurance had been, was being or intended to be carried by it, and the undisputed testimony shows that, from the long experience of operation of all five ferries on Red River in Miller County, two of them for a period of more than forty years, no substantial damage had resulted or been incurred, and it cannot be said that an ordinarily prudent business man would be justified in incurring the great expense of this kind of insurance, in view of such experience. No great amount was claimed or estimated, and none allowed for fire insurance, which would ordinarily be considered a proper charge, but it is also true that no fire insurance had been carried and no fire losses had occurred during this period of operation.

Appellant should have been allowed the $6,000 yearly claimed, and the court should have considered the amount for amortization of the plant during the next three years only when it was shown the ferry would be displaced by the erection of a bridge.

The court should also have considered, in making allowance for necessary expenses of operation, a reasonable amount for "emergency work," as appellant calls it, required done in reconditioning "the shifting river bank" after overflows, for the road to the landing. This, notwithstanding no charge had theretofore been made against the company by J. B. Shults, its president, and manager of the ferry, for such work done by teams and men from his plantation hard by. Such work had been done, was necessary, and the testimony shows it will continue necessary to be done so long as the ferry is operated from "the shifting bank" of the overflowing river. We have concluded, however, that the testimony does not show such a probability now of suspension of travel over this State Highway road, the eastern approach to the

ferry, because of periodic extraordinary overflows of the river, since the roadbed has been raised and graveled, as warrants consideration of the allowance of any amount for loss of tolls or decreased income on that account.

The gross income from the ferry was shown for each of the years that it had been operated by the appellant corporation and the actual expenses of such operation. The gross receipts for the first five months of the fiscal year that will end May 31, 1927, June to October, 1926, are shown to be $31,013.69, and, as appellant puts it in its brief, "the receipts from the ferry are approximately $60,000 a year, collected in small change from each passenger, and the items of expense are disbursed in small amounts, requiring care and economy."

The net income, as shown by exhibits made by Brooks Shults, secretary, from appellant's books, by taking the actual expenses charged for operation by the company from the amount of the gross receipts, including, as such expenses, office expense each of J. B. Shults, president, and George T. Conway, vice president, salaries allowed to each of said parties, and the fees and expenses of attorneys in connection with the bridge litigation, was:

For the year ending May 31, 1923	$13,003.08
For the year ending May 31, 1926	28,430.84
And five months of the present fiscal year	14,407.32

Paulk, an expert accountant, made an examination of the books of the appellant company from June, 1922, to November 1, 1926, and an exhibit of the result of such audit, showing the gross income and actual expenditures, the earnings for the fiscal year ending May 31, follows:

Year 1923	$13,002.07
Year 1924	35,685.42
For 5 months of 1927	14,686.76

His schedules showed also the profits made each year by the ferry company, after adding to the net profits, as shown by its books, the salaries and office expenses paid to J. B. Shults and George T. Conway and the interest

paid on bonds given for the bridge franchise, one-half to Conway and one-half to Shults, which, of course, greatly increased the showing of net earnings. There is little difference in the amounts shown as net profits for the five-month period in 1927 by the secretary of the company, $14,407.32, and by accountant Paulk, $14,686.76.

Paulk made schedules also showing the gross and net income of the appellant company for the years mentioned at the reduced rate of 35 cents for ferriage of automobiles, and for the five months of the fiscal year 1927, leaving the expenses exactly as charged, except a slight reduction for income taxes, which will be reduced as the income was reduced, showing that with such reductions of gross income the net profit at the 35c rate would have been as follows:

For the year 1923	$ 4,012.77
For the year 1926	11,464.84
For the five months of the present fiscal year	7,335.76

In making these figures, however, he allowed no salaries for the officials and only $100 salary for Brooks Shults, the secretary and bookkeeper, as charged on the company's books.

The actual audit of total expenses as charged on the books for ferry operation by the secretary for the five months period (attorneys' fees and expense of bridge litigation not included) is $12,685.52; to this should be added, as above shown, the proportionate amount of the yearly allowance for amortization, $2,500, making in all $15,185.52. The estimated income at the 35c rates for the same period is $14,472.85, according to the secretary's calculation, not enough to pay the expenses as indicated. The income from the reduced rates as estimated by Paulk, one-half that produced by the old rates, is $15,506.84: $321.32 more than the expenses for this period, leaving only a negligible amount for a return on the value of the property used in rendering service to the public.

It can make no difference that the plant or ferry may have been entirely paid for out of excessive profits from

high rates in past years, since the law, in the protection of the owner in enjoyment of the property, does not consider the source from which the money came to purchase it, but only that it is used in rendering the service.

It is true the estimate of the independent accountant showed a substantial amount of earnings over expenses for the five-month period of operation at the 35c rate, but from it was excluded any charge for the salaries of officers, other items properly chargeable, and no allowance was made for amortization. There might well be excluded from the expense of operation the charge of any salary paid to the vice president, who had no real duties to perform relative to the operation of the ferry, but an additional allowance for compensation could be made to the secretary up to $250 a month, which would offset largely the allowance to the vice president, and not be unreasonable compensation to the secretary for the service rendered, as shown by the testimony. The salary as allowed to the president was begun to be charged and paid before this rate litigation developed, and, although it is large in comparison with the salary of other years, the testimony shows him to be an experienced and capable man, devoting virtually his entire time and attention to the management of the ferry, which has been so efficiently done that no damage to persons and property making use of the ferry has ever resulted during the long time of his supervision. Then, too, in other years it made no difference that the salary reflected by the books was not large, since ample compensation was realized by him out of profits and dividends.

From the testimony and estimates the circuit court should have found that day rates of toll of 50 cents for ferriage of automobiles and 50 cents for trucks (per ton), instead of the 35-cent rate made by the county court, with a night rate of 75 cents for automobiles and 75 cents per ton for trucks, instead of 70 cents, as fixed by the county court, would have been reasonable and yielded just compensation to the ferry company upon the value of its property used in rendering service to the

public. *Coal District Power Co.* v. *Booneville,* 161 Ark. 638, 256 S. W. 871.

The said rates as fixed by the county court are shown to have been unreasonable, and the circuit court erred in holding otherwise and in not finding and fixing the rates designated above, which will afford a fair and just return upon the investment as reasonable, for which errors its judgment will be reversed, and the cause remanded with directions to reverse and overrule the judgment and order of the county court fixing said unreasonable rates, and adjudge and fix the said rates as reasonable, and have certified its judgment to that court for establishment of the said rates herein designated as reasonable rates of toll for the ferriage of automobiles and trucks at the Fulton Ferry operated by appellant.

It is so ordered.

INTERNATIONAL SHOE COMPANY v. PINKUS.

Opinion delivered March 21, 1927.

1. INSOLVENT DEBTOR—EFFECT OF APPOINTMENT OF RECEIVER.—The effect of the appointment of a receiver of an insolvent debtor, under Crawford & Moses' Dig., §§ 5885-5893, is the same as if the debtor had made an assignment for the benefit of his creditors.
2. BANKRUPTCY—EFFECT OF PETITIONING FOR APPOINTMENT OF RECEIVER.—Filing a petition in the chancery court by a debtor is an act of bankruptcy within the Federal Bankruptcy Law.
3. BANKRUPTCY—JURISDICTION.—The Federal bankruptcy court does not obtain jurisdiction of the estate of a debtor in the absence either of a voluntary petition by the debtor or a petition by creditors as provided by law.
4. BANKRUPTCY—STATE INSOLVENCY LAWS.—The Federal Bankruptcy Act does not abrogate or repeal the insolvency laws of a State, but merely suspends its operation in so far as the State statute comes in conflict.
5. BANKRUPTCY—STATE INSOLVENCY ACT.—Unless creditors of an insolvent take action to give the bankruptcy court jurisdiction, a proceeding in the State court, under Crawford & Moses' Dig.,

§§ 5885-5893, for the appointment of a receiver for an insolvent debtor, is valid.

6. BANKRUPTCY—JURISDICTION.—Jurisdiction of the Federal Bankruptcy Court in bankruptcy matters is exclusive when properly invoked in the administration of the affairs of insolvent debtors.

7. BANKRUPTCY—JURISDICTION.—Even though the State chancery court has jurisdiction, under Crawford & Moses' Dig., §§ 5885-5893, to declare an insolvent debtor a bankrupt, it cannot prevent either resident or nonresident creditors from invoking the jurisdiction of the Federal Bankruptcy Court under the Bankruptcy Act (U. S. Comp. Stat., § 9585 *et seq.*).

8. BANKRUPTCY—DISPOSITION OF PROPERTY FOR CREDITORS' BENEFIT.—The fact that an insolvent debtor may go into the bankruptcy court, or be forced there by his creditors, does not prevent him from disposing of his property where the jurisdiction of that court is not properly invoked.

Appeal from Chicot Chancery Court; *E. G. Hammock,* Chancellor; affirmed.

Streett & Burnside, for appellant.

Golden & Golden, E. E. Hopson and *N. B. Scott,* for appellee.

MEHAFFY, J. The appellant filed its complaint in the chancery court of Chicot County, alleging that it was a corporation legally organized and doing an interstate business; that its transaction with Pinkus constituted interstate commerce, and that it was authorized to maintain the suit; that the defendant, I. Pinkus, and the garnishees, M. A. Threet, M. A. Threet as receiver, Sam Dessent, Bank of Dermott, and Exchange Bank & Trust Company were all citizens and residents of the State of Arkansas, the last two being banking corporations. It alleged that, on the 24th day of August, 1925, it obtained judgment against I. Pinkus in the common pleas court of Chicot County for $463.43, with interest from December 9, 1924, at the rate of 6 per cent. per annum, and for all costs. That no part of said judgment has been paid; that an execution was issued against the property of Pinkus, and the sheriff reported that he was unable to find any property of the defendant upon which to levy. It further alleged that the garnishee, M. A. Threet, and

M. A. Threet as receiver, has in his possession and control said moneys, property of defendant Pinkus, acquired by the sale of merchandise and fixtures belonging to Pinkus under certain proceedings now pending in the Chicot Chancery Court, wherein I. Pinkus was plaintiff and Ed Cannon and other creditors of the said Pinkus, including the plaintiff herein, are defendants, instituted under and by virtue of act 48 of the Acts of the General Assembly for 1897, being now §§ 5885 to 5893, inclusive, of Crawford & Moses' Digest. That all proceedings of the Chicot Chancery Court under the State statute are void, because the insolvency laws of the State were suspended by the bankrupt act; that the moneys now held by Threet, individually or as receiver, belong to I. Pinkus, and are subject to the payment of judgment in favor of plaintiff; that the said Threet, individually and as receiver, has said moneys deposited in one or both of the banks named as garnishees; that Sam Dessent owes Pinkus certain sums of money arising from sale and purchase of merchandise and fixtures.

Plaintiff attached interrogatories to be answered under oath by each of the garnishees. Plaintiff attaches a copy of the judgment in the common pleas court, the return of the sheriff, and the petition of defendant, Pinkus, to be declared an insolvent, and for the appointment of a receiver; also shows the exhibits attached to the petition. Plaintiff also attaches, as an exhibit, the decree and orders of the chancery court. Plaintiff also exhibits the transcripts of the answer of Threet as receiver, showing the amount realized from the sale of the store and fixtures belonging to I. Pinkus. Exchange Bank & Trust Company also filed answer to interrogatories, which were exhibited with plaintiff's complaint. Defendants filed demurrers to plaintiff's complaint, and the court sustained the demurrers and dismissed plaintiff's complaint.

It is contended by the appellant, first, that the Federal bankrupt act of 1898 superseded and suspended the

insolvency laws of the State of Arkansas, in so far as the instant case is concerned, and that the proceedings attempted to be had thereunder in this case are *coram non judice,* and void, second, that, if the chancery court had jurisdiction to declare Pinkus a bankrupt, it could not bind appellant, a nonresident of the State, in such proceeding.

The Arkansas statute with reference to insolvent debtors simply authorizes a debtor to go in the chancery court and ask for the appointment of a receiver to take charge of his property and distribute the same among his creditors. The effect of this is the same as if the debtor had made an assignment of his property for the benefit of his creditors, and this court has repeatedly held that a debtor may make an assignment of all his property, but that he cannot reserve any to himself, except, of course, the exemptions he is allowed by the Constitution.

This court, however, has said: "It is no longer questioned that the national bankruptcy law brooks no interference with its operation, and supersedes all State insolvency laws in conflict with it or that provide the same relief. But it is also true that such Federal bankruptcy law does not repeal or abrogate State laws in conflict, but only supersedes and suspends their operation for the time being upon persons or cases within the purview of the Federal statute. The national bankruptcy act does not apply to all persons and all corporations. * * * It is true that the appointment of a receiver by the State court for the insolvent company constituted an act of bankruptcy within the meaning of § 3a (4) of the bankruptcy act, which could have been taken advantage of by the creditors of said company by involuntary proceedings at any time within the four months thereafter, and which was done on the 17th day of January, 1910." *Roberts Cotton Oil Co.* v. *F. E. Morse & Co.,* 97 Ark. 513, 135 S. W. 334.

The debtor in the case at bar could have filed his petition in voluntary bankruptcy, and the Federal court

would have ordered a distribution of his property among his creditors, just as was directed by the chancery court. But there is no law requiring him to go into voluntary bankruptcy, and, if he had been required by law or any other force to do so, his bankruptcy would not have been voluntary. Where the debtor's assets are small, it is frequently very much better for his creditors to have him either make an assignment for the benefit of his creditors or have a receiver appointed by the chancery court, to whom all of his property shall be turned over, to be distributed among his creditors, than it would be for him to go into voluntary bankruptcy. When he filed his petition for the appointment of a receiver in the chancery court, he committed an act of bankruptcy under the Federal bankruptcy law, but, in order for the bankruptcy court to get jurisdiction, the Federal law requires certain procedure. There must be a petition by three or more creditors who have provable claims against the debtor, which amount in the aggregate to $500 or over, or, if all the creditors are less than 12, then one creditor may file petition against the debtor. The filing a petition in the chancery court for the appointment of a receiver by an insolvent debtor, or the making of an assignment for the benefit of his creditors, is an act of bankruptcy, but an act of bankruptcy of itself does not put one in the Federal court. There must either be a voluntary petition by the debtor or a petition by the creditors as provided by law. If the creditors had filed a petition against the debtor in the bankrupt court, the bankrupt court would have had jurisdiction, and the State court could have acted no further, but the Federal bankrupt act does not abrogate or repeal the insolvency laws of a State, even where the insolvency laws are in conflict with the bankruptcy act. But, in such case, it only suspends the State statute, but, notwithstanding the bankrupt act, State statutes that are not in conflict therewith are still operative, and it has been held, both by this court and by the Federal court, even where the State

statute is in conflict with the Federal statute, the bankruptcy act suspends the operation only upon persons or cases within the purview of the Federal statute. Unless the creditors take action for the purpose of giving the bankrupt court jurisdiction, the proceeding in the State court is valid. The statute does not prohibit creditors from filing petition in bankruptcy, and does not require them to release or relinquish their debt or claim against the debtor. They may file their claim and participate in the proceeds, or they may decline to do so and still have their judgment or claim against the debtor. Nothing that the debtor could do could defeat the right of the creditors to invoke the bankruptcy law or have the bankrupt estate administered in the Federal court. The bankruptcy law is paramount, and the jurisdiction of the Federal court in bankruptcy, when properly invoked in the administration of the affairs of insolvent persons or corporations, is exclusive. But the bankruptcy court does not take jurisdiction unless a request to do so is made by some creditor or the debtor. There are doubtless many insolvent persons who do not wish to go into voluntary bankruptcy, and whose situation is such that the creditors could not put them into involuntary bankruptcy. But, in all cases where the jurisdiction of the Federal court in bankruptcy is properly invoked, all procedure thereafter in the State court must cease. If there were no statutes on insolvency, an insolvent debtor could either make an assignment, turn over all his property for the benefit of his creditors, or could apply to the chancery court for the appointment of a receiver to take charge of all of his property.

The appellant next insists that, even if the chancery court had jurisdiction to declare Pinkus a bankrupt, it could not bind the appellant, a nonresident of the State. It not only could not bind a nonresident, but it could not bind a resident creditor. No creditors are prevented from invoking the jurisdiction of the bankrupt court, whether they are residents or nonresidents, and no one can

get a release from his debts in any court other than the bankrupt court, except by the voluntary act of the creditor. The creditor may or may not release or relinquish his claim. If he wishes to participate in the proceeds or the assets of the debtor, he may be required to accept his *pro rata* part in full payment, but he is not required to do this. He can decline to do so, and pursue any remedy he may have, including an application or petition in the bankrupt court, but, if he does not wish to pursue this remedy, then the debtor may, through the chancery court, do what he might do by making a general assignment, and, although either constitutes an act of bankruptcy, it will be binding until the jurisdiction of the Federal court is properly invoked. Simply because an insolvent debtor may go into the bankruptcy court, or may be forced to go by a petition of creditors, does not prevent him from disposing of all of his property for the benefit of all of his creditors, unless the jurisdiction of the bankrupt court is properly invoked, and we therefore conclude that, unless and until the jurisdiction of the bankrupt court is properly invoked, the voluntary agreement of the creditors is binding. It follows from what we have said that the decree of the chancery court must be affirmed.

AULT v. McGAUGHEY.

Opinion delivered March 21, 1927.

1. MASTER AND SERVANT—NEGLIGENCE—FAILURE TO BRACE WALL.—In an action for the death of a bricklayer caused by the caving in of a dirt wall in an excavation, the issue of the master's negligence in failing to brace the wall was for the jury.
2. MASTER AND SERVANT—RELIANCE ON MASTER'S JUDGMENT.—While a servant assumes the risks and hazards ordinarily incident to his work, he has a right to rely upon the master's judgment unless the danger is so obvious that no ordinarily prudent person would incur it under like circumstances.

3. MASTER AND SERVANT—SAFE PLACE TO WORK.—A master is under duty to use ordinary care to provide a reasonably safe place for the servant to work.

4. MASTER AND SERVANT—QUESTIONS FOR JURY.—In an action for death of a bricklayer caused by the caving-in of an unbraced dirt wall in an excavation, where he was instructed to lay brick, the issues of contributory negligence and assumed risk *held* under the evidence to be for the jury.

5. MASTER AND SERVANT—SAFE PLACE TO WORK.—In an action for negligence in causing the death of a bricklayer caused by the caving-in of an unbraced dirt wall in an excavation, the master was required to use due care to provide a safe place to work, notwithstanding the hazards and dangers changed during the progress of construction.

6. MASTER AND SERVANT—DUTY TO FURNISH SAFE PLACE—INSTRUCTIONS.—In an action for negligently causing the death of a bricklayer by failing to brace a dirt wall, an instruction that the defendants were under duty to use such care as ordinarily prudent builders would have used under the circumstances, and, if prudent builders would have braced the earth wall, then it was defendants' duty to do so, *held* not abstract.

7. TRIAL—OBJECTION TO PART OF STATEMENT.—In an action against a master for death of a servant, testimony of the widow as to what the deceased and his mother had told her as to deceased's age was not erroneously admitted, where defendant's objection was only as to admission of what deceased had told his wife.

8. EVIDENCE—HEARSAY—AGE.—The date of a person's birth may be testified to by members of his family, although they may know of the fact only by hearsay founded on family tradition.

9. EVIDENCE—DIAGRAM.—In an action for death of a servant caused by a cave-in of an unbraced dirt wall, the admission of a diagram sufficiently identified was not prejudicial.

10. DEATH—DAMAGES TO DECEASED'S MOTHER—EVIDENCE.—In an action for death, it was not error to admit in evidence checks to corroborate his mother's testimony that her son had contributed to her support, as tending to prove the extent of her loss.

11. DEATH—CONSCIOUS PAIN AND SUFFERING.—In an action for a wrongful death of a laborer from the caving-in of a dirt wall, proof that there were three successive slides which gradually smothered deceased, *held* to sustain a finding of $1,500 for the benefit of his estate.

Appeal from Garland Circuit Court; *Earl Witt*, Judge; affirmed.

Martin, Wootton & Martin, T. D. Wynne and *Chas. A. Miller,* for appellant.

Witt & Witt and *Murphy & Wood,* for appellee.

MEHAFFY, J. The appellee, plaintiff below, as administratrix of the estate of T. L. McGaughey, deceased, filed suit in the Garland Circuit Court against the appellants, who were defendants below, alleging that the defendants, W. F. Ault and C. H. Burden, were partners doing a general contracting business in the State of Arkansas, and that deceased, T. L. McGaughey, was a bricklayer, and, on the 14th day of March, 1924, was working in the employ of the defendants, engaged in laying bricks in the construction of a building on Main Street, in Little Rock, and that the defendants were in charge of the construction of said building, and, in the construction, excavated a basement about 14 feet below the street level, and started the walls of the said building about fourteen feet below the street level; that said building was being constructed adjoining a three-story brick building on the corner of 5th and Main Streets, known as the Hegarty building; that the Hegarty building had no basement, and that it was necessary, in the construction of the building, for defendants to excavate under the south wall of the Hegarty building and to construct a wall 14 feet high under said Hegarty wall; that defendants had excavated a section under the Hegarty wall about 8 feet in length and to a depth of about 14 feet, and had underpinned the wall for the purpose of foundation under said wall, and that plaintiffs' intestate was ordered by the foreman in charge to begin constructing the footings for the wall under the Hegarty wall, and that, under the direction of the foreman, he began laying bricks for the footing of said wall; that it was the duty of the defendants to make the place reasonably safe, and that defendants should have had the dirt wall under the Hegarty wall braced so that it would not cave or slide, and, if they had had proper regard for the safety of their employees, they would have braced the dirt wall to prevent caving, alleging that they negligently failed to brace

the wall or to protect it from sliding; that deceased was not aware of the danger, and obeyed the command of his superior, and began to lay bricks, and that, while he was so engaged, the wall caved in on him and completely covered him and crushed him to death. There were three distinct slides of dirt; the first covered him to his waist line, the second to his shoulders, and the third covered his entire body and smothered him to death. The first and second slides crushed and bruised his body and caused him to suffer great and excruciating pain of body and mind, and that the third slide also caused him to suffer until he died.

Plaintiffs prayed judgment for the sum of $25,000. Mrs. Ella Wallace, mother of deceased, filed a complaint, and alleged that deceased contributed to her support, and would have continued to do so had he lived, and asked judgment for $8,035.

The defendants answered, denying all the allegations of negligence contained in the complaints, and denied that it was their duty to make the place safe, and denied that it was their duty to have the wall braced so that it would not slide, and they denied that the deceased did not know of the dangers; alleged that the slide was one continuous act, and that death was instantaneous. Defendants also alleged that they were not guilty of any negligence, and that there was nothing to indicate to the defendants that a slide would occur or that there was any danger; alleged that they took all the necessary precautions to prevent injury, and that plaintiffs' intestate's death was due to a risk that he assumed. They also pleaded contributory negligence and negligence of fellow-servant.

The trial resulted in a verdict in the sum of $3,000 for the mother, $8,000 in favor of the widow, and $1,500 for the benefit of the estate, making a total of $12,500. The defendants filed motion for a new trial, which motion was by the court overruled, and exceptions saved by defendants, and appeal prayed and granted.

Dorothy McGaughey testified that she was the widow of the deceased, that he was a bricklayer, earning $12 a day, and that he spent very little on himself; that he made about $250 a month, and that she got the benefit of about $150 of it; that deceased was in good health, a strong man, and never lost a day. Deceased was 27 years of age. She testified that she was the administratrix of the estate, and stated that her deceased husband and his mother told her that deceased was 27 years old.

A clerk of the probate court of Garland County testified as to the issuing of letters of administration to plaintiff.

Fred J. Hayes testified that plaintiff was his stepdaughter; that, when they got the news of her husband's death, he came to Little Rock, saw the excavation, and the dirt was sticky, muddy clay, and that the cave-in was by a big opening or window. It was open, and had no cover. He said he looked into the room adjoining the cave-in and could see old barrels and an ice-box that weighed a ton or more; saw no shoring or bracing against the earth. Witness reached Little Rock about 11 o'clock, went to the undertaker first, and then, in about 20 minutes, went to the scene of the accident; came back to Little Rock again Tuesday. Cleveland Smith testified, for the plaintiff, that he was city engineer of Hot Springs, and went to Little Rock and made an inspection of the Hegarty building and surroundings.

The room at the southeast corner adjoining the Back building is about 12 or 15 feet wide and about 50 or 60 feet long, has no floor; the window was in the extreme end of the open room in the southeast corner of the Hegarty building. A diagram was made and introduced in evidence, over the objection of the defendants. Witness testified that he had had quite a bit of experience in making excavations, but never had any engineering for the construction of buildings or excavating of basements; observed the kind and character of earth in Little Rock,

but did not know the exact nature of the soil at the Back building; that he made his observation and made the diagram for the purpose of this suit.

Frank J. Dove, a contractor of Little Rock, testified that he had an excavating machine that they used in excavating work for other contractors. The principal excavating work had been for the Donaghey building and clearing the lot where the Lafayette Hotel was built. He observed the excavating at the Back building; that the formation was clay and gravel, and nearer the bottom it was more of a sandy formation; that the earth was likely to cave or slide in a perpendicular excavation; that it did cave in the Donaghey Building. He had been following engineering since 1906. They prevented cavings by bracing the walls with lumber or jacks. On cross-examination witness said they did not do any building, but they had excavated for building; that they had a cave-in at the Donaghey building; had happened the next morning after a rain. The reputation of Ault & Burden is good. He testified that they braced the earth in sewer ditches, and that the Back building would not have caved if it had been braced.

H. S. Cole testified as to the weather conditions at the time of the accident, as to rainfall and the direction and velocity of the wind.

L. P. Whitlock testified that he had observed the excavating prior to the time of the accident; that they had dug out the wall under the Hegarty building, and that it had no braces. The material removed was clay, gravel and sand. The excavation was about 15 feet deep, and the construction of the wall was being done under the brick wall. There were no braces under it; that he did not see any braces against the earth before the accident; that he saw that the work was dangerous.

Other witnesses testified as to the condition of the soil and the manner of excavating and constructing the wall. John R. Hughes, a plumber, testified that he remembered the accident, and looked over the condition of the building where the Hegarty drug building was,

and that the sewer slid in with the cave-in. He testified that the sewer had been torn out, and that the earth was wet from the rain the night before; that the sewer went out with the cave-in. He did not think that the sewer kept it in a saturated condition, but the rain did it; that he had every reason to believe that the sewer was all right until the rain came; that there had been no leak in the sewer; if there had been, the earth would have been stained, but it was not stained; that there was nothing wrong with the plumbing before the accident.

Other witnesses testified about the excavation and plumbing. Frank Symmers, another bricklayer, working on the same job with McGaughey when he was killed, said they were laying bricks about 4 feet apart, underpinning the building by pier. They were, at the time, working about 13 feet from the top, and were down below the main part of the excavation. They built the foundations in sections, each one approximately 8 feet wide. The accident occurred about a quarter of nine in the morning, after they had been working three-quarters of an hour. It was the first time they had been working in that span. He said: "We had been working in the section about five minutes; don't know exactly how the slide happened; it hit me across the shoulders as I was stooping. When I got up, deceased was buried half way up to his knees. He hollered for one of the laborers to help him out, and that was the last I saw of him. The second slide came, and they got me uncovered. I don't know the cause of it, or anything. There was just a moment between the first and second slides. After the second slide, then a third slide. I had my hands up when the second slide came, and they saw the tips of my fingers above the dirt. I was about gone when they dug down to me. There was a smothering sensation, not any other pain; the earth was on top of me. Nobody in particular directed us to go down there to work; when we first went we were directed to do these footings by the superintendent on the job. No one said anything about any danger.

When the dirt covered me up, it seemed hours, but it was a very short time. The wall was not braced in any way."

There were several other witnesses who testified, but the testimony was in substance about the same as we have set out. Mr. Copeman testified for the defendants: He lived in Pensacola, Florida; had about nine years experience as superintendent; about 18 years in the building business. "We did this work by sections. We would take a section every 8 feet along in the 140 feet. This was done as a precaution. When we would finish one section we would move our digging crew. My attention was on the job all the time; I was in the basement all day." Witness then testified about the formation of the earth about the place, and that they made a test about the compactness and strength to support the weight above it. "I found no defects, not one. There was a light rain the evening before, but it did not have any influence on the dirt. I inspected the section to see if there was any evidence that a cave-in or anything might occur. There was no evidence of any defect. I did not have the wall braced. The brick walls above were braced; did not brace the earth, for the reason that I did not think it was necessary on account of the way the dirt was standing. Nothing occurred to lead us to believe that it was necessary to shore up the earth and walls. I ascertained a satisfactory cause. It was an old broken sewer. I could tell it was an old broken pipe by the joints; that, in my opinion, caused the cave-in. We did not know anything about the sewer pipe before that time. I knew nothing about it, and had no occasion to inquire."

This witness testified at great length about the condition and the care that was taken, and several other witnesses testified for defendants, and the testimony tended to show that not only were the contractors of good reputation, but that care was exercised, and that there was nothing to indicate any danger. The plaintiff then introduced witnesses in rebuttal, but the testimony in the whole case was quite lengthy, and we think we have set out enough to show the substance of the testimony on the real issues of the case.

The appellant's first contention is that its peremptory instruction should have been given by the court, and they say that plaintiffs' theory that the wall should have been shored or braced was not only impracticable, but impossible; but the testimony in the witnesses for the plaintiff tends to show not only that the dirt wall could have been braced, but that it should have been done in order to make the place reasonably safe. It is true that, when an employee enters the service of his employer, he assumes all of the risks ordinarily incident to the business. This court has many times held that he assumes all the risk and hazard ordinarily incident to the business, and, of course, whether the risk was usual or ordinary or not, if it were obvious, or plaintiff knew of the danger, this would be a complete defense. But this court has said: "The servant has a right to rely on the judgment of the master, unless the danger is so obvious that no prudent man would incur it under like circumstances." *Choctaw, Okla. & G. R. Co.* v. *Jones,* 77 Ark. 367, 92 S. W. 244, 4 L. R. A. N. S. 837, 7 Ann. Cas. 430.

The appellant, however, argues in this case that its peremptory instruction should have been given because the circumstances were such that even the defendants themselves had no opportunity of knowing, and that there was nothing to put them upon inquiry. And in support of their contention they quote as follows from Labatt on Master & Servant: "It is not negligence to fail to provide against an accident of such a nature that nobody could have foreseen it and that no prudence could have anticipated the need of guarding against it. After an accident has occurred, it is easy to see what may have prevented it; but that itself does not prove or tend to prove that reasonable or ordinary care would have anticipated or guarded against it."

Appellants cite many other cases to the same effect, and, if the proof showed that the injury was caused by an accident, or that the accident was of such a nature that no one could have foreseen it and that no prudence could have anticipated the need of guarding against it, then,

of course, it would not be negligence. However, we think that there is ample proof on the question of the negligence of the employer to make it a question for the jury. Witnesses testified that the earth was not braced in any way, and one witness testified that he had every reason to believe that the sewer was all right until the cave-in came, and that, from the condition of the ground, he would judge that there was no leak in the sewer before that time. Other witnesses testified that there was no brace at all, and it would not be safe to excavate under a brick wall three stories high, for the distance that they excavated under the Hegarty building, without bracing the earth. Witnesses who were competent to testify on the subject state that the earth was not braced, and that it was dangerous without being braced.

Without quoting all the testimony, it may be said that, while there was some conflict in the testimony, yet there was ample testimony, we think, to submit the question to the jury for its determination as to whether the appellant was guilty of negligence in its failure to brace the wall.

It was, of course, the duty of the employer to use ordinary care to provide a reasonably safe place for the employee to work. And whether the employer did this or not was a question of fact for the jury, as was also the question of assumed risk and contributory negligence.

Appellant's next contention is that instruction number one, given on behalf of plaintiff, was erroneous. Their contention is that this instruction is abstract, that it is equally applicable to any state of facts relating to master and servant. That, of course, may also be said of an instruction to the jury defining negligence. The instruction complained of is as follows: "It was the duty of the defendants to exercise ordinary care to furnish their servants a reasonably safe place in which to work and to make reasonable inspection from time to time to see that the place was kept safe. The degree of care required of defendants should be tested by the circumstances surrounding the character of the employment and the par-

ticular facts of the case, and, if you believe from a preponderance or greater weight of evidence that defendants failed to use such care, and the death of T. L. McGaughey resulted from such negligence, your verdict should be for the plaintiff."

This court has many times passed on instructions similar to the one under discussion, and has held that such instructions were properly given. The instruction is given in the case of the *Central Coal & Coke Co.* v. *Barnes,* 149 Ark. 533, 233 S. W. 833; *Wisconsin & Arkansas Lumber Co.* v. *Standridge,* 132 Ark. 535, 201 S. W. 295.

The appellant contends that the instruction was not applicable, because the work itself constantly changed—as it progressed, the hazards and dangers increased or diminished as the work proceeded. We think that in this particular case the dangers or hazards did not increase or diminish as the work progressed in the sense contended for by the appellant. The testimony of the witnesses showed that it should have been braced; that that was the duty of the master; if it had been braced, there would have been no danger, and the hazard would not have increased or diminished as the work progressed. It is true that there may be many places that could not be made safe at all, but here the jury was told that it was the duty of the master to exercise ordinary care to furnish a reasonably safe place. Some witnesses have testified that the wall should have been braced, that it was unsafe to work there without the wall being braced, and that braces would have made it safe. And we conclude that there was no error in giving instruction number one.

Appellant next complains that the court gave instruction number two, but they simply state that the objections to this instruction are the same as the objection to number one, that it is purely abstract. It is unnecesary to set out instruction number two in full, but it simply told the jury that it was the duty of the defendants to use such care, skill and foresight as ordinarily prudent builders would have used under the circumstances, and

that, if they believe from a preponderance of the evidence that a builder of ordinary skill and prudence would have braced the earth, then it was defendant's duty to do so, and if they find that the defendant failed, and, on account of such failure, deceased was killed, the verdict would be for the plaintiff. We see no objections to instruction number two, and number three is objected to because appellants claim it is abstract and argumentative, involved, and misleading.

In fact, the appellant complains about the instruction above named, as well as number five, as being abstract, and also objects to number five because it is stated that it excludes from the consideration of the jury the defense of assumed risk. We think, however, that, when the instructions are considered as a whole, they clearly state the law applicable to the case, and it would serve no useful purpose to set them out at length.

Appellants also object to certain testimony admitted by the trial court. Among other things they object to the testimony of the plaintiff in stating the age of her deceased husband. She was asked how she knew the age of her husband, and answered, "He told me how old he was, and his mother told me." Objection was made to this answer, as it was a statement made to the administratrix of the estate by the deceased, but the answer included the statement that his mother told her, which was not asked to be excluded, and the appellant did not ask that that portion of the answer that her husband's mother told her be excluded. Hearsay evidence as to age may be the best evidence that can be had. At any rate, it is usually admissible. "Another required exception to the hearsay rule relates to family tradition or pedigree. Such evidence is admitted because it is the best the nature of the case admits, and because greater evils are apprehended by rejection of such evidence than from its admission. The law has relaxed general rules and allowed the exception. * * * And so the date of a person's birth may be testified to by members of his

family, although they may know of the fact only by hearsay founded on family tradition." 10 R. C. L., 963.

While the hearsay rule is well established, yet there are many exceptions. "Proof of the age of a person may generally be made by the testimony of a relative or other person who is in such position to have personal knowledge of such age. But the date of a person's birth may also be testified to by members of his family, though they know the fact only by hearsay, based on family tradition." 3 Jones on Evidence, 2015.

In addition to the testimony objected to, the mother of the deceased, Mrs. Wallace, testified that he was born September 14, 1897, and there is no objection urged to this, and there is really no dispute about his age.

Appellant also urges that the court erred in permitting witness Cleveland Smith to introduce in evidence a diagram prepared by the witness. We do not think there was any error in admitting this diagram. We think it was sufficiently identified, and its introduction was not prejudicial.

It is also contended that the court erred in permitting Ella Wallace, mother of deceased, to introduce in evidence certain checks. The only purpose of introducing the checks was to corroborate the testimony of Mrs. Wallace that her son contributed to her support, and we do not think there was any error in admitting them.

Appellant also insists that there was no proof that the deceased suffered any conscious pain, and therefore nothing can be recovered for the estate. There is evidence that there were three slides, and that the first came up to his knees, and he called for help. The next slide came up to his waist, and the third covered him up and smothered him. The laborer who was working with him was also covered, but had raised his hands so that his fingers extended above the dirt. Of course, no one can tell what his pain and anguish was from the time the dirt caved in till his death. We can only imagine how awful it must have been. In deciding a case where one was thrown into the water and drowned, this court

said: "Under the circumstances the finding that the pain and suffering were not merely incidental to the death, and that death from the injury was not instantaneous, is fully sustained. No one can conceive what awful agonies must have been endured by Ruff if he was conscious that death would be the inevitable result of his falling into the lake. The jury were justified in concluding that Ruff, during the fall and after he struck the water, was conscious, and from that time until his death he endured pain." *St. L. I. M. & S. R. Co.* v. *Robertson,* 103 Ark. 361, 146 S. W. 482. We think the jury were justified in this case in finding $1,500 for the estate.

The case was properly submitted to the jury, and the evidence is sufficient to support the verdict. Judgment is affirmed.

EUREKA OIL COMPANY *v.* MOONEY.

Opinion delivered March 14, 1927.

1. MASTER AND SERVANT—PROPRIETY OF DIRECTED VERDICT.—In an action for death of an employee, whose duty it was to go out on a plank over a pool of oil and clean an intake, and whose body was found in the pool, it was not error, in view of a conflict in the evidence, to refuse to direct a verdict for defendant.
2. MASTER AND SERVANT—FAILURE TO WARN—INSTRUCTION.—In an action for death of an employee found in an oil pool, an instruction that, after finding that deceased was youthful and inexperienced, he did not assume the risk of danger from fumes arising from the pool unless he knew of the same and appreciated the danger arising therefrom, or unless he was warned and instructed of such danger, was not error, since it only meant to tell the jury that, when the evidence disclosed that the employee was young and inexperienced and did not appreciate the danger, he did not assume the risk unless warned.
3. EVIDENCE—RES GESTAE.—In an action for death of an employee, whose duty it was to go out on a plank over a pool of oil to clean the intake pipe, and whose body was found in the pool, testimony that deceased, a few hours previously, explained his actions in staggering after cleaning the pipe by saying that he could smell gas, was not competent as part of *res gestae.*

4. MASTER AND SERVANT—NEGLIGENCE—EVIDENCE.—In an action for the death of an employee, whose duty it was to go on a plank over a pool of oil to clean an intake pipe, and whose body was found in the pool, testimony that deceased, on one occasion, on arising from cleaning the pipe, staggered and almost fell from the plank, was competent testimony entitling the jury to draw reasonable inferences under the circumstances.

5. TRIAL—GENERAL OBJECTION TO STATEMENT.—Overruling of a general objection to the entire statement of a witness was not error where part of his testimony was competent.

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

Powell, Smead & Knox, for appellant.

J. W. Westbrook and *W. R. Donham,* for appellee.

KIRBY, J. This is the second appeal of this case, a statement of which can be found in the report of opinion on first appeal in 168 Ark. 479, 271 S. W. 321, which is the law of the case, of course, and will control here, the facts on this trial being substantially the same as on the former appeal. *Wisconsin-Arkansas Lumber Co.* v. *Scott,* 153 Ark. 65, 239 S. W. 391; *Henry Wrape Co.* v. *Barrentine,* 138 Ark. 267, 211 S. W. 366.

The court, in reversing the case, relative to an erroneous instruction on assumed risk, said: "It is true deceased had only been employed one day, but the danger from the work—such as there was—was immediately obvious and patent, unless, indeed, this danger was enhanced by the fumes from the oil. Any other danger was so obvious and patent that it was error to submit the question of deceased's knowledge and appreciation of it," and also held that the testimony was sufficient to send the question of appellant's negligence being the proximate cause of deceased's death to the jury. It is insisted for reversal now that the court erred in admitting hearsay testimony, and in not directing a verdict for defendant. The case was tried by agreement on the same record as made on the first trial, some additional witnesses being introduced.

A new witness for plaintiff testified that he had lived around the oil fields of Camden, El Dorado and Smack-

over about four years; had done practically all kinds of work in an oil field; had worked around oil wells and oil fumes. He stated that there are fumes from the oil when it comes in from flowing wells that can be detected. Some men can stand to inhale the fumes and others cannot. Inhaling them produces shortness of breath to such an extent that, after a little while, they cannot stand up. The fumes are strongest right after the well is brought in, and continue strong so long as the well is flowing; had known two or three people to become overcome from gas from an open well flowing open in the air. It made them sick, and they just could not stand it. One of the wells where this occurred was a swabber, and the other an open well, both in the open in the El Dorado field. A swabber is a well where the gas pressure is not strong enough to force the oil out. It is swabbed a few times, and the gas pressure is then strong enough to cause the oil to flow. Said that persons he knew to have been overcome by fumes were not in actual contact with the oil, but some distance away, fifteen or twenty feet from the flow. The fumes make them sick, and some cannot stand it even in an open earthen storage.

Other witnesses testified that this well had to be swabbed; that the oil would go to the top of the derrick, fall back to the ground, and run down to the dam across the ravine, 200 feet away; that the pool was two feet deep, and would overflow in about thirty minutes, if the suction pipe was not kept in continuous operation. The suction box or intake was about 2½ feet from the dam, and a plank 12 inches wide and about 6 feet long projected out from the dam, resting on a cross-piece nailed to two stobs, the end of the plank being securely buried in the side of the dam. He and other witnesses stated there would not be any fumes from the oil which could be smelled, but there would be no dangerous fumes, as it had flowed that far in the open air, fumes escaping when exposed to the air; that there were no fumes from the oil the day deceased was killed.

This witness stated that he was out on the plank several times the day the boy was killed, and found it perfectly solid; that it was solid the next day, one end of the plank being buried in the levee or dam and the other on the cross-piece nailed to the stobs, and that this was the customary way of preparing a method to unstop an intake pipe, the only way it could be done.

Other witnesses testified that no dangerous gas fumes would arise from oil in an open container or pool like this one that had been exposed to the air in flowing to the top of the derrick and falling to earth on down to the dam; that sufficient fumes would not arise from it to overcome one, or cause him to lose his balance and fall from the plank, even though he had got down on his hands and knees and reached down into the oil to clean the pipe, bringing his face in close proximity with the oil. Some of these witnesses stated that the oil in the south field, where this pool is located, gave off no poison gas fumes at all.

Appellant's father, and administrator of his son's estate, testified as on the first trial, and over like objections as to the competency of the testimony, that his son had only been working for the company one day before his death, although he had worked for the natural gas company before going to work for the defendant; that his son went down and started the pump, and continued operating it until about 10 o'clock. The foreman came along and asked him how he was getting along, and he replied, "All right." He then went out on the plank while the foreman was talking to witness, and the foreman passed on. The boy got down on his knees and was reaching down into the oil, cleaning out the suction-box on the pipe in the pool; that, when he got up, he came staggering like and nearly fell (Objection).

Objection being overruled, witness stated: "Anyway, he went out on the plank and cleaned this suction-box out, and then he straightened up, and I noticed him kind of staggering—nearly fell off of the plank—and

I asked him what was the matter, and he said he could smell the gas." This testimony was all objected to.

Witness, about 5 o'clock next morning, got up, and deceased had not come in; went to look for him; the pool was full of oil; noticed where deceased had eaten his lunch on some boards, and some one saying he must have fallen into the pool; took a stick and reached down into the oil, and discovered the body. The feet were towards the plank, the head out in the pool, lying on its face, as nearly as the witness could tell. His watch and $25.33 were in his pockets.

There was testimony tending to show also that the boy had been murdered, and that his skull was fractured, the latter fact being established by a post-mortem examination. One physician thought the line in the X-ray picture might not have been a fracture, and could have been a suture.

Appellant insists that, since the court held on the former appeal that the deceased assumed all risk of danger from his work, it being immediately and obviously patent, unless it was enhanced from the fumes from the oil, and that the undisputed testimony shows that no dangerous fumes would or could arise from such oil flowing into an open container like this pool, the court should have instructed a verdict in its favor, and especially that the court erred in giving instruction No. 3, relative to assumed risk.

It will suffice to say, however, that the testimony is not undisputed, one witness having sworn to the contrary, although the great preponderance of the evidence tends to show that no dangerous gas fumes would or could arise from the oil in the pool in which deceased was found dead, after it flowed out of the well and down to the dam; all poisonous fumes having escaped and been dissipated in the air. The court did not err therefore in refusing to direct a verdict, the testimony not being undisputed.

This instruction tells the jury that, after they found that deceased was youthful and inexperienced, he did not

assume the risk of danger from fumes arising from the oil, "unless he knew of same and appreciated the danger arising therefrom, or unless he was warned and instructed of such danger. You are further instructed that, under such circumstances, the burden of showing such warning or appreciation of the danger incident to such fumes is on the defendant."

This instruction only meant to tell the jury that, when the evidence disclosed that the servant was young and inexperienced in the particular service, and did not fully realize and appreciate the danger, he did not assume the risk, unless warned thereof, and, under the circumstances, no error was committed in giving it.

It is next insisted that the court erred in admitting the testimony of deceased's father, over objection of defendant, as follows: "Anyway, he went out on the plank and cleaned this suction-box out, and then he straightened up, and I noticed him kind of staggering—nearly fell off of the plank—and I asked him what was the matter, and he said he could smell the gas."

This statement of deceased's answer to his father explaining his action in staggering in rising after cleaning out the suction-box, "He could smell the gas," was not incident to the cause of deceased's death some hours thereafter, and could be no part of the *res gestae.* It did not attend and was in no wise immediately connected with any act causing the death of the deceased some hours thereafter. It had no connection with that fact at all, and could not have been a spontaneous declaration arising out of or connected with it. It was hearsay, and might have been prejudicial.

The statement of witness, however, that he had, some hours earlier, seen deceased, after rising from cleaning the suction-box, stagger and almost fall from the plank, was competent testimony, from which the jury were entitled to draw any reasonable inference under the circumstances, and, since the whole of the witness' statement was objected to, and part of it was competent, and no special objection was made to that part of same being

incompetent as hearsay, the court committed no error in overruling the general objection to the entire statement. *St. L. I. M. & S. R. Co.* v. *Stroud,* 67 Ark. 112, 56 S. W. 870; *Redmon* v. *Hudson,* 124 Ark. 26, 186 S. W. 312.

This is a doubtful case of liability, so far as the proof of negligence is concerned, but, having already held that there was sufficient testimony to send it to the jury, and the jury having found again, upon correct instructions and conflicting testimony, in appellee's favor, and the record being free from prejudicial error, the judgment must be affirmed. It is so ordered.

MEHAFFY, J., not participating.

HAMILTON v. FARMER.

Opinion delivered March 14, 1927.

1. LIFE ESTATES—LIMITATION.—The statute of limitations does not begin to run against a remainderman until the life tenant's death.
2. COVENANTS—EVICTION.—An outstanding paramount title is not an eviction and does not of itself constitute a breach of the warranty in a deed.
3. MORTGAGES—DECREE FORECLOSING LIEN.—A grantee purchasing the interest of a remainderman and executing a note and mortgage therefor was bound by the contract, and a decree foreclosing the lien in favor of the remainderman was correct.
4. COVENANTS—WARRANTY—EVICTION.—Generally, an eviction, to authorize an action for breach of a covenant of warranty, must be without the consent and participation of the grantee, and, if brought about through his fraud or collusion, or if he invites or does anything to bring about the assertion of a paramount title, the eviction is unavailable to him in such action.
5. COVENANTS—BREACH OF WARRANTY.—A covenant of warranty in a deed is not broken until actual or constructive possession by paramount title is taken, as a mere outstanding title may never be asserted.
6. COVENANTS—BREACH OF WARRANTY.—Where a remainderman did not undertake to assert title until invited to do so by the grantee, and did not claim any right to possession in the latter's suit to

confirm title, and the court simply adjudged that he was owner of a twelfth interest subject to a life estate, there was no breach of the implied warranty of quiet enjoyment.

Appeal from Craighead Chancery Court, Western District; *J. M. Futrell,* Chancellor; affirmed.

T. A. Turner and *Horace Sloan,* for appellant.

Basil Baker and *N. F. Lamb,* for appellee.

MEHAFFY, J. The appellant, A. J. Hamilton, purchased the land in controversy from Thomas G. Foster and wife on October 21, 1918. Foster had acquired title to the lands from Henry A. Armour and wife, and A. J. Hamilton alleges in his suit that the warranty in said deed from Armour and wife was breached by a paramount outstanding title, held by Doss Pierce, one of the heirs at law of G. A. Crisler, and that plaintiff had been evicted by being compelled to pay Doss Pierce the sum of $233 and costs for his interest therein.

It was alleged in Hamilton's complaint that the estate of Foster, who had died, was insolvent, and, for that reason, Henry Armour was made a party defendant. On October 17, 1903, W. W. Crisler and Nancy A. Wallace conveyed the lands to said G. W. Armour, and that Henry Armour acquired title to said lands as an heir of G. W. Armour, deceased. The complaint alleges warranties in each of the conveyances and alleges a breach of said warranties. The following stipulation was entered into:

STIPULATION AFFECTING BOTH CASES.

"It is hereby stipulated by and between the parties to the above entitled causes and their respective attorneys of record as follows:

"First: Said two causes may be consolidated.

"Second: The depositions and evidence heretofore taken and entered in both of said causes may be introduced in evidence upon the trial of said consolidated causes in so far as said evidence is competent, relevant and material, except a stipulation to which is attached papers purporting to be the letters written by one Hamilton, which stipulation and letters shall not be introduced in evidence, but, in lieu thereof, it is agreed that J. H.

Hamilton mentioned in the proceedings and evidence is now living.

"Third: All deeds of record thereof pertaining to the real estate involved herein may be introduced in evidence.

"Fourth: All orders, decrees, proceedings and evidence in a cause where A. J. Hamilton was petitioner and A. J. Hamilton against Doss Pierce *et al.*, pending in this court, in which said Hamilton sought to confirm title to the real estate involved herein and to cancel the title of Doss Pierce thereto, may be introduced in evidence by either party.

"It is further stipulated and agreed that the two written instruments pleaded in the answer herein as having been executed by James H. Hamilton were in fact executed and delivered by him for the consideration mentioned therein at the date alleged; that, while no real estate is specifically described in either of said instruments, yet the same have reference to the real estate involved in this suit, and were intended to include and convey any interest in said real estate which said James H. Hamilton may have had, and that said two instruments may be introduced in evidence as conveyance by said James H. Hamilton of any interest he had or claimed to have in the estate of said G. A. Crisler, including the real estate involved in this suit.

"Fifth: That the amount paid by plaintiff, to-wit, $233, was a reasonable consideration, if plaintiff is to recover in said cause, and that attorney's fee of $100 is not excessive, and shall be considered a fair charge and payment in said cause, along with costs, in matter of Hamilton *v.* Pierce, Craighead Chancery Court, No. 2107.

"It is further agreed that G. A. Crisler died seized of the real estate involved in this case, leaving surviving him W. W. Crisler, Nancy R. M. Wallace, Ellen Pierce and Pinky Hamilton, as sole heirs at law of G. A. Crisler.

"That, at the time of G. A. Crisler's death, James H. Hamilton and Pinky Hamilton were married, and, as the result of said marriage, one child was born alive, and

that the death of Pinky Hamilton occurred prior to the death of Ellen Pierce, who, at the time of her death, had two children, one of whom has since died, leaving Doss Pierce her sole remaining heir, and who, as such, inherited a one-twelfth interest in the property herein described."

Testimony was introduced to the effect that W. W. Crisler and Nancy Wallace executed a deed to the land in controversy to G. W. Armour. W. W. Crisler was one of the heirs of G. A. Crisler, his other heirs being Mindy Wallace, Ellen Pierce, and Pinky Hamilton. Pinky Hamilton, before her marriage, was Pinky Crisler.

The testimony shows conveyances down to the conveyance to appellant by Foster, and, as stated by appellant in his brief, there are two principal questions. First, was there a breach of the covenants of warranty? The chancellor found that there was a breach of warranty, because Doss Pierce had asserted his right to one-twelfth interest in the land in court. Under the decisions of our court, of course, he could not have maintained a suit for possession until after the death of the life tenant, because his cause of action would not have accrued during the lifetime of the life tenant. We think that Doss Pierce was not barred by the statute of limitations and that he would have had a cause of action after the death of the life tenant, but he did not undertake to assert it until the appellant himself had begun a suit to confirm his title, and it is perfectly clear from the record in the case that he knew that Doss Pierce owned a one-twelfth interest. But an outstanding paramount title is not an eviction, and does not of itself constitute a breach of the warranty; but appellant, having purchased the interest of Doss Pierce and executed a note and mortgage therefor, was bound by this contract, and the judgment or decree against the appellant foreclosing the lien in favor of Doss Pierce was unquestionably correct. The next and most difficult question, however, is whether plaintiff would have a cause of action against the grantors for a breach of warranty, and the first question to be decided is, did his own conduct disentitle him to recover damages against the grantors?

The record indicates that the appellant himself had lived in the community a long while, and knew the parties, and knew that Doss Pierce was an heir to some portion of the estate; but, as we have already said, the existence of this paramount title itself would not constitute an eviction nor entitle the appellant to bring suit against the grantors. It is generally held that an eviction, in order to be effective as a basis of an action for breach of covenants of warranty, must be without the consent and participation of the grantee. Any eviction brought about through either the fraud or collusion on the part of the grantee will be unavailing to him in an action against the grantor for damages for a breach of warranty. We think that a grantee cannot invite or do anything to bring about the assertion of the paramount title and thereby an eviction, and then recover damages against the grantors. Doss Pierce might never have asserted his title. The eviction must be by title paramount to constitute a breach, for a collusive eviction is of no force or effect in an action for a breach of warranty. *Frix* v. *Miller,* 115 Ala. 476, 22 So. 146, 67 Am. St. Rep. 57.

In a case in the Court of Appeals in Kentucky it appeared that one Thomas Vincent sold to A. J. Hicks a certain tract of land in Hickman County, Kentucky, and executed and delivered a deed to him, with covenants and general warranty therefor. Subsequently a suit was instituted against Hicks to recover about 22 acres of land, and a judgment was entered against Hicks for its possession. Hicks thereupon brought suit against the grantor for a breach of warranty, and the following agreement was signed:

"It is agreed that the judgment in favor of Maxwell and others against A. J. Hicks, in the Hickman Circuit Court, was and is an agreed judgment based on the value of the said 22 acres of land and the rents of same, and the value of said land and rents thereof were reasonably worth the amount said Hicks agreed to pay Maxwell *et al.*, and said agreed judgment was agreed to between said

parties several days before said Hickman court convened, and the same was based on the facts found in the depositions of said case of *Maxwell et al.* v. *Hicks.* It is also agreed that the facts in said depositions were not at any time submitted to said court. It is further agreed that a certified copy of the deed from Maxwell *et al.* to Hicks shall be read here in this action as evidence."

The court said, after quoting said agreement:

"This agreement shows that the judgment was entered as a result of an agreement between the Maxwells and the Hicks, and fully supports the averment of the answer in regard thereto. The deed referred to in the agreement was in evidence, and shows that, previous to the judgment, Maxwell, for a recited consideration, conveyed the 22 acres to the appellee, Hicks. Was there an eviction as contemplated by law? There can be no action maintained for a breach of warranty in a case like this until the vendee has been regularly evicted by a judgment of a court of competent jurisdiction. * * * The appellant was not bound by any agreement which Hicks and Maxwell made with reference to the land, neither was he bound by the judgment which was entered as a result of the agreement. From the facts admitted in this record, the appellees were not entitled to maintain this action for the alleged breach of warranty." *Vinson* v. *Hicks* (Ky.), 64 S. W. 456.

It has been said: "An eviction brought about by collusion would not sustain the action for breach of covenant, nor could the plaintiff recover any damages which could have been prevented or avoided by reasonable diligence on his part, and he owed a duty to the defendant to so conduct himself as to make the damages as little as possible." *Jenkes* v. *Quinn,* 137 N. Y. 223, 33 N. E. 376. The chancellor in his opinion said: "This leaves for consideration the express warranty, on which little need be said. This warranty, reduced to its final analysis, is a promise to protect possession. This covenant is not breached until there has either been an actual or con-

structive eviction by paramount title. An outstanding paramount title is not sufficient, for it may never be asserted."

We think the chancellor was correct; that Doss Pierce might never have asserted his title. But appellant insists that the chancellor overlooked the fact that there is an implied warranty of quiet enjoyment. The lower court, however, did not overlook this, we think, and did not hold that this warranty was broken when made, but held that Doss Pierce had no right to possession and could not assert any right to possession until the death of Hamilton, who had a life estate. He not only did not undertake to assert any title until invited to do so by appellant, but he did not in the suit claim, and the chancellor did not find, that he had any right to possession. The chancery court simply adjudged that he was the owner of a one-twelfth interest, subject to the life estate of Hamilton. This judgment gave Pierce no more right than he already had, and we think that, while there may be a constructive eviction which will justify a suit by the grantee for damages, there was no such eviction in this case. The life tenant may have had a right to interfere with the possession, but Pierce did not. As we have already said, one cannot invite or bring about the assertion of a paramount title and thereby bring about an eviction and then bring suit against his grantors for eviction.

Finding no error in the decree of the chancery court, it is affirmed.

LENA LUMBER COMPANY v. BRICKHOUSE.

Opinion delivered March 21, 1927.

1. PRINCIPAL AND SURETY—BREACH OF CONTRACT.—A contract to construct a house requiring payment of 80 per cent. of estimated value to contractor as work progressed, *held* not to have have been breached by paying full contract price without retaining 20 per cent., in absence of evidence that payments were in excess of 80 per cent. of estimated value, since such requirement does not limit payment to 80 per cent. of contract price.
2. PRINCIPAL AND SURETY—BREACH OF CONTRACT.—A surety on a contractor's bond and indemnitor, alleging that owner breached contract by paying full contract price without retaining 20 per cent. thereof, had the burden of proving a breach of the contract in manner claimed.
3. MECHANICS' LIEN—RIGHT TO SUE ON CONTRACTOR'S BOND.—Where a bond, furnished by a contractor under contract for construction of a house, provided that it was made for use and benefit of all persons entitled to liens, lienors *held* entitled to judgment on bond, although it had not been filed in office of circuit clerk.
4. CORPORATIONS—DEFENSE OF ULTRA VIRES.—A lumber corporation, seeking to avail itself of *ultra vires* of indemnity agreement executed by it in that it was not authorized by articles of incorporation, must plead such want of power as special defense.
5. CORPORATIONS—RIGHT TO DEFENSE OF ULTRA VIRES.—Where a lumber company executed indemnity agreement for the purpose of securing a contract to furnish lumber and millwork for construction on a house and had accepted benefits flowing from such contract, it cannot thereafter escape performance of the indemnity agreement on ground that it was *ultra vires* and void in not being authorized by articles of incorporation.

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

Ernest Briner and *Brouse & McDaniel,* for appellant.

John F. Clifford, for National Surety Company, for appellee; *Ben D. Brickhouse, Linwood L. Brickhouse,* and *J. C. Marshall,* for Brickhouse.

McHANEY, J. On March 7, 1923, appellee, W. W. Brickhouse, being the owner of a certain lot at 1915 Izard Street, in the city of Little Rock, employed J. H. Levillian, a local building contractor, to build for him an eight-room brick veneer residence thereon, according to

certain plans and specifications made by Ray Burks, architect, and to furnish and supply all labor and materials therefor, for the contract price of $6,000. The contract between them is in writing, and it provides that the payments thereon shall be made "on certificates of superintendent, from time to time as the work progresses, to-wit, 80 per cent. of the estimated value of same, subject to additions and reductions as hereinafter provided. Said 80 per cent. to be paid as the work progresses on said residence, and the remainder on satisfactory completion and acceptance of the entire work, after the expiration of ten days." The following clause, written in the contract between them, was stricken out before the contract was signed. "It is agreed by the parties that —— per cent. of the contract price shall be held by the owner as security for the faithful completion of the work, and may be applied, under the direction of the superintendent, in the liquidation of any damages under this contract; furnishing to the owner a release from any liens or right of lien, also a sworn statement, as required by law, before commencing work on this contract, and hereby acknowledges receipt of notice to furnish same."

Appellee Brickhouse required Levillian to give a bond to complete the house according to the plans and specifications and in accordance with said written contract, and, on the same date, the appellant, National Surety Company, became surety on Levillian's bond, binding itself unto Brickhouse "(as well as to the persons who may become entitled to liens under the contract hereinbefore mentioned), in the sum of $6,000, * * * to be paid to the said W. W. Brickhouse, and to said parties who may be entitled to liens," etc. Said bond is conditioned for the due performance by Levillian of all the "covenants, conditions, and agreements" in said contract, "and shall duly and promptly pay and discharge all indebtedness that may be incurred by said J. H. Levillian in carrying out the said contract, and complete same free from all mechanics' liens, * * * as

well as all costs, including attorney's fees, in enforcing the payment and collection of any and all indebtedness incurred by said J. H. Levillian in carrying out said contract." Another clause in said bond is as follows: "This bond is made for the use and benefit of all persons who may become entitled to liens under said contract, according to provisions of law in such cases made and provided, and may be sued upon by them as if executed to them in proper person."

On the same date appellant, Lena Lumber Company, executed and delivered to appellee, National Surety Company, an indemnity agreement by which it agreed "to indemnify the company (National Surety Company) from and against any and all liability, loss, costs, damages, attorney's fees, and expenses of whatever kind or nature which the company may sustain or incur by reason or in consequence" of executing the bond for Levillian. The whole matter is based on the fact that Brickhouse wanted to build a house for $6,000 by contract with a bond. Levillian wanted the contract, but had to have help to make the bond. The Lena Lumber Company wanted to sell the lumber and millwork, and agreed to indemnify the surety company on the bond to get this contract from Levillian, and so it was done to the satisfaction of all concerned.

Construction work was begun, and, on July 9, 1923, the house was completed, and appellee and his family moved into it on July 10. Shortly thereafter his troubles began. Various material furnishers, within the time limited by law, served notices of their claims on him and thereafter filed affidavits for liens, with their accounts attached, in the proper office. It was agreed by counsel, in open court, that, up to and including September 25, 1923, appellee Brickhouse had paid out for labor and material $6,085.62, $85.62 in excess of the original contract price.

On October 1, 1923, appellant, Lena Lumber Company, brought suit in the Pulaski Chancery Court, alleging that it had furnished to Levillian for said house

lumber and other building material amounting to $1,801.84; that it had been paid $1,300, leaving a balance due it of $501.84, for which it asked judgment, and that same be declared a lien on said property. The various lienors filed interventions in said suit for the amounts due them. Appellees, in due time, filed an answer, later an amended answer and cross-complaint, against Lena Lumber Company, and still later an amended cross-complaint against both appellants, Lena Lumber Company and National Surety Company, and still later a substitute for amended answer and cross-complaint, setting out the bond hereinbefore mentioned, and alleging that, after the completion of the house, and after he had paid the contract price of $6,000, liens had been filed amounting to $2,300, which Levillian and the surety company had failed and refused to pay, for which he prayed judgment, for all costs and attorney's fees.

The court entered its decree as follows:

1.	In favor of Lena Lumber Company against Levillian and costs, and its complaint as to all other parties dismissed for want of equity		$ 501.80
2.	In favor of Brickhouse against the surety company for amounts paid by Brickhouse to settle liens of		
	Crabb Electric Company	$ 50.00	
	Little Rock Paint & Wallpaper Co.	130.00	
	Gregg Hardware Co.	36.85	
	Bracy Bros. Hardware Co.	145.00	
	Attorney's fee taxed by court in this cause	150.00	511.85
3.	In favor of interveners who are decreed to have a lien on Brickhouse property against the surety company, as follows:		
	R. A. Thiemie	434.12	
	Henry-Johnson Co.	84.90	
	D. W. Dwiggins & Co.	81.00	
	Stuart Roofing Co.	66.50	
	Arkansas Brick & Tile Co.	396.22	1,062.74

4. In favor of Bracy Bros. Hardware Co. against Brickhouse for extras 198.50
5. In favor of surety company against Lena Lumber Co. on its indemnity contract, which included the $150 attorney's fee allowed Brickhouse against it 1,724.59
6. In favor of Lena Lumber Co. against Levillian, including the $501.80 awarded it under item 1, the total sum of 2,024.59

(This was an error. The total amount should be $2,076.39).

From the decree against them as aforesaid, the National Surety Company and the Lena Lumber Company have appealed to this court.

There is no dispute about the correctness of the items due to the holders of liens or the lienable items paid by Brickhouse. Counsel for Lena Lumber Company feel that the court should have given it a lien for the $501.80 balance due it by Levillian, but, under the view we take of this case, if the bond is valid, it would be immaterial, for, as indemnitor for the surety, it would have to pay its own claim.

Counsel for both appellants earnestly insist that appellee, Brickhouse, breached the contract by paying to the contractor the full contract price without retaining 20 per cent. thereof, as they claim the contract requires. The germane provisions of the contract have already been set out, and we will not repeat them. But that is exactly what the parties refused to put in their contract. By one paragraph of the written contract it was provided that "20 per cent. of the contract price shall be held by the owner as security for the faithful completion of the work," but the contracting parties struck out this section and refused to make the contract with that provision in it. This was done, no doubt, for the reason that appellee required Levillian to give a bond "for the faithful completion of the work," and, so far as he was concerned, that was the only security he desired "for the faithful completion of the work." The strik-

ing out of this section of the contract is very significant that the parties did not intend that any part of the contract price should be retained by the owner. But they say that the clause preceding, which provides that the owner should pay, from time to time "80 per cent. *of the estimated value of the same* * * * as the work progresses on said residence, and the remainder on satisfactory completion and acceptance of the entire work, after the expiration of ten days," means that he is required to retain 20 per cent. of the contract price. But not so. The 80 per cent. he is required to pay as the work progresses is not 80 per cent. of the contract price, but 80 per cent. "of the *estimated value of the same.*"

It is shown by the evidence that the actual cost of the house was largely in excess of the contract price, the items being as follows:

Paid by Brickhouse to September 25, 1923	$6,085.62
Liens thereafter paid by Brickhouse	361.85
Liens of interveners	1,062.74
Total cost of house	$7,510.21

It is not shown by the evidence just when Brickhouse made payments to the contractor or the amounts of such payments aggregating $6,085.62, or, if so shown, it has not been abstracted, and we cannot therefore say that he violated the contract by paying more than 80 per cent. of the estimated value of same, from time to time as the work progressed, even though it be conceded that it would be in violation of the contract to do so. Moreover, payments in excess of 80 per cent. of the estimated value or of the contract price, so far as we can tell from an examination of the evidence as abstracted, may have been made "after the expiration of ten days," as the contract provided he should do. He accepted and moved into the house on July 10, and it is agreed that, up to September 25, 1923, he had paid out $6,085.62. We cannot tell when these payments were made, and, in the absence of a showing to the contrary, we will presume

that the payments were made as the work progressed, in accordance with the contract, and the remainder after the expiration of ten days from the acceptance of the house. The burden was on appellants to show by a preponderance of the evidence that appellee breached the contract in the manner claimed.

The exact point we have been discussing was decided in the case of *Graves* v. *Merrill,* 67 Minn. 463, 70 N. W. 562, where the court used this language: "The contract was not that no more than 85 per cent. of the contract price of the building should be paid during the progress of the work, but that such payments should not exceed 85 per cent. of the 'total amount of the materials and labor furnished at the building at the time the certificate is issued.' Such is the plain reading of the contract, and such is the construction placed upon the language of the contract by the defendant in his answer. There is no room for construction or argument. The simple statement of the facts (of this case) is the argument of the case. It by no means follows that 85 per cent. of the contract price would equal or exceed 85 per cent. of the amount of materials and labor furnished. As the only breach of the building contract here claimed is that payments were made by the plaintiff in violation of the contract, and as there is no evidence in the record to support the claim, it follows that the order appealed from must be affirmed."

The case of *National Surety Company* v. *Long,* 85 Ark. 158, 107 S. W. 384, came to this court on two separate appeals. The first, being reported in 79 Ark. 323, 96 S. W. 745, had a clause in the contract between the owner and contractor very much like the contract in this case, which is as follows: "The said party of the first part agrees to pay to the party of the second part for said work the sum of six thousand six hundred dollars ($6,600), the contract price, to be paid in installments according to written estimates to be made by the architect or the superintendent as the work progresses, payments to be made not oftener than as allowed in the bond,

and said installments are to be 75 per cent. of the value of the work done and materials furnished and incorporated in the building, the remaining 25 per cent. of said contract price to be paid by the party of the first part to the party of the second part in ten days after the building is completed and accepted."

Appellant in that case urged that it was a breach of the contract for the owner to pay more than 75 per cent. of the contract price, but the court held that the clause meant 75 per cent. of the value of the work done and materials furnished and incorporated in the building, rather than 75 per cent. of the contract price, and, in disposing of the matter, used this language:

"Exactly the same question was raised in *Howard County* v. *Baker;* 119 Mo. 397, and the same conclusion was reached by the Missouri court that was reached by this court heretofore and now. It is true that this clause does not contemplate that there should be a material divergence between 75 per cent. of the contract price and 75 per cent. of the value of the work and materials furnished and incorporated in the building. The contract was evidently drawn in the contemplation that these terms would be, as they should be, identical. But in this case, and it may happen in many others, these terms were not identical. The 'contract price' and 'value of labor and materials furnished' may be widely separated. In this case the value of the work and material was over $3,000 more than the contract price. Therefore, where these two standards are different, it becomes necessary to see which must control; and there is no better or sounder rule to observe than to follow the language of the contract itself.

"It first agrees that the contract price shall be paid in installments, according to written estimates made by the architect or the superintendent, as the work progresses. This is a certain, definite and sensible agreement. Then there is another certain, definite and sensible agreement that the installments are to be 75 per cent. of the value of the work done and materials furnished and incorporated in the building. It would have

saved many words, if the other construction was the correct one, to have said that the said installments were to be 75 per cent. of the contract price. But that is not said; and it is expressly stipulated that the 75 per cent. is to be the value of the work done and materials furnished and incorporated in the building. The next clause provides that the 25 per cent. remaining of the contract price is to be paid ten days after the building is completed and accepted. This evidently contemplates that, after paying 75 per cent. of the value of the work and materials, there should still remain 25 per cent. of the contract price; and this is as it should be. But all things are not as they should be; and this is a case where it is the misfortune of some one that the contract price and the value of the work and materials were radically different. There are three provisions in this clause, each of them definite and certain of itself, and it is the duty of the court, in construing them, to give each its proper force and meaning; to harmonize them, if possible; if not, to give each the meaning which proper construction requires."

We therefore hold that there was no breach of the contract shown on the part of appellee, Brickhouse.

It is next insisted that the interveners holding liens were not entitled to judgment on the bond, for the reason that same had not been filed in the office of the circuit clerk, and for the further reason that there was no privity of contract between the surety company and the interveners. The same question was raised in the recent case of *Stewart-McGehee Construction Co.* v. *Brewster,* 171 Ark. 197, 284 S. W. 53, where this court said: "We cannot concur with this view. It is conceded by the company that the bond was executed under the authority of § 6912, *supra* (C. & M. Dig.), and, by its express terms the company as principal and the Fidelity and Deposit Company of Baltimore, Maryland, as surety, 'are held and firmly bound unto the State of Arkansas, for the use of * * * and material furnishers and other persons having claims which might be the basis of liens,' etc. This court, in a

long line of cases, has ruled that, where a promise is made to one upon a sufficient consideration for the benefit of another, the beneficiary may sue the promisor for breach of his promise." (Citing cases).

In the present case the language of the bond is even stronger. It says: "This bond is made for the use and benefit of all persons who may become entitled to liens under said contract, according to provisions of law in such cases made and provided, and may be sued upon by them as if executed to them in proper person."

It is finally insisted by counsel for appellant, Lena Lumber Company, that its act in executing the indemnity agreement to the surety company is *ultra vires* and void, for the reason that it is not authorized to do so in its articles of incorporation. This contention is without merit, for the reason, first, it failed to plead that special defense, and second, for the reason that it was interested in getting the contract to furnish the lumber and millwork in said house, which it did, and, having accepted the benefits flowing from said contract, it would be wholly unjust to allow it to escape performance of its contract, having received the benefits thereof. Relative to the first proposition, this court has held that, "if a corporation seeks to avail itself of *ultra vires,* or for want of power to make a contract, it must plead that special defense." *Anderson-Tully Company* v. *Gillett Lumber Co.,* 155 Ark. 233, 244 S. W. 29; *Simon* v. *Caffe,* 80 Ark. 67, 95 S. W. 1011; *Winer* v. *Bank of Blytheville,* 89 Ark. 435, 117 S. W. 232.

Relative to the second proposition, above stated, there are numerous decisions of this court sustaining this principle. In *Richeson* v. *National Bank of Mena,* 96 Ark. 602, 132 S. W. 916, it is said: "If the corporation has received the profits resulting from the compliance of the other party with the contract, it would be wholly unjust to allow the corporation to escape performance of the contract by which it realized these profits. As is said in the case of *Wright* v. *Hughes,* 119 Ind. 324: 'The rule is now too thoroughly established to be longer open to

question that, where a contract has been executed and fully performed on the part of the corporation, or the party with whom it contracted, neither will be permitted to insist that the contract was not within the power of the corporation'." A case exactly in point with this is that of *Wittmer Lumber Co.* v. *Rice,* 23 Md. App. 586, 55 N. E. 868, the syllabus of which is as follows: "Where one, having a contract with another to build a house, executed a bond to the other to secure the payment of any mechanics' liens or claims for material to be furnished in such building, and a lumber corporation becomes surety on such bond, in consideration of the contractor's agreeing to purchase from it material to be used in such building, such corporation, in an action by it to enforce a lien for material furnished in such building, cannot defeat a plea alleging its suretyship as defense by claiming the contract was *ultra vires,* since, by receiving the benefits of the contract, it was estopped from denying that it had power to become surety thereon."

The decree of the lower court gave judgment in favor of appellant, Lena Lumber Company, against Levillian in the total sum of $2,024.59. It is entitled to a judgment against Levillian for the sum of $501.80, balance due it for lumber and millwork; $1,062.74, being the amount of the liens of interveners for which judgment was rendered against the surety company; $361.85, being the amount of liens paid by Brickhouse for which judgment was rendered against the surety company; and $150 attorney's fee for Brickhouse in prosecuting his suit to enforce the payment of such liens, making a total of $2,076.39, for which appellant, Lena Lumber Company, is entitled to a judgment against Levillian, instead of $2,024.59, as allowed in the decree. The decree of the lower court will be modified in this respect, and, as modified, will be affirmed. It is so ordered.

OPINION ON REHEARING.

McHANEY, J. In the original opinion we allowed excessive amounts under items 2 of the decree of the

lower court in favor of Brickhouse against the surety company, as follows:

	Amount allowed	Correct amount
Crab Electric Co.	50.00	45.00
Little Rock Paint & Wall Paper Co.	130.00	120.00
Gregg Hardware Company	36.85	36.85
Bracy Bros. Hardware Co.	145.00	100.00
Attorney's fee	150.00	150.00
Totals	511.85	451.85

Therefore the correct amount is $451.85, which results in a corresponding reduction of $60 in the total decree against the surety company and Lena Lumber Company. The opinion will be so amended. The motion for rehearing is otherwise overruled.

PERRITT v. SAXON.

Opinion delivered March 21, 1927.

ATTORNEY AND CLIENT—RIGHT TO LIEN.—Under a decree enforcing specific performance of a contract to convey an interest in the oil and gas and other minerals in a certain tract of land to plaintiffs for services rendered as attorneys for their client, *held* that plaintiffs were not entitled to have a lien on the client's interest in addition to specific performance of the contract.

Appeal from Union Chancery Court, Second Division; *A. D. Pope,* Special Chancellor; affirmed.

L. B. Smead, for appellant.

McNalley & Sellers, for appellee.

McHANEY, J. This action grows out of an intervention by appellees, Saxon & Davidson, attorneys at law, Camden, Arkansas, filed in the case of Buchanan Graves and wife *v.* Thomas A. Foster *et al.,* pending in the Union Chancery Court, Second Division, on a new trial from a reversal by this court in the case of *Foster* v. *Graves,* 168 Ark. 1033, 275 S. W. 653.

The suit, as it originally appeared in this court, was brought by Graves against Foster, and Ratcliff, Wilson, Hawkins, LeCroy and Ellison, to whom Foster had conveyed certain portions of the royalty, to cancel two deeds, under which Foster claimed title to one-half the royalty from Graves in a certain forty-acre oil lease. Saxon & Davidson were employed by appellant, H. C. Ratcliff, to represent him as his attorney in defending that suit, which they did, both in the lower court and on appeal, and, for their services, Ratcliff agreed to deed them an undivided one-sixty-fourth (1/64) interest in the oil and gas and other minerals in the southwest northeast (or lot 5 of the northeast quarter), section 3, township 16 south, range 15 west. Ratcliff failed to make a conveyance to them of this 1/64 interest, and, after the reversal of the case by this court, they filed their intervention in the lower court, setting up these facts and praying that they be declared to be the owner of an undivided 1/64 interest of all the oil, gas and other minerals in, under and upon said land.

Later they filed an amendment to their intervention, stating that W. D. Perritt claimed some interest in the property involved in this action, which was unknown to the interveners, but that, whatever interest he had, if any, was inferior to the rights of the interveners, and they asked that he be made a party defendant therein, which was done. Service of summons was had upon both Ratcliff and Perritt, but they failed to appear, and made default, and, on the 3rd day of October, 1925, the court entered a decree on the intervention, finding the facts in favor of the interveners, and, continuing, the decree recites:

"It is therefore considered, ordered, adjudged and decreed by the court that interveners, Ed F. Saxon and James Davidson, are the owners of an undivided one sixty-fourth interest in and to all of the oil, gas and other minerals in, under and upon the following described lands situated in Union County, Arkansas, to-wit: southwest quarter of the northeast quarter (or lot No. 5 of the

northeast quarter) of section 3, township 16 south, range 15 west, containing 40 acres, more or less. And that said interest is free, clear and unincumbered of and from any and all claims of the defendants, H. C. Ratcliff and W. D. Perritt, or either of them, and subject only to the claim of Buchanan Graves and Jennie Graves, under the suit herein, and that said interest above described is by this order quieted and confirmed in said interveners, Ed F. Saxon and James Davidson, as against said defendants, H. C. Ratcliff and W. D. Perritt, and all other persons holding or claiming under, by or through them or either of them."

And the court further decreed that interveners were the owners, subject to the claims of Buchanan Graves and wife, of an undivided one-sixty-fourth of all moneys collected theretofore or that may thereafter be collected by M. G. Wade, receiver in the cause pending in said court between Graves and Foster.

From this order and decree of the court comes this appeal.

The decree recites that it was heard upon certain record evidence and "the oral testimony of witnesses adduced before the court upon the trial of the cause on said intervention, from all of which, the oral testimony and the recorded instruments of writing, the court finds," etc. Then follow the findings of the court. Neither the documentary evidence nor the oral testimony has been brought into the record by bill of exceptions or otherwise, and we will therefore indulge the presumption that there was ample evidence to sustain the decree. The only question raised on this appeal is that the decree of the court declared a lien upon the royalty interest in controversy, which would be error on the face of the record, for the reason that appellees could not have a lien under the statute (§§ 6304 and 6306 of Crawford & Moses' Digest), having represented one of the defendants in the litigation and did not obtain any affirmative relief for his client by the recovery of a judgment. In other words, that the statute giving liens to attorneys cannot be

extended to cases where the services of the attorney merely protected an existing title or defended a suit attacking the title, and that, before the lien will attach, there must be a service rendered in the recovery of the property.

That is undoubtedly correct, but such is not the effect of the decree in this case. While the petition of interveners prayed for a lien upon the property and the decree of the court found that they were entitled to a lien, yet the effect of the decree was for specific performance by divesting the title to the one sixty-fourth interest out of appellant, Ratcliff, and investing same in appellees. The effect of the decree was not to establish or enforce a lien in favor of the attorneys, but it was, in effect, specific performance of the contract which the court found had been entered into between the parties.

No error appearing, the decree of the chancery court is affirmed.

LIFE & CASUALTY COMPANY v. SANDERS.

Opinion delivered March 21, 1927.

1. INSURANCE—FRAUDULENT SETTLEMENT—EVIDENCE.—In an action to recover weekly benefits under health and accident policies, evidence *held* to make it a jury question whether insurer's agent made false representation to get insurer to surrender the policies and accept a small sum in full satisfaction.
2. EVIDENCE—COMPETENCY.—In an action on health and accident insurance policies, it was proper to exclude the testimony of a physician that he had examined a specimen of blood supposed to be that of the insured where the witness was unable to testify positively that the specimen examined was taken from the insured.
3. INSURANCE—PENALTY AND ATTORNEY'S FEE.—In an action to recover weekly benefits under health and accident policies, where the insured denied any liability, it was not error, after verdict for the plaintiff, to assess the statutory penalty and an attorney's fee, where the court permitted plaintiff to amend his complaint at the conclusion of the testimony of plaintiff's first witness, thereby reducing the claim to the amount for which the jury returned a verdict.

4. PLEADING—DISCRETION TO PERMIT AMENDMENTS.—Generally, it is within the trial court's discretion to permit a complaint to be amended during the trial or at the close of the testimony to conform to the proof.

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

Isgrig & Dillon, for appellant.

Longstreth & Longstreth and *J. A. Weas,* for appellee.

McHANEY, J. This is an action by appellee against appellant to recover weekly benefits accruing to him under two policies of health and accident insurance, providing for a total indemnity of $8 per week, issued by appellant to him. The policies were issued by appellant in 1918, and the premiums thereon were paid for several years. In his original complaint he alleged that he had become totally disabled in July and continued so between August 1, 1923, and the date of bringing this suit, a total of seventy-nine weeks, for which he had not been paid, as provided in said policies, making a total of $632, for which he asked judgment.

Appellant denied liability on the ground, first, under a provision of the policy wherein it is provided "that, should sickness begin prior to the date of said policy, or be caused by intemperance, immorality or venereal disease, no payments will be made"; that appellee, at the time of the delivery of the policy, had a venereal disease, syphilis, from which he is still suffering; and, second, that on January 29, 1924, they paid him a small sum under each of said policies, which was accepted by him in full satisfaction of his claim against it, and that this payment amounted to a settlement in full for all liability thereunder.

The case was tried before a jury, under instructions which are not complained of by appellant, except its request for a directed verdict in its favor, which the court refused, and the jury returned a verdict for plaintiff in the sum of $468.70, to which amount the court added $125 as attorney's fee, and the twelve per cent.

penalty provided by law. Thereafter appellant filed a motion for a new trial, which was overruled, and it has appealed to this court.

Appellant's first contention is that the court should have instructed a verdict in its favor, "unless the release or contract of settlement, signed by the appellee, was void for the reasons as alleged in the complaint and pleadings of appellee." The complaint alleged that the settlement was procured from appellee through false and fraudulent representations and statements of appellant's agent, and that it was therefore void. Appellant testified that he is a negro, is married, and has been living with his wife as husband and wife about thirteen years; has never had syphilis or any other venereal disease, and has not now; that he is now totally disabled, and has been since July 11, 1923; that the agent of the company came to him and wanted him to settle with them; "they told me we just as well get the money, they wasn't going to pay me no more"; that the doctor had reported he had syphilis; that he didn't know the doctor had reported he had syphilis, as the doctor had never told him that he had syphilis.

"Q. Why did you accept the money and make these settlements? A. Well, just because I didn't want to be bothered with them. They kept worrying me to death. Of course I knew I didn't have syphilis. The agent said I just as well take it because they were not going to pay me any more claims, whether I had syphilis or didn't."

His wife, Millie Sanders, testified with reference to this settlement to substantially the same things testified to by her husband, and, in addition, she said that, when the agent told her her husband had syphilis, she asked him who said so, and he said "That is what the blank shows." She further said that she told the agent that they had paid her five claims, and she wanted to know the reason they wouldn't pay her, and he told her that her husband had syphilis. Further, that she accepted the money after he wouldn't receive money on the policies, making the policies lapse, and that is another

reason why she made the settlement, that they wouldn't take the premiums, and said the policies would lapse and she wouldn't get anything, so she settled with them.

Dr. E. H. White testified that he made a blood examination of appellee for syphilis, and found that he didn't have it. Several other doctors testified that plaintiff did not have syphilis. There appears in the bill of exceptions the statement of Dr. Oscar Gray, the physician who examined him on his application for sick benefits, and on the form required by the company, in which he stated that the appellee was suffering with paralysis and strangulated hernia, and, in answer to question 10, "Is disease venereal or of venereal origin?" he answered "No."

There was sufficient testimony in the record therefore to go to the jury on the question of whether appellant's agent made false and fraudulent representations to the appellee in getting him to surrender his policies and accept a small settlement in full satisfaction thereof.

He made the statement to both appellee and his wife that appellee had syphilis; that the doctor in his report had so stated, and that the company wouldn't pay any benefits for this reason; that they would not accept any more premiums, and that the policies would lapse.

It is undisputed that appellee relied upon these statements and accepted a nominal sum in settlement thereof, and we think the court properly submitted this question to the jury, and that appellant's request for a directed verdict was properly denied.

It is next insisted that the court erred in excluding the proffered testimony of Dr. Gebauer, to the effect that he had examined a specimen of blood, supposedly that of appellee, Harris Sanders, and found it to be "2 plus Wasserman positive," showing that appellee was afflicted with syphilis. But the witness was unable to testify that the specimen examined was taken from appellee. He said that probably ninety per cent. of their specimens were taken by him, but that he is not positive whether, in this case, he took the specimen himself or whether

Dr. Judd took it and delivered it to witness. The court properly excluded the proffered testimony, for the reason appellant failed to show that the specimen examined was that of appellee.

It is finally insisted that the court erred in assessing the twelve per cent. penalty and attorney's fees, because the court permitted appellee to amend his complaint, over appellant's objection, at the conclusion of the testimony of witness Dillingham, manager for appellant, who was appellee's first witness, and thereby reducing the amount claimed from $632 to $468.70. Generally it is within the discretion of the court to permit the complaint to be amended during the trial or at the close of the testimony to conform to the proof. *Duff* v. *Ayers,* 156 Ark. 17, 246 S. W. 508. But it is urged that, having brought suit and gone to trial on a demand for more than justly due, appellee could not amend his complaint by reducing the demand to the correct amount, and recover the statutory penalty and attorney's fees in addition thereto. We do not agree with appellant in this contention. If, instead of proceeding with the trial of the case and denying any liability whatever on the grounds here urged, it had either offered to pay the reduced amount, or had asked to be given the time in which to pay same as provided in the policies, appellee could not have recovered the penalty and attorney's fees, and, in addition, would have been required to pay all costs, for the reason that he demanded a sum greater than he was entitled to under the policies.

In *Queen of Ark. Ins. Co.* v. *Milham,* 102 Ark. 675, 145 S. W. 540, appellee brought suit on the policy, and appellant answered, denying that it owed him the amount claimed, and set up a breach of certain conditions of the policy. Later it amended its answer, in which it said that appellee owed it the sum of $12 and interest on a note given for a part of the premium for the policy sued on, and asked that the same be allowed as a credit or set-off against any amount that might be found to be due appellee. Appellee then filed an amendment to his complaint,

in which he admitted that he owed the appellant the premium note of twelve dollars and interest, and asked for judgment in the sum of $423.36 as the amount sued for." The jury returned a verdict for this amount, and the court allowed the twelve per cent. penalty and attorney's fees. On appeal the only question raised was the error of the court in assessing the penalty and attorney's fees under the statute, and, in disposing of the case, this court said: "When appellant filed its amended answer and claimed as a set-off the amount due it by appellee on the premium note, appellee at once conceded that the amount should be deducted from the amount sued for in his original complaint, and only asked judgment for the difference, which was $423.36. If appellant wished to avoid the penalty and attorney's fee provided for in the statute, it should have offered to confess judgment for that amount, and thus have ended the suit. It did not do so, but elected to go on and contest the claim of the appellee on other grounds, and thereby became liable for the penalty and attorney's fees provided for in the statute when appellee recovered the amount sued for." *Great Southern F. Ins. Co.* v. *Burns & Billington*, 118 Ark. 30, 175 S. W. 1161; *Queen of Ark. Ins. Co.* v. *Milham*, 102 Ark. 675, 145 S. W. 540; *Queen of Ark. Ins. Co.* v. *Bramlett*, 103 Ark. 1, 145 S. W. 541; *Am. Natl. Ins. Co.* v. *White*, 126 Ark. 494, 191 S. W. 25.

The jury returned a verdict for the sum demanded, $468.70, and the court properly assessed the penalty and attorney's fees. No error appearing, the judgment is affirmed.

SMITH, J., dissents in part.

BANK OF RISON v. LAYNE & BOWLER COMPANY.

Opinion delivered March 21, 1927.

1. BANKS AND BANKING—LETTER ACKNOWLEDGING ESCROW.—A letter written by the cashier of a bank stating that the bank acknowledged receipt of money, which sum was placed in escrow with the bank, to be paid out only to the party to whom the letter was addressed, *held* binding on the bank.
2. ESCROWS—DIVERSION OF FUNDS—LIABILITY.—Where a deposit in escrow with a bank was made upon condition that the money was to be paid only to plaintiff, who was to drill a well for the depositor, and the bank paid out the money on order of the depositor to a third person who used plaintiff's rig and machinery and injured same in an amount exceeding the amount in escrow, *held* that the bank was liable to plaintiff for the amount of deposit with interest.
3. BANKS AND BANKING—ESCROW—ULTRA VIRES.—An escrow agreement with a bank, providing that the deposit in escrow should be paid out only to plaintiff company engaged in drilling a well for a depositor *held* not *ultra vires*.
4. BANKS AND BANKING—AUTHORITY OF CASHIER.—The cashier of a bank *held* authorized to accept a deposit in escrow to be used solely for drilling purposes.

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

Palmer Danaher, M. Danaher and *Woodson Mosley,* for appellant.

W. A. Leach, for appellee.

McHANEY, J. Appellee, Layne & Bowler Company, had, in 1920, drilled a test well in Cleveland County, Arkansas, for the Success Drilling, Lease & Oil Company, to a depth of 800 feet. The drilling company became indebted to appellee in the sum of $2,042, which it was unable to pay, and all work under the contract ceased about the 9th day of October, 1920. Later the parties resumed negotiations for the completion of the test-hole already commenced, and the appellee, on account of the previous indebtedness, required the drilling company to make a deposit of $1,000 in the appellant bank to pay for further work before it would enter into another contract for the completion of the well. On the 19th day of

May, 1921, appellant wrote appellee as follows: "We understand from Mr. J. D. Newton that you are to resume operations on Elliott well No. 1 when the bank will guarantee you $1,000. This amount is in our hands now, with the understanding that it is to be used solely for drilling purposes." The J. D. Newton mentioned was the secretary and general manager of the drilling company.

On the 24th day of May, 1924, the appellant bank wrote the appellee as follows:

"Rison, Arkansas, May 24, 1921.

"The Bank of Rison, Rison, Arkansas, hereby acknowledges receipt from Success Drilling, Lease & Oil Company, one thousand dollars, which sum is placed in escrow with the said Bank of Rison, to be paid out only to Layne & Bowler Company, on orders of J. D. Newton, representative of Success Drilling & Lease & Oil Company.

(Signed) "Bank of Rison,
"By Walter Elrod, Cashier."

It appears that Walter Elrod, cashier of the appellant bank, was also very closely identified with the drilling company, holding in his name, as trustee, all the leases owned by it.

On the 25th day of May, 1921, an agreement in writing was prepared between appellee and the drilling company and signed by the drilling company, subject to the approval of the Memphis office of the appellee, by the terms of which drilling of the test-hole was to be resumed by appellee, for which he was to be paid at the rate of $6 per foot, not only for that part of the well which had caved in or clogged up, but for drilling through new soil. It was further agreed that $1,000 had been deposited with the appellant bank to guarantee the performance of all obligations on the part of the drilling company under the contract, and that no part of the said $1,000 was subject to withdrawal by the drilling company, but was to be paid to appellee from time to time as the work progressed, as therein provided. The contract was

approved by the Memphis office on the 26th day of May. There was some little delay by appellee in getting its men on the job and resuming drilling operations, and on May 31 the drilling company wrote appellee that it was disappointed that the men had not come, and requested that they do so at once. The next day, June 1, the drilling company again wrote appellee that the seriousness of the delay of getting the men there had passed, and that, if they had good places or jobs elsewhere, not to disturb them, as this one might not last long; that the delay would not inconvenience him, and to let him know beforehand when he would send the men. On June 19 the drilling company again wrote appellee that, upon his return to Rison the evening before, Mr. J. W. Elrod told him that he had a "phone message" from appellee, stating that it could send a crew of men there Monday to commence drilling. He said: "I am sorry to tell you that I have been unable to secure the finances with which to drill my well, and, knowing this to be so, I went ahead and cleaned out the well, and am going to get the casing to case it so that the hole will be preserved. I go Monday to Shreveport to get this casing."

Again in this letter he said: "It would be folly for me to have your men come, knowing my financial status, while I have quite a lot of leases sold, but the abstract and signatures are in escrow in the bank, and have been for some time, awaiting redemption." Again he said: "I hope this will be satisfactory to you, and, if it is not, you can give me the seven days' notice, as set out in the contract, which will terminate it, and I will deliver your machinery F. O. B. cars Rison, Arkansas, unless we can come to some agreement more favorable. I am perfectly willing to pay you rental for the time I have used the machinery, as I may go some deeper to see if I cannot find production at the shallow depth, as was indicated in the Branner well near by."

In response to this letter of the 19th, appellee sent Mr. E. Brown Sanderson to Rison to find out what they were doing with the well and appellee's machinery, and he

found that they had another driller out there, and were using their rig and machinery, and had been for a month or so; that it was damaged and needed repairs, and that they had used about fourteen hundred feet of appellee's four-inch iron pipe, and had twisted it off in the hole about thirty feet from the top, and that this pipe was worth ninety-one cents a foot.

On June 22 the drilling company again wrote appellee in part as follows: "As to the money in escrow, there will be no difficulty in adjusting this. I would like to keep the machinery as long as possible, and can see no reason why I cannot pay you a reasonable rent for it, that you could not permit me to do so."

Several other letters were introduced in evidence between the parties to the same general effect. The evidence showed that the rental value of the machinery was not less than $25 per day, and that the drilling company had used the machinery for a period of about fifty days, and finally the drilling company twisted off the drill stem, leaving about 1,400 feet of it in the hole.

At the conclusion of the testimony, the court rendered a decree against appellant for $1,240, being $1,000 principal and $240 interest from the time the suit was filed, from which comes this appeal.

Appellant says the two writings of the bank are insufficient to bind it. But we differ with appellant as to this. By the writing of May 24 the bank received the $1,000 and held same in escrow, and agreed that same was "to be paid out only to Layne & Bowler Company, on orders of J. D. Newton."

It therefore had no authority to pay it to any one else, and, by so doing, it became liable to appellee for the amount thereof, with interest from the date of suit. Elrod was the cashier of the bank and trustee for the drilling company. He also knew of the contract between the drilling company and appellee. The writing of May 24, as well as of May 19, was executed by Elrod for the bank for the purpose of inducing appellee to enter into the contract with the drilling company, and to get the

well drilled deeper. Thereafter, instead of permitting appellee to do the drilling under the contract, the drilling company took possession of the rig and machinery, hired another driller, operated the outfit for fifty days, without the knowledge or consent of appellee, broke about 1,400 feet of the drill stem off in the well, of the value of 91 cents per foot. While all this was going on, the cashier of the bank permitted the escrow money in his possession to be checked out, for these or other purposes, which he had agreed in writing should "be paid out only to Layne & Bowler Company." If he had kept this money as he agreed, it would have been available to pay the rental value, or damages for the value of the drill stem destroyed, and other damages claimed, either of which was in excess of the judgment against it.

There is no merit to the contention that the bank is not bound because the escrow agreement is *ultra vires*, and that the cashier had no authority to accept this deposit for this special purpose.

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

STANDARD PIPE LINE COMPANY v. INDEX-SULPHUR DRAINAGE DISTRICT.

Opinion delivered March 28, 1927.

1. DRAINS—ASSESSMENT OF PIPE LINE.—The right-of-way of a pipe line company is subject to assessment as real property for preliminary expenses of a drainage district, as provided by the Index-Sulphur Drainage District Act, approved February 4, 1920.
2. HIGHWAYS—ASSESSMENT OF PIPE LINE.—The right-of-way of a pipe line company is subject to assessment as real property for preliminary expenses of a highway district, as provided by the South Miller County Highway District Act, approved February 4, 1920.
3. COMMERCE—ASSESSMENTS FOR LOCAL IMPROVEMENTS.—Special assessments on a pipe line used in interstate commerce for the construction of drainage and highway districts *held* not a tax which is forbidden by the interstate commerce clause of the Constitution of the United States.

4. DRAINS—HIGHWAYS—ASSESSMENT FOR PRELIMINARY EXPENSES.—Levy of a special assessment to pay the preliminary expenses of drainage and highway districts *held* not arbitrary because levied on the assessed valuation of property for State and county purposes, since this method does not imply that it is not also according to benefits to be derived from the two improvements.
5. DRAINS — HIGHWAYS — IMPROVEMENT TAX — BENEFIT.— In the absence of flagrant abuse or purely arbitrary action by the Legislature, it may establish drainage and road districts and tax lands therein for local improvement, and lands will not escape liability solely because they will not receive direct benefits.
6. DRAINS—HIGHWAYS—SPECIAL ASSESSMENT ON PIPE LINE—VALIDITY.—Assessments on a pipe line for preliminary expenses of a drainage district and of a highway district provided by special acts of the Legislature *held,* under the evidence, not to be arbitrary or an unreasonable exercise of the legislative taxing power.
7. DRAINS—HIGHWAYS—VALIDITY OF ASSESSMENT OF PIPE LINE.—Where a property owner had not made complaint in the manner provided by law that the assessment of its property for State and county purposes was discriminatory, it could not complain on that account when such assessment was used as the basis for a special assessment to pay the preliminary expenses of drainage and highway districts.

Appeal from Miller Chancery Court; *C. E. Johnson,* Chancellor; affirmed.

STATEMENT OF FACTS.

Index-Sulphur Drainage District and South Miller County Highway District brought separate suits in the chancery court against Standard Pipe Line Company, Inc., to recover the amount of special improvement taxes against said company for the payment of preliminary expenses in winding up the affairs of said improvement districts. The suit in each case was defended on the ground that the assessment of benefits was arbitrary and discriminatory and, in any event, that the defendant company was not in any sense benefited by said improvements. The cases were consolidated for the purposes of trial.

The record in the case is very voluminous, but a brief statement of facts will suffice to indicate what issues of law are involved in the appeal.

Index-Sulphur Drainage District was created by a special act of the Legislature, approved February 4, 1920. It was ascertained by the commissioners that the cost of the improvement would exceed the benefits to the real property situated in the district, and they recommended that further proceedings be discontinued and the affairs of the district should be wound up. The Legislature of 1923 passed an act to repeal Index-Sulphur Drainage District of Miller County, Arkansas, and provided that the affairs of the district be wound up by the commissioners and its legal indebtedness paid. Special Acts of 1923, p. 282. Section 9 of the repealing act provides that the commissioners of the district should levy upon the real estate within the district a tax sufficient to pay the indebtedness of the district, and that said tax should be levied upon the real estate, using the assessment for State and county purposes as assessed and fixed for the year 1923. The section further provides that the commissioners should declare the per cent. to be levied annually on said assessment for State and county purposes for the year 1923 that would be required to pay off the outstanding indebtedness of the district. The section also provides that, if the commissioners deem it to the best interest of the property owners, the taxes may be spread over four annual installments. Pursuant to the authority given by this act, the commissioners levied a tax upon the real property in the district of 1.6 per cent. of the assessed value of the real property of the district, including said company's pipe line, as fixed by the Arkansas Railroad Commission under the provisions of our statute authorizing it to assess the property of pipe-line companies in the State of Arkansas. The amount of said tax or special assessment for the year levied was $457.23, and for the four annual installments the aggregate amount which would be paid by said pipe-line company would be $1,828.92. The act creating the district provided that the property of railroad, telegraph, telephone and pipe-line companies situated within the district should be classed as real estate and an assessment of benefits be

levied against such property as was done upon other real estate. The Standard Pipe Line Company, Inc., had its pipe line in said improvement district, and it extended into the State of Louisiana. It was engaged in piping oil from the State of Arkansas into the State of Louisiana. Other facts with reference to this case will be stated in the opinion.

South Miller County Highway District was created by special act, approved February 4, 1920, and was repealed by special act of the Legislature, approved February 9, 1923. Special Acts of 1923, p. 126. It was ascertained by the commissioners that the cost of the improvement would greatly exceed the benefits to the real property, and, for that reason, the construction of the improvement was abandoned. For a more particular statement of the acts of the commissioners in winding up the affairs of the district and determining its indebtedness see *Meek* v. *Christian,* 168 Ark. 313, 270 S. W. 614. The original act creating the district provided that railroad, telegraph, telephone and pipe-line companies situated in the district should be classified as real estate and that their property should be assessed as other real estate for the construction of the improvement. The act creating the district also provided that if, for any cause, the improvement was not constructed, the preliminary expenses should be paid by the commissioners, and they were directed to determine the percentage to be levied annually on the assessment for county and State purposes for the year 1923, and that the amount of taxes should be spread over four annual installments. A rate of 1.6 per cent. was levied against the assessed value of the lands, railroads, pipe lines, etc., using the assessment for State and county purposes for the year 1923 as a basis for assessing said property. The amount assessed against the Standard Pipe Line Company, Inc., was $1,655, which was the amount due under the plan of assessment provided to be made for the payment of preliminary expenses as above set forth. Other facts will be stated in the opinion.

The court found the issues in favor of the plaintiffs, and a decree was entered of record declaring that the amount assessed in support of each improvement district against the Standard Pipe Line Company, Inc., was a lien on the right-of-way and pipe line within said district, and provided for the collection of the same by sale of the property assessed. The consolidated case is here on appeal.

T. M. Milling, W. H. Arnold, W. H. Arnold, Jr., and *David C. Arnold,* for appellant.

Henry Moore, Jr., and *T. B. Vance,* for appellee.

HART, C. J., (after stating the facts). It is first contended by counsel for the defendant that its pipe line is not real estate and could not be classified as such by the Legislature in the acts creating said improvement districts. There is a conflict in the adjudicated cases as to whether or not the right-of-way of a railroad company or of a telegraph company is subject to local assessments, but this court has held that the right-of-way of a railroad corporation or of a telegraph company is subject to local assessment as real property. *Missouri Pac. Rd. Co.* v. *Conway County Bridge Dist.,* 142 Ark. 1, 218 S. W. 189; and *Western Union Tel. Co.* v. *Road Imp. Dist. No. 1,* 144 Ark. 476, 222 S. W. 717. Such holding is in accord with the weight of modern authority on the question. The reason is that the railroad or telegraph company has an easement in its right-of-way which is permanent in its nature and which may be specially benefited by drainage or road improvements. It is not like the case of allowing streetcar companies, gas and water companies to use the streets of a city under legislative authority. In all such cases the Legislature merely gives such public service corporations the use of the streets, and they acquire no permanent easement in them; while, in the case of railroad or telegraph companies, they have the exclusive right to use their rights-of-way for the purposes for which such corporations are organized, and such uses carry with is an interest in the ground which is in the nature of real property and is the subject of a special assessment as such. *North-*

ern Pacific Ry. Co. v. *Richland County,* 28 N. Dak. 172, 148 *N. W.* 545, Ann. Cas. 1919E, p. 574, and case-note; and L. R. A. 1915A, p. 129, and case-note.

By analogy the right-of-way and pipe line of the defendant was subject to assessment for the preliminary expenses of each improvement district the same as the other real property in the district.

It is next insisted that the pipe line of the defendant extends from the State of Arkansas into the State of Louisiana, and that it is wholly engaged in interstate commerce, and that to levy a special assessment upon its pipe line for a drainage district or road improvement district would be in violation of the Constitution of the United States, which prohibits the State from laying a tax on interstate commerce in any form. We do not think that a special assessment of real property to construct a local improvement is a tax which is forbidden by what is commonly called the interstate commerce clause of the Constitution of the United States. *Northern Pacific Ry. Co.* v. *Richland County,* 28 N. D. 172, Ann. Cas. 1916E, and cases cited on page 579. This is the effect of numerous cases heretofore decided by this court relating to road improvement districts, which have been affirmed by the Supreme Court of the United States. Indeed, this is the view of the matter taken by the Supreme Court of the United States in the earlier case of *Illinois Central Rd. Co.* v. *Decatur,* 147 U. S. 190, 13 S. Ct. 293, where it was held that an exemption from taxation is to be taken as an exemption from the burden of ordinary taxes, and does not relieve from the obligation to pay special assessments, imposed to pay the cost of local improvements, and charged upon contiguous property upon the theory that it is benefited thereby. In discussing the subject it was said:

"And whether the charges are called special taxes or special assessments, and by whatever tribunal or by whatever mode the question of benefits may be determined, the fact remains that the charges are for a local improvement, and cast upon the contiguous property, upon the

assumption that it has received a benefit from such improvement, which benefit justifies the charge. The charges here are not taxes proper, are not contributions to the State or to the city for the purpose of enabling either to carry on its general administration of affairs, but are a charge only and specially for the cost for a local improvement, supposed to have resulted in an enhancement of the value of the railroad company's property."

Moreover, there is a distinction between a tax upon property which is used in interstate commerce which is valid, and a tax upon the act of interstate commerce which is not. *Cleveland, etc., R. Co.* v. *Backus,* 154 U. S. 439, 14 S. Ct. 1122, and *Adams Express Co.* v. *Ohio State Auditor,* 165 U. S. 194, 17 S. Ct. 305.

It is next insisted that the levy of the special assessment is arbitrary because it is levied upon a percentage of the assessed valuation of the property for State and county purposes. We cannot agree with counsel in this contention. The Legislature provided that the preliminary expenses in each case, in the case of the abandonment of the project, should be paid by a special assessment based upon a percentage of the value of the real property in the district for State and county purposes as shown by the assessment roll for 1923. This constituted a legislative determination of the justice of this method of assessing benefits, and such legislation has been expressly upheld by this court as a proper exercise of legislative power. *Missouri Pacific Rd. Co.* v. *Sears,* 166 Ark. 104, 265 S. W. 653. The court expressly held in this and other cases that the fact that the special assessment is made upon the whole value of the property as assessed for State and county purposes does not imply that it is not also according to the benefits to be derived from the improvements. Hence it is not an arbitrary method of ascertaining the amount of benefits to assume that they will accrue in proportion to the actual value of the whole property. In *Western Crawford Road Imp. Dist.* v. *Missouri Pacific Rd. Co.,* 157 Ark. 304, 248 S. W. 563, it was

held that a legislative determination that the preliminary expenses of an abandoned highway improvement levied on the basis of the assessed value of the property in the district for State and county purposes would not exceed the anticipated benefits from the construction of the improvement, is conclusive unless shown on its face to be arbitrary and unreasonable. This case was carried to the Supreme Court of the United States, and it was there held that, where a special road improvement is abandoned, after preliminary publication and inquiry, because the cost would probably exceed the benefits to the land included in the improvement district, the State may defray the expenses of the inquiry by assessing the lands according to their value as assessed for purposes of State and county taxation. *Missouri Pacific Rd. Co.* v. *West Crawford Rd. Imp. Dist.,* 266 U. S. 187, 45 S. Ct. 31. It was there said that it is only against a flagrant abuse or purely arbitrary exercise of the taxing power that the Constitution of the United States affords protection. Again, the Supreme Court of the United States has reaffirmed the rule that it is only where the legislative determination is palpably arbitrary, and therefore an abuse of the taxing power, that it can be said to offend the due process of law clause of the Fourteenth Amendment. *Kansas City So. Ry. Co.* v. *Rd. Imp. Dist. No. 3 of Sevier County,* 266 U. S. 379, 45 S. Ct. 136.

It is now well settled by the decisions of our own court above cited and many others which might be cited, and by the decisions of the Supreme Court of the United States, that, in the absence of flagrant abuse or purely arbitrary action on the part of the State Legislature, it may establish drainage and road districts and tax lands therein for local improvements, and that none of such lands may escape liability solely because they will not receive direct benefits. *Houck* v. *Little River Drainage District,* 239 U. S. 254, 36 S. Ct. 58; *Miller & Lux, Inc.,* v. *Sacramento & San Joaquin Drainage Dist.,* 256 U. S. 129, 41 S. Ct. 404; and *Valley Farms Co. of Yonkers* v. *County of Westchester,* 261 U. S. 155, 43 S. Ct. 261.

Tested by these settled principles of law, it cannot be said that the action of the Legislature in fixing the levy for the payment of the preliminary expenses of each district at a certain per cent. of the assessed value of the real property of the district was palpably arbitrary and an abuse of the taxing power. It is true that, according to the evidence of the defendant company, it could not receive any benefit from either the drainage district or the road district. According to the testimony of the witnesses for it, it was wholly engaged in the business of carrying oil in its pipes from the State of Arkansas into the State of Louisiana. Its pipes were laid under the ground, and had a life of about twenty years. They were not affected by the water standing on the ground, and the telegraph line operated by the company was merely used as an aid of its pipe-line business, and was not in any sense benefited by the proposed road or drainage system. It may be said that a decided preponderance of the evidence establishes this view; but, under the principles of law decided in the cases above referred to, this does not end the matter; for it does not show that the legislative action was palpably arbitrary. According to the evidence of the plaintiffs, the drainage system would drain the water off of the right-of-way of the defendant company, and this would enable its employees to enter upon its land and more easily dig down to its pipe lines when it was necessary to replace or to repair them. Then, too, it would better enable the company to repair its telegraph line when the water had been drained off of its right-of-way. Under the charter of the company, it had a right to lay additional pipe lines and to operate its telegraph line as a telegraph line when in the future it was deemed necessary or expedient to do so. As we have already seen, it was not necessary that the special benefits should be direct and immediate. The Legislature, in an investigation of the matter, would have had a right to accept the testimony of the plaintiff as true and to have ascertained as a fact that the construction of the drainage system, by draining the right-of-way of the defendant, would

result in special benefits to its real property along the lines indicated. In addition, it may be said that, in case of a break in the pipe line, it would be necessary to repair this quickly in order to prevent a great wastage of oil, and this could be more easily and readily done if the water was drained off of the right-of-way along which the pipe lines were laid.

For the same reason it may be said that the construction of the proposed highway would result in a special benefit to the pipe line of the defendant. In case a discovery of oil should make it expedient or necessary to lay new pipe lines, an improved highway would be of great benefit in distributing the material along the right-of-way for the purpose of laying additional pipe lines. Then, too, it would be beneficial in cases of ordinary repairs of the pipe line and of the telegraph line. Hence we are of the opinion that the legislative determination that the preliminary expenses should be paid by a per cent. of the assessed valuation of the real property in the district for State and county purposes for the year 1923 was not palpably arbitrary and therefore an unreasonable exercise of the legislative taxing power.

Finally, it is insisted that the assessment is discriminatory because it makes the pipe-line company pay an undue proportion of the special assessments levied to pay the preliminary expenses. Now, under our statute, pipe-line companies have the power of eminent domain and various other privileges, and the uses for which such companies are organized necessarily make them subject to the unit system of taxation. They are classified for the purposes of taxation, and a special board is given the power to assess them when other real property is assessed by the local taxing authorities of the various counties. No complaint was made by the company when its property was assessed for taxation in 1923 by the Arkansas Railroad Commission, whose duty it was to assess its property. If the company thought that its property was being discriminated against in the assessment made at that time, it should have made complaint in the manner

provided by law. Not having done so, it must be assumed that it considered the assessment of its property for State and county purposes to be just and reasonable and that it was not in any manner discriminatory when compared with the assessment made on other real property by the county assessors. In *Valley Farms Co.* v. *Westchester,* 261 U. S. 155, 43 S. Ct. 261, it was held that, where the State law gives a property owner an opportunity to be heard upon the valuation of his property for general taxation, he is not entitled, under the Fourteenth Amendment to the Constitution of the United States, to a further hearing on that subject when such valuations are used as bases for apportioning special assessments.

The result of our views is that the decision of the chancery court, holding that the assessment of benefits against the pipe line of the defendant was not palpably arbitrary and a plain abuse of legislative taxing power, was correct, and its decree is therefore affirmed.

LONG v. VOLZ.

Opinion delivered March 28, 1927.

1. APPEAL AND ERROR—LIABILITY ON SUPERSEDEAS BOND.—Where a decree by its terms was *in rem,* it was error, in a subsequent action on a supersedeas bond given to stay execution on such decree, to find that the decree was *in personam.*
2. PLEADING—MOTION TO MAKE MORE SPECIFIC.—Denial of a motion to make a complaint more specific and to require plaintiff to state how and in what manner plaintiff had been damaged by defendants' failure to perfect an appeal in a case in which they had executed a supersedeas bond, *held* error.
3. APPEAL AND ERROR—LIABILITY ON SUPERSEDEAS BOND.—A supersedeas bond providing that, if the appeal should not be perfected, the sureties should pay the damages and "perform the judgment of the court appealed from," *held* to render the sureties liable only for damages growing out of failure to perform the judgment.
4. APPEAL AND ERROR—DAMAGES ON SUPERSEDEAS BOND—DUTY TO MINIMIZE.—Where the execution of a decree has been stayed by

filing a supersedeas bond, and the appeal is never perfected, the prevailing party should minimize his damages for which the sureties on the bond are liable by procuring a sale of the property on which a lien was declared by the decree.

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

McNalley & Sellers, for appellant.

Coulter & Coulter, for appellee.

WOOD, J. On July 8, 1924, a decree was rendered in the Union Chancery Court in favor of Fred Volz in the case therein pending of Fred Volz *v.* C. A. King and others. No personal decree was entered in the case, but a decree *in rem* was rendered which recites, in part, as follows:

"That plaintiff is entitled to a judgment *in rem* for the sum prayed for, less one-half of $30 for hauling on January 17, 1924; that this sum constitutes a lien on the leasehold estate covering the east half of the east half of the northwest quarter of section 28, township 16 south, range 14 west, in Union County, Arkansas, and that this lien should be foreclosed and said property be sold if said sum be not paid within fifteen days from this date. It is therefore by the court considered, ordered, adjudged and decreed that the plaintiff have judgment *in rem* in the sum of $642.50 with interest thereon from this date until paid at the rate of 6 per cent. per annum; that the same be and it is hereby declared to be a lien on the leasehold estate covering the west half of the east half of the northwest quarter of section 28, township 16 south, range 14 west, in Union County, Arkansas, together with all personal property located thereon and used in connection therewith; that said lien, together with all the equities and rights of every kind of J. P. Stone and the Stone Oil Company be foreclosed and said property be sold free from the equities of any of the defendants herein unless said sum be paid within fifteen days from this date; that H. G. Williams be, and he is hereby, appointed commissioner," etc.

J. P. Stone and the Stone Oil Company, who were made parties defendant in the action in chancery, prayed an appeal and were allowed to file a supersedeas bond, which bond recites as follows:

"Whereas, the appellant, J. P. Stone, trustee for the Stone Oil Company, has taken an appeal from the judgment of the Union Chancery Court rendered at its July term, 1924, on the 8th day of July, 1924, against the west half of the east half of the northwest quarter of section 28, township 16 south, range 14 west, in Union County, Arkansas, *in rem,* in favor of the appellee, Fred W. Volz, for the sum of $565, with costs, and said appellant desires to supersede said judgment.

"Now the said J. P. Stone, trustee for the Stone Oil Company, which owns the above described leasehold interest, and J. M. Long and A. J. Perdue, as sureties, hereby covenant with the said appellee that appellant will pay to appellee all damages, interest and cost that may be adjudged against appellant on such appeal, or in the event of appellant's failure to prosecute such appeal to final judgment in the Supreme Court, or if said appeal should be for any cause dismissed, that said sureties shall pay to appellee all damages, interest and cost and shall perform the judgment of the court appealed from; also that said appeal shall be prosecuted without delay," etc.

The bond was signed by J. P. Stone, trustee for the Stone Oil Company, principal, and by J. M. Long and A. J. Perdue, as sureties. The appeal from the decree in the chancery court was not perfected.

In May, 1925, this action was instituted in the Union Circuit Court against J. M. Long and A. J. Perdue on the above bond. The defendants answered and alleged that the bond on which the action was founded ceased to be effective on January 8, 1925, the date when the time for the taking of the appeal in the chancery cause expired. They alleged that it was the duty of the plaintiff in that cause to have minimized his damages by procuring a sale under said lien declared in said judgment and decree,

and to have had execution issued against the defendants in that action personally, all of which he had neglected and refused to do, and that, not having done so, he is entitled to only nominal damages against the defendants, for which they offer to confess. They prayed that plaintiff recover of them nominal damages only, together with his costs.

The plaintiff, Volz, demurred to the answer. The court sustained the demurrer. Thereupon the defendants stood upon their answer and refused to plead further. The cause was thereupon submitted upon the complaint, the bond sued on, and the record of the decree of the chancery court. The court found that the plaintiff had obtained judgment in the Union Chancery Court against J. P. Stone and J. P. Stone, trustee for the Stone Oil Company, in the sum of $642.50, together with the costs in the cause; that an appeal was prayed and granted and the supersedeas bond sued on was executed; that the appeal was not perfected within the time allowed by law, and that the plaintiff Volz was entitled to judgment in the sum of $689.61, together with the costs in the chancery cause, and entered judgment for that sum, from which is this appeal.

The court erred in finding that the chancery court rendered a decree in favor of the appellee against J. P. Stone, trustee for the Stone Oil Company, in the sum of $642.50. The decree in the chancery court set out above controverts this finding of the court. The decree itself proves conclusively that only a decree *in rem* was rendered in the chancery cause in the sum of $642.50, and the same was declared a lien on a certain leasehold estate, describing it, and directing that same be sold to satisfy the decree. No personal judgment was rendered against J. P. Stone and J. P. Stone, trustee for the Stone Oil Company. Now, the applicable provisions of the bond on which this action is founded are as follows: "In the event of appellant's failure to prosecute such appeal to final judgment in the Supreme Court, or if said appeal should be for any cause dismissed, that said sureties

shall pay to appellee all damages, interests and costs and shall perform the judgment of the court appealed from." The judgment appealed from was a judgment *in rem* in the sum of $642.50 against a certain leasehold estate, declaring the same a lien on that leasehold estate and directing that the same be sold to satisfy the decree.

In the court below the appellants, before filing their answer, moved the court to require the appellee to make his complaint more specific, and that he be required to state how and in what manner he had been damaged by the giving of the bond and the failure to perfect the appeal. The court should have granted this motion, because it is manifest from the recitals of the decree and the language of the bond that the appellants are only liable on the bond because of the failure of J. P. Stone and the Stone Oil Company to prosecute the appeal from the decree of the chancery court, and, under the express language of the bond, the appellants herein, as sureties for J. P. Stone, trustee for the Stone Oil Company, are only liable on the bond for the damages, interest and costs growing out of the failure to perform the judgment of the court appealed from. The judgment of the court appealed from required that the leasehold estate therein described be sold to satisfy a judgment in the sum of $642.50, together with the interest and costs in the chancery cause, which sum was declared a lien against such leasehold estate. The filing of the supersedeas bond by the appellants in the chancery cause had the effect of staying the proceedings in that cause until the time for the appeal had expired, and, if such stay of the proceedings in the chancery cause resulted in damage to the plaintiff in that cause, the appellee here is entitled to recover the amount of such damage against the appellants in the present action on the bond.

This is an issue which the appellants sought to have presented to the trial court by their motion to have the appellee make his complaint in the chancery court more specific, and by their answer setting up that it was the duty of plaintiff to minimize his damages by procuring

a sale of the property on which a lien was declared by decree of the court. The court erred in overruling appellants' motion to require appellee to make his complaint more specific as set forth in the first paragraph of such motion, and also erred in sustaining the appellee's demurrer to appellants' answer. The court erred in not having the issues joined and tried as indicated.

For such errors the judgment is reversed, and the cause remanded for a new trial.

Justices SMITH and MCHANEY dissenting.

CLEVELAND v. BRECKENRIDGE.

Opinion delivered March 28, 1927.

1. DEEDS—ACCEPTANCE.—Evidence *held* to sustain a finding that there was no acceptance of a deed.
2. DEEDS—SUFFICIENCY OF DELIVERY.—To constitute a valid delivery of a deed, the grantor, by acts or words, or both, must have manifested an intention to pass the title to the grantee and the latter must have intended to accept the deed.

Appeal from Clay Chancery Court, Western District; *J. M. Futrell,* Chancellor; affirmed.

J. L. Taylor, for appellant.

C. T. Bloodworth, for appellee.

WOOD, J. This is an action by the appellant against the appellee begun in the circuit court of Clay County, and afterwards, without objection, so far as the record shows, found its way to the chancery court, where it was tried and a decree entered in favor of the appellee, from which is this appeal.

The appellant alleged in substance that she was the owner of the land in controversy, describing same in her complaint; that her mother, Mary Breckenridge, died on April 14, 1924, and, at the time of her death, she was in possession of the land and was the owner thereof, having a fee simple title thereto; that the appellant is the only surviving heir of her mother, and as such is entitled to

the possession of the property and to damages for the unlawful detention thereof by the appellee. She alleged that, before the death of her mother, the house situated on the land had been insured by her against loss by fire, and that the same had been destroyed and the amount of the insurance in the sum of $250 had been collected by the appellee and converted to his own use. Appellant prayed for possession and for damages.

The answer denied all the material allegations of the complaint.

A. H. Breckenridge intervened and alleged that he was the owner of the land under an agreement between J. F. Breckenridge, his father, and Mary Breckenridge, his stepmother, by which they agreed to convey to him the land in consideration that he take care of them and furnish them such cash and other supplies as they might need, which the intervener did in the sum of $2,000. He prayed that the title to the land be vested in him. The appellant answered the intervention, stating that, if such an agreement had been made, it was not in writing, and that no part thereof had been performed; that the same was without consideration and void, and that the appellee, A. H. Breckenridge, was barred by laches from maintaining the action.

The facts are substantially as follows: J. F. Breckenridge was the owner of eighty acres of land in Clay County which had been purchased by him in 1907. He sold off forty acres to one T. R. Cleveland, and A. H. Breckenridge, his son by a former marriage, purchased the land from Cleveland, and appellee, J. F. Breckenridge, and the then Mrs. Breckenridge, the stepmother of A. H. Breckenridge, sold to A. H. Breckenridge 27 acres of the adjoining forty. J. F. Breckenridge desired to sell to his son the entire forty acres, but Mrs. Breckenridge, the stepmother, objected. She desired that they retain the remaining thirteen acres for a home. A scrivener was called in to make the deeds. One deed was made out to A. H. Breckenridge to twenty-seven acres, and another deed was executed by Breckenridge to his wife for the

remaining thirteen acres of the forty. The deeds were executed and acknowledged by J. H. Breckenridge and his wife to A. H. Breckenridge, and by J. H. Breckenridge to his wife. The scrivener testified that he wrote the deeds, took the acknowledgments, and laid the deeds on the table. He testified that Mr. and Mrs. Breckenridge were living on the land at the time. Mrs. Breckenridge turned over a span of young mules on the purchase price of the land in controversy. They lived there on the place until Mrs. Breckenridge died. The title was in the name of J. F. Breckenridge. The deeds were witnessed by one Barnes.

The appellant testified that she was the daughter of Mrs. J. F. Breckenridge by a former husband, Lovell. She was the only child, and she married a man by the name of Cleveland. She stated that the thirteen acres of land in controversy belonged to her mother. Her mother died on the land. Appellant knew about the deed her stepfather, Breckenridge, made to her mother. Her mother showed her the deed, which she kept in a trunk. Her mother told the appellant that Mr. Breckenridge had given her the deed to sign over the rest of the land to Albert Breckenridge. Witness' mother had been living on the land since 1903. The last conversation witness had with her mother was in March, 1924. At that time she told the appellant she had lost the deed. She died April 14, 1924. Witness stated that her mother's trunk was then at witness' house; that her mother also told her that she had turned a span of young mules in on the purchase price. Her mother had $191 in money and she said that Breckenridge spent it. Witness' mother had been in possession of the land claiming it since witness' stepfather made the deed to her.

Ten witnesses testified on behalf of the appellant, and their testimony tended to prove that Mrs. Breckenridge claimed the land since 1907 after J. H. Breckenridge made the deed to her. One witness stated that Mrs. Breckenridge showed her the deed in 1908. At least three of the witnesses stated that she had shown them the

deed, and practically all of them stated that she claimed to own the land and would not sell the same; that she wished to keep the land for her daughter, the appellant. Several of the witnesses stated that J. F. Breckenridge spoke of the land as belonging to Mrs. Breckenridge, and that he could not get her to dispose of it. The testimony of some of the witnesses was also to the effect that they never heard of Albert Breckenridge claiming the land. One of the witnesses stated that, in 1920, Mrs. Breckenridge rented the land to witness' brother, and that Mrs. Breckenridge was in possession in 1921; that old man Frank Breckenridge had sold all of his property and left, and that Mrs. Breckenridge thought he was gone for good.

The testimony of the appellee was to the effect that, on the occasion when J. F. Breckenridge and wife sold the twenty-seven acres to A. H. Breckenridge, J. F. Breckenridge made out a deed also to his wife, but she did not accept it, and afterwards burned the same by throwing it in the stove. The deed was in witness' trunk. Witness and his wife lived on the place all the time, but his son, Albert, took care of them and paid all the taxes. Albert also collected the rents on the whole place and had the management of it. Mrs. Breckenridge told A. H. Breckenridge, witness' son, that he could have the land if he would take care of them, and she stated that is the reason why she would destroy the deed. She wanted to make A. H. Breckenridge a deed, and they did make a deed to the 27 acres, and he also made out a deed to Mrs. Breckenridge. She never did accept it, and burned the same two or three years afterwards. She was unwilling to make Albert H. Breckenridge a deed to the thirteen acres because she was afraid he might die, and she wanted a place to live. Witness and his wife had been living on the place all along.

The greater number of witnesses testified on behalf of the appellee to the effect that A. H. Breckenridge had control and management of the land in controversy, and rented it out and collected the rents. Some of them

stated that he claimed to own the land, and the rents were paid to him. One witness testified that he was present when the scrivener wrote the deeds in 1907 and witnessed the deeds with Frank Barnes as the other witness. After the deeds were written and signed, the scrivener laid them on the table and left. Mrs. Breckenridge said several times that there was not any use in making the deeds to her. J. F. Breckenridge threw the deed to the 13 acres in his trunk.

Another witness testified that he saw the deed and talked to Mrs. Breckenridge about having it recorded, and went out to get it and put it on record for her, but she declined. This was in 1908 or 1909. She didn't want to take it, and said as long as she lived it wasn't necessary, and at her death it was to go to Calla. Several of the witnesses testified to hearing Mr. and Mrs. Breckenridge state that they had agreed to sell the land to Albert Breckenridge, since he had been furnishing them with money, paying their bills and taking care of them.

From the evidence adduced the trial court found that there was no delivery and acceptance of the deed to Mrs. J. F. Breckenridge, and that no title ever passed to her. Without pursuing the subject further, we are convinced that the finding of the trial court, to say the least, was not against the preponderance of the evidence. Whether or not there has been a delivery of a deed depends upon the intention of the parties as manifested by their acts and words. The grantor, by his acts or words, or both, must have manifested an intention to pass the title to the grantee and the grantee must have intended to accept such deed in order to constitute a valid delivery and conveyance of title. *Cribbs* v. *Walker,* 74 Ark. 104, 85 S. W. 244; *Russell* v. *May,* 77 Ark. 89, 90 S. W. 617; *Ames* v. *Ames,* 80 Ark. 8, 96 S. W. 144, 117 A. S. R. 68; *LaCott* v. *Quertermous,* 84 Ark. 610, 107 S. W. 167; *Maxwell* v. *Maxwell,* 98 Ark. 466, 136 S. W. 172; *Battle* v. *Anders,* 100 Ark. 427, 140 S. W. 593; *Faulkner* v. *Frazel,* 113 Ark. 289,

168 S. W. 568; *Wood* v. *Wood*, 116 Ark. 142, 172 S. W. 860; 8 R. C. L., Deeds, par. 47.

It occurs to us that a preponderance of the testimony sustains the finding of the trial court. The decree is therefore correct, and it is affirmed.

TUGGLE *v.* TRIBBLE.

Opinion delivered March 28, 1927.

1. APPEAL AND ERROR—QUESTION NOT DECIDED BELOW.—Where the circuit court refused to entertain jurisdiction on appeal from the county court and therefore did not determine the question whether the county court had jurisdiction to enter judgment changing the location of a road, such question is not before the Supreme Court.
2. COURTS—APPEAL FROM COUNTY COURT—AFFIDAVIT.—Under Crawford & Moses' Dig., § 2287, it is error for the county court to make an order granting an appeal to the circuit court until the party appealing shall have filed an affidavit with the court as prescribed therein, but such filing may be waived in the circuit court, and is waived where there is no motion to dismiss the appeal.
3. COURTS—FILING AFFIDAVIT WITH CIRCUIT CLERK.—Where a petition for appeal and affidavit were filed with the clerk of the circuit court within apt time and a transcript of proceedings in the county court, it was error to dismiss the appeal, since filing of the transcript with the circuit clerk was tantamount to an order for appeal by the clerk.

Appeal from Garland Circuit Court; *Earl Witt*, Judge; reversed.

C. T. Cotham, for appellant.

Murphy & Wood, for appellee.

WOOD, J. Act No. 611 of the Acts of 1923, amending § 7328 of Kirby's Digest (now § 5249 of Crawford & Moses' Digest) provides for the opening of new roads and changing old roads, the same to be located on section lines as near as may be, taking into consideration the convenience of public travel, contour of the country, etc. The procedure to be followed is prescribed in the act.

This action was begun by A. H. Tribble and other property owners of Garland County, under the above statute, by filing petitions in the county court asking for certain changes to be made in the location of part of what is designated in the petitions as the "Harlan Boulevard". The petitioners described the changes desired and prayed that the road be changed and relocated as described.

D. M. Tuggle and 59 other property owners appeared in the county court, asked to be made parties, and filed a remonstrance against granting the prayer of the petitions. They also filed a demurrer and motion to dismiss the petitions upon various grounds, which are set forth in the demurrer and motion to dismiss. On the 26th day of October, 1925, the county court entered an order overruling the demurrer and motion to dismiss, to which ruling the remonstrants duly excepted. On the same day the petition was heard, and the court entered a judgment granting the same and reciting the changes as prayed in the petition. This judgment concluded with the following recital: "To which order of the court the remonstrants, D. M. Tuggle *et al.*, at the time excepted and filed their motion and affidavit for appeal to the circuit court of Garland County, which motion is granted."

On the 1st day of June, 1926, the same being an adjourned day of the regular April, 1926, term of the Garland County Court, that court, by *nunc pro tunc* entry, changed the above recital to read as follows: "To which order of the court the remonstrants, D. M. Tuggle *et al*, at the time excepted, and prayed an appeal to the circuit court, which appeal by the court was granted, conditioned upon the remonstrants filing the affidavit for an appeal as by law required."

On the 14th day of April, 1926, D. M. Tuggle, for himself and others, filed in the Garland County Court the following:

"Comes D. M. Tuggle, for himself and for all others in like situation, and states that he is a citizen and taxpayer of Garland County, Arkansas, and that he was a party to the proceedings herein in this court in the above

entitled cause, and moves the court for an appeal from the judgment or order of the Garland County Court to the circuit court of Garland County, Arkansas.

"D. M. Tuggle, for himself and for all others in like situation, states that he is a citizen and taxpayer of Garland County, Arkansas, and that he was a party to the proceedings below, and that the appeal taken by him from the judgment of this court rendered in the above-entitled cause to the Garland County Circuit Court, is taken because the appellant verily believes that he is aggrieved, and is not taken for vexation or delay, but that justice may be done him. (Signed) D. M. Tuggle.

"Subscribed and sworn to before me this the 14th day of April, 1926. (Signed) Trager Freeman, Clerk. Ursery S. Owen, D. C."

On April 21, 1926, the transcript of the proceedings in the county court was filed with the clerk of the Garland County Circuit Court. On May 25, 1926, A. H. Tribble filed his motion to dismiss the appeal on the ground that the county court did not enter an order granting the appeal after the filing of the affidavit and prayer for appeal in that court, and that the circuit clerk had not entered an order granting the appeal, and therefore the circuit court had no jurisdiction of the action. The trial court, upon the above facts, granted the motion and entered a judgment dismissing the appeal from the county court to the circuit court, from which judgment is this appeal.

The trial court refused to entertain jurisdiction of the action as an appeal from the county court, and therefore did not determine the question as to whether or not the county court had jurisdiction to enter a judgment changing the location of the road. That question therefore is not before this court. The only question for our consideration and decision is whether or not the trial court erred in dismissing the appellants' alleged appeal from the judgment of the county court.

Section 2287, C. & M. Digest, provides as follows: "Appeals shall be granted as a matter of right to the circuit court from all final orders and judgments of the

county court, at any time within six months after the rendition of the same, either by the court rendering the order or judgment or by the clerk of the circuit court, * * * as in other cases at law, by the party aggrieved filing an affidavit and prayer for an appeal with the clerk of the court in which the appeal is taken; and, upon the filing of such affidavit and prayer, the court rendering the judgment or order appealed from, or the clerk of the circuit court, shall forthwith order an appeal to the circuit court at any time within six months after the rendition of the judgment or order appealed from, and not thereafter. The party aggrieved, his agent or attorney, shall swear in said affidavit that the appeal is taken because the appellant verily believes that he is aggrieved, and is not taken for vexation or delay, but that justice may be done him."

The order of the county court granting the appeal, as evidenced by its *nunc pro tunc* judgment, is as follows: "To which order of the court the remonstrants, D. M. Tuggle *et al.*, at the time excepted and prayed an appeal to the circuit court, which appeal was granted, conditioned upon the remonstrants filing an affidavit for an appeal as by law required."

Under the above statute, and our decisions, it is essential to the jurisdiction of the circuit court that an appeal be granted by the county court or by the clerk of the circuit court, and it is error for the county court to make an order granting the appeal until the party aggrieved shall have filed with the clerk of the county court an affidavit as prescribed in the statute. The statute contemplates that the affidavit and prayer for appeal shall be filed in advance of any order made by the court or the clerk, as the case may be, in order that the court or clerk, before ordering the appeal, may have an opportunity to ascertain whether or not the affidavit complies with the statute. The filing of an affidavit under the statute above is not jurisdictional, because it may be waived in the circuit court, and is waived, where the party against whom the appeal is sought does not, in the

circuit court *in limine,* move to dismiss the appeal before taking any substantive or affirmative steps in the cause.

In *Drainage District No. 7* v. *Stuart,* 104 Ark. 113-118, 147 S. W. 460, speaking of the general statute above, we said: "Under the general statute the filing of an affidavit for appeal is not jurisdictional, and therefore may be waived by failure to have the trial court rule on a motion to dismiss, embodying in the motion such objection." And in *Wulf* v. *Davis,* 108 Ark. 292, 157 S. W. 384, we said: "The filing of an affidavit was a prerequisite but was waived by appellants appearing and taking substantative steps without moving to dismiss the appeal on that ground."

Here, however, the appellee did move in the circuit court to dismiss the appeal of the county court before taking any substantive steps, and there was therefore no error in the ruling of the trial court in refusing to entertain jurisdiction on the ground that the affidavit for appeal had not been filed with the clerk of the county court in advance of the order of the court for the appeal. The above statute, however, further provides that "upon the filing of such affidavit and prayer for appeal * * * the clerk of the circuit court shall forthwith order an appeal to the circuit court at any time within six months after rendition of the judgment or order appealed from, etc." Now, it will be observed that, within six months, the motion for appeal and the affidavit were filed with the clerk of the county court in which the appeal was taken, and the transcript of all the proceedings had in the cause, including the affidavit and prayer for appeal, was filed also with the clerk of the circuit court within the six months. The filing of the transcript from the county court by the clerk of the circuit court, such transcript containing the affidavit and prayer for appeal, was tantamount to an order for appeal by the circuit clerk. If the circuit clerk did not intend, by his act in filing the transcript of the proceedings before the county court, to order an appeal from that court, he should have refused to file the transcript, for his act in filing same

was clearly indicative of the fact that he intended to order an appeal. We are convinced that to hold otherwise would be "sticking in the bark," and magnifying form above substance. We must assume that the circuit clerk performed his duty and that he was cognizant of the statute *supra,* prescribing his duty. Therefore we should presume that the circuit clerk examined the transcript of the record of the proceedings in the county court when it was presented to him for filing before he filed the same, and that he discovered that the affidavit and prayer for appeal had been filed in the county court within six months after the rendition of the judgment in such court; and by filing the transcript, instead of rejecting the same, he treated it as an application for an order of appeal, and his act in filing it was equivalent to an order for appeal.

In *Hempstead County* v. *Howard County*, 51 Ark. 344, 11 S. W. 478, there was a motion to dismiss the appeal from the judgment of the county court because there was no formal prayer addressed to the circuit clerk for an appeal and because the county clerk, who was ex-officio circuit clerk, had affixed the seal of the latter court to his certificate of the proceedings in the county court. Chief Justice COCKRILL, speaking for the court, said: "The repeated decisions of this court discountenancing irregularities of procedure which do not affect the rights of parties upon the merits, and recognizing in the circuit court the power of amending its process and records as well as pleadings, to any extent short of impairing the substantial rights of the parties, leave no room for argument against the action of the court in this instance. The prayer for an appeal contemplated by the statute is addressed to the clerk for the purpose of apprising him that an appeal is desired. If the statutory affidavit for an appeal is presented to him without a formal prayer, and he acts upon it and causes the appeal to be perfected, the requirements of the statute have obviously been fulfilled, for the only end the prayer could effect has been attained."

The above language is exceedingly apposite here. The true spirit and purpose of the statute has been attained when the affidavit and prayer for appeal has been filed with the clerk of the county court, within the time allowed, and when either the county court or the clerk of the circuit court, after the filing of such affidavit, orders an appeal. In *Brown* v. *Kirkland,* 156 Ark. 542-548, 246 S. W. 851, passing upon a question similar in principle, we said: "The entering of an order upon the affidavit for appeal by the clerk of course would have been the best evidence that the appeal had been granted by him, but his act in complying with all the essential requirements of the statute regulating appeals in such cases was sufficient to show that he had granted the appeal and to invest the circuit court with jurisdiction." It follows that the trial court erred in dismissing the appeal. The judgment is therefore reversed, and the cause is remanded for further proceedings according to law.

CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY v. RUSSELL.

Opinion delivered March 28, 1927.

1. MASTER AND SERVANT—NONPAYMENT OF WAGES—CONSTRUCTION OF STATUTE.—Crawford & Moses' Dig., § 7125, providing that, on nonpayment by a railway company of the wages of a servant or employee, upon his discharge his wages shall continue from the date of his discharge or refusal to further employ him until paid, is a penal statute, and must be strictly construed.
2. MASTER AND SERVANT—EMPLOYMENT DURING EMERGENCY.—Where plaintiff was employed to watch a railway engine only for the period of an emergency, there was neither discharge nor refusal to further employ him at expiration of the emergency, and he could not recover the penalty for nonpayment of wages provided by Crawford & Moses' Dig., § 7125.

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

Thos. S. Buzbee, Geo. B. Pugh and *A. S. Buzbee,* for appellant.

E. W. McGough, for appellee.

SMITH, J. This suit was instituted by appellee to recover from appellant certain wages due him and a penalty for their nonpayment.

The cause was heard in the court below upon an agreed statement of facts, wherein it was recited: "That, on August 17, 1921, plaintiff, who was not a regular employee of defendant, was employed by one of defendant's engineers only to watch an engine belonging to defendant at Calion, Arkansas, said engine and the train to which it was attached being 'tied up' at Calion on account of congestion of traffic in defendant's yards at El Dorado, Arkansas; that plaintiff was hired to watch said engine until orders were received for said engine to proceed to El Dorado." It was further recited in the agreed statement of facts that the engineer agreed that plaintiff should receive for the first eight hours 64 cents per hour and for every hour thereafter he was to have time and a half, or 96 cents per hour, and that plaintiff watched the engine from 10 a. m. to 10 p. m., making a total of 12 hours, and was entitled to receive the sum of $8.96."

The agreed statement of facts further recited that "at the expiration of said service plaintiff demanded said sum, but it was not paid him. He thereupon requested that his money, or a valid check therefor, be sent to defendant's office at El Dorado, Arkansas, where defendant kept an agent. Plaintiff was given a statement of his time, which was signed by defendant's agent at Calion, Arkansas, and was told that his money or a valid check therefor would be sent to El Dorado, Arkansas, in seven days."

At the expiration of the seven days plaintiff called at the office of the defendant in El Dorado and demanded of the agent in charge his wages, or a valid check therefor. The demand was not complied with, although

repeated from time to time, and plaintiff was told by the agent, upon each demand, that he had no check for plaintiff.

After the institution of this suit an offer was made by the defendant railway company to confess judgment for the amount of wages due plaintiff. Upon the trial below before the court, by consent, judgment was rendered in plaintiff's favor for $8.96 wages and $307.20 as penalty, and the defendant has appealed.

This suit was brought under § 7125, C. & M. Digest, and so much of it as is necessary to be considered here, reads as follows: "Whenever any railroad company * * * shall discharge, with or without cause, or refuse to further employ, any servant or employee thereof, the unpaid wages of any such servant or employee then earned at the contract rate, without abatement or deduction, shall be and become due and payable on the day of such discharge or refusal to longer employ; any such servant or employee may request of his foreman or the keeper of his time to have the money due him, or a valid check therefor, sent to any station where a regular agent is kept, and if the money aforesaid, or a valid check therefor, does not reach such station within seven days from the date it is so requested, then, as a penalty for such nonpayment, the wages of such servant or employee shall continue from the date of the discharge or refusal to further employ at the same rate until paid."

In construing this statute it has been said that it was penal in its nature, and must therefore be strictly construed, and that no one can recover thereunder unless he comes strictly within its provisions. *Caldwell* v. *Missouri Pacific Ry. Co.*, 137 Ark. 439. In the case of *St. L. I. M. & S. Ry. Co.* v. *Bryant*, 92 Ark. 425, which was a suit to recover a penalty under the statute quoted, it was said: "We think that the object and purpose of the statute was to secure to the employee the prompt payment of his wages, or a continuance of his employment, so that he would have a livelihood and a means of main-

tenance. To secure that object, it would be necessary to give him that employment in which he was competent to perform the duties thereof and at a place where he could reasonably be in order to perform those duties of such employment. The employee, by earning his wages under the contract of employment, shows that he was competent and able to perform the duties of the employment in which the wages were earned; and therefore we are of the opinion that the 'further employment' meant by the statute is employment of the same class and kind and in the same locality in which his wages were earned under the contract of employment."

Construing this statute strictly, as we must do because of its penal character, it must be said that there was neither a discharge of plaintiff nor a refusal to longer employ him. Plaintiff was employed in an emergency, and he was not discharged. It was not contemplated that his employment would extend beyond the expiration of the emergency. When the train could be moved, plaintiff's service would no longer be required. He could not therefore have been longer employed after the engine had been moved.

The employment arose out of an emergency, and the payment of the wages earned was therefore not a matter of routine to be reported by a foreman or keeper of time, and the language of the statute does not appear to be broad enough to cover the facts of the case.

The court below should therefore have rendered a judgment in plaintiff's favor only for the wages due him, with costs and interest to the date of the offer to confess judgment. The judgment will therefore be modified by striking out the allowance of the penalty, and, as thus modified, will be affirmed.

LANEY v. FAULKNER COUNTY HOSPITAL.

Opinion delivered March 28, 1927.

1. CORPORATIONS—AGREEMENT TO PURCHASE BONDS.—A written contract to purchase $1,000 of the bonds of a corporation is not so ambiguous as to be unenforceable, in view of oral testimony as to an agreement to buy at par such bonds bearing 4 per cent. interest.
2. PLEADING—ALLEGATIONS OF COMPLAINT.—Allegations of a complaint which were not denied will be taken as true.
3. EVIDENCE—ORAL EVIDENCE EXPLAINING WRITING.—Where a written instrument does not express the entire agreement or understanding of parties, oral testimony may be admitted to show such agreement or understanding.
4. CORPORATIONS—CONTRACT TO BUY BONDS.—A contract to purchase $1,000 of bonds of a corporation *held* not void for want of mutuality as not showing obligation to sell the bonds, nor for want of the seller's signature; delivery of part of the bonds and tender of the remainder constituting binding acceptance of the contract on the seller's part.

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

Wm. J. Clark, for appellant.

C. A. Holland and *R. W. Robins,* for appellee.

SMITH, J. Appellee, a corporation organized under the laws of this State for the purpose of building a hospital in the city of Conway, filed an amended complaint, in which it alleged that, on November 12, 1923, the appellant, B. T. Laney, Jr., contracted and agreed in writing to purchase bonds issued by appellee to the amount of $1,000, at par, and bearing interest at 4 per cent., as shown by a copy of the agreement made an exhibit to the complaint.

The hospital was erected at a cost of about $40,000, and funds for its erection were furnished upon defendant's subscription and similar subscriptions by various citizens of Faulkner County and a subsequent issue of bonds secured by a mortgage loan on the hospital building.

The complaint further alleged that, conformably to the agreement, defendant has paid $500 and received

therefor five bonds of $100 each. That a tender of five bonds for $100 each has been made to defendant, who refused to accept and pay for them, and that all the bonds were to be of like interest and kind as the $500 actually delivered. A tender of the bonds accompanied the complaint, and there was a prayer for judgment for the contract price of the bonds. The agreement to purchase the bonds reads as follows:

"Faulkner County Hospital,
"Conway, Arkansas, Nov. 12, 1923.

"For the purpose of erecting a modern hospital in Conway, for the benefit of the people of Faulkner County, I hereby agree to purchase bond(s) of the Faulkner County Hospital, aggregating one thousand dollars ($1000). One-half on or before January 1, 1924, the remainder June 1, '24.

"B. T. Laney, Jr."

The answer filed contained a denial that defendant had entered into an agreement for the purchase of any bonds of the hospital, or that he was indebted in any sum upon the alleged agreement. The answer admitted that defendant had signed the document, a copy of which was attached to the complaint, but denied that there was any agreement beyond that set out in said document. It denied that the same was intended to be a binding contract, and alleges its insufficiency as such. It further alleged that, if said writing signed by defendant be held sufficient to constitute a binding contract, he has complied therewith and discharged the obligations thereof "by purchasing from plaintiff bonds of the Faulkner County Hospital aggregating more than one thousand dollars, $500 of which were 4 per cent. bonds similar to the one attached to the complaint and $3,000 of which were 8 per cent. mortgage bonds."

The 4 per cent. bonds were unsecured, and the 8 per cent. bonds were secured by a mortgage on the hospital building.

Upon the issues thus joined, only one witness testified, this witness being P. F. Cleaver, the president of the

hospital. This witness testified that he was familiar with all the transactions of the institution since its organization. He offered in evidence the original subscription card signed by defendant. Witness had asked defendant to redeem his subscription by taking the $500 4 per cent. bonds which had not been delivered and paid for, but defendant declined to do so, and gave, as the reason for his refusal, the fact that he had already done more than his share towards building the hospital. Defendant had taken and paid for $500 of the 4 per cent. debenture bonds, and did not question that the bonds accepted accorded with the pledge or contract. A tender of the $500 4 per cent. bonds was made and refused. Defendant did not admit to witness that he had accepted the $500 in 4 per cent. bonds, but did admit that he had paid for these bonds.

An attempt was made, upon the cross-examination of the witness, to prove that witness had agreed with defendant to release defendant from the unperformed part of the contract upon the condition that defendant would buy and pay for $3,000 of the 8 per cent. bonds. The witness did not make this admission, and he categorically denied that he had any such authority. Witness testified that defendant did buy and pay for $3,000 of the 8 per cent. bonds. There was no contradiction of the testimony of Mr. Cleaver, as he was the only witness called.

Under the direction of the court a verdict was returned in favor of the plaintiff for $500, and judgment was rendered accordingly, from which is this appeal.

For the reversal of the judgment it is insisted that the complaint, as amended, did not state a cause of action, and that the testimony offered did not support the verdict.

Numerous authorities are cited to the effect that, if an agreement is so uncertain or ambiguous that the court is unable to collect from it what the parties intended, the court cannot enforce it, and there is therefore no valid contract, and it is alleged that the contract here sought to be enforced is of that character. It is also insisted that

the contract is void for the want of mutuality, as it was not shown that the plaintiff was bound by the agreement to sell any bonds to defendant, and that the so-called contract amounted to nothing more than an unaccepted offer on the part of defendant to purchase. We do not agree with counsel in either contention.

The subscription card, which the answer admits was signed by defendant, did not purport to express the entire contract between the parties, but the oral testimony makes the provisions of the agreement clear. These were that appellant had agreed to buy $1,000 of 4 per cent. bonds at par, but had only bought and paid for $500 of the bonds, and had declined to pay for the remainder, not because the bonds tendered did not conform to the contract, but because defendant thought he had done enough for the hospital. The allegation of the complaint, "that all the bonds purchased were to be of like interest and kind as the $500 actually delivered," was not denied in the answer, and for this reason must be taken as true. Section 1231, C. & M. Digest. No testimony was offered to support the allegation that Cleaver had agreed, or had authority to agree, to treat the purchase of $3,000 of 8 per cent. bonds as a performance or discharge of the obligation of the contract to purchase and pay for $500 additional 4 per cent. bonds.

The doctrine of the case of *Breckenridge & Brashears* v. *Hearne Timber Co.*, 135 Ark. 31, 204 S. W. 981, applies here. It was there said: "The writing did not specify how long the same was to continue in force. The oral testimony offered made it clear that it was contemplated by the parties that the contract should be in operation for the period of one year. This testimony was within the rule that, where a written instrument does not express the entire agreement or understanding of the parties, oral testimony may be admitted to show such agreement or understanding. In such cases the instrument on its face shows that it is not complete, and the admission of oral testimony therefore does not tend to vary or contradict the written contract. The contract being silent as to

the period of duration, parol evidence was admissible to show it.

If it be said that the subscription card does not show an obligation on the part of the plaintiff to sell bonds in any amount and was not signed by the plaintiff, it may be answered that the delivery of a part of the bonds and the tender of the remainder constituted a binding acceptance of the contract on the part of plaintiff.

The court was correct therefore in directing a verdict in plaintiff's favor, as no valid defense to the suit was shown, and the judgment will therefore be affirmed.

FAULKNER COUNTY BANK & TRUST COMPANY v. VAIL.

Opinion delivered March 28, 1927.

MORTGAGES—PRIORITY.—Where a husband and wife executed a note and mortgage to a loan company for money to purchase land, but the loan company failed to advance the money as agreed, but transferred the note and mortgage to a third person, and subsequently a bank advanced the money to buy the land to the husband and wife and simultaneously took a mortgage, the lien of such mortgage was prior to that of the mortgage to the loan company.

Appeal from Faulkner Chancery Court; *John E. Martineau,* Chancellor on exchange of circuits; reversed.

J. C. & Wm. G. Clark, for appellant.

R. W. Robins, for appellee.

HUMPHREYS, J. This suit was instituted in the chancery court of Faulkner County by appellee against George I. Wharton, Annie May Wharton, his wife, and appellant to recover judgment against the Whartons on a promissory note for $1,500 and interest, dated October 20, 1920, and to foreclose a mortgage executed by them on said date to secure same on the northwest quarter of the southwest quarter of section 17, township 5 north, range 11 west, in said county. It was alleged that the note and mortgage were executed to the Conservative Loan Company; that it placed the mortgage of record on the 22d

day of December, 1922, and duly assigned the note and mortgage to appellee on January 5, 1923, for a valuable consideration before maturity.

Appellant filed an answer, interposing the defense that it acquired a lien for $995 upon said real estate paramount to appellee's lien by virtue of having furnished that amount of money to the Whartons to buy the land with the understanding that he and his wife would execute a mortgage back to it on said land to secure the purchase money thus advanced. Appellant also filed a cross-bill against the Whartons asking judgment upon the purchase money note, with interest, and for a decree of foreclosure and order of sale to satisfy said indebtedness.

The cause was submitted to the court upon the pleadings and testimony adduced by the respective parties, which resulted in a judgment against the Whartons in favor of appellee for the $1,500 note and interest, and in favor of appellant for $1,032.75 on the purchase money note, declaring a paramount lien upon the land in favor of appellee, and decreeing a foreclosure of the land and sale thereof to satisfy said judgments in the order of priority thus declared.

Appellant has duly prosecuted an appeal to this court from that part of the decree declaring its lien inferior to the lien of appellee.

The facts are undisputed. On October 20, 1922, George I. Wharton and his wife, Annie May Wharton, in contemplation of the purchase of said land, executed a note and mortgage on same to the Conservative Loan Company for $1,500 with which to pay for it. The Conservative Loan Company recorded the mortgage on December 22, 1922, and assigned the note and mortgage to appellee on January 5, 1923, before maturity, for a valuable consideration. The Conservative Loan Company failed to advance any sum to the Whartons on the $1,500 note and mortgage, so they were unable to purchase the land. Later in the year they renewed their effort to purchase the land, and contracted to buy

same from the owners for $1,000, paying $10 down to bind the trade. They then arranged with appellant to advance the balance of the purchase money, amounting to $995, $5 being included to pay the expenses to be incurred in the preparation of the papers, under agreement that they would execute a mortgage back to appellant on the land to secure it for the purchase money advanced. Pursuant to the agreement, the Whartons executed the note for $995 and a mortgage to secure same upon said land, but, through mistake, described it as being in section 7 instead of section 17. The mortgage was dated December 28, 1922, acknowledged December 29, and immediately sent from Wharton's home, about twenty miles distant, to the bank. Upon receipt of the mortgage the bank placed $995 to the credit of George I. Wharton with which to pay for the land. He then notified the owners of the land that he had obtained the money from the bank to pay them, whereupon they executed a deed, correctly describing the land, to him, dated December 30, 1922. Upon the receipt of the deed he gave them a check, drawn upon the bank, for $990 and sent the deed to it. The owners of the land came to town, and cashed the check. The transaction was closed on December 30, 1922. On that date the deed was delivered to the bank, the purchase money paid on the check, mortgage recorded, and Wharton took possession of the land. Subsequently the misdescription in the mortgage was discovered and the bank retained the deed, not placing the same on record, until it could get a new mortgage from the Whartons correcting the description. On June 21, 1923, it procured a new mortgage properly describing the land, and then placed it and the deed on record.

In 19 R. C. L., page 416, article 196, the rule applicable to the facts recited above is as follows:

"It is a general rule, to which there is little dissent, that a mortgage on land executed by the purchaser of the land contemporaneously with the acquirement of the legal title thereto, or afterwards, but as a part of the same

transaction, is a purchase money mortgage, and entitled to preference as such over all other claims or liens arising through the mortgagor, though they are prior in point of time; and this is true without reference to whether the mortgage was executed to the vendor or to a third person. The reason for the rule most frequently given is that the execution of the deed and mortgage being simultaneous acts, the title to the land does not for a single moment rest in the purchaser, but merely passes through his hands, and, without stopping, vests in the mortgagee, and during such instantaneous passage no lien of any character can attach to the title. The deed and mortgage need not be executed at the same moment, nor even on the same day, to make them contemporaneous, provided they were parts of one continuous transaction, and so intended to be, so that the two instruments should be given contemporaneous operation in order to promote the intent of the parties."

The rule thus announced is supported by the following authorities: 27 Cyc. 1180-1182; 2 Pomeroy's Equity Jurisprudence, art. 725 (3d ed.); 1 Jones on Mortgages (7th ed.), 703-713. Our own court states in the case of *Western Tie & Timber Co.* v. *Campbell,* 113 Ark. 570, 169 S. W. 253, Ann. Cas. 1916C, 943, that:

"A mortgage given at the time of the purchase of real estate to secure the purchase money, whether given to the vendor or to a third person, who, as a part of the same transaction, advances the purchase money, has preference over all judgments and * * * liens against the mortgagor."

Appellee contends that § 1498 of Crawford & Moses' Digest, providing that an after-acquired title by a grantor shall immediately pass to his grantee, rendered the mortgage lien of appellee prior and paramount to that of appellant because prior in date and recorded first. We do not think so, for the Whartons only acquired by reason of the simultaneous transaction an equity in the land subject to the payment of the purchase money to the bank, and appellee could not acquire more under that

statute than his grantors, the Whartons, acquired. Appellee had nothing under his mortgage prior to the time the bank advanced the purchase money to buy the land. Wharton had no title to it at all at the time the note and mortgage which he purchased were executed. If the bank had not advanced the money with which to buy the land under an agreement that it was to have a mortgage to secure the purchase money thus advanced, appellee would never have acquired any lien upon same, for Wharton could not have purchased same unless the bank had advanced him the money to do so. It would indeed be inequitable, under these circumstances, to allow appellee's lien to take precedence over that of appellant.

On account of the error indicated the decree is reversed, and the cause is remanded, with directions to declare appellant's lien paramount to that of appellee.

BURKHOLDER v. SMITH.

Opinion delivered March 28, 1927.

IMPROVEMENT DISTRICT—SALE OF BONDS—BREACH OF CONTRACT.—A contract for the sale of bonds by an improvement district was not breached by the commissioners of the district where they refused to accept as part payment the buyer's certified check, which had become the subject of garnishment proceedings, and was in litigation between the buyer and another.

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

Action by G. E. Burkholder, trading as Burkholder Bond Company, against A. P. Smith, W. D. Braddock and W. M. Rankin, commissioners of Street Improvement District No. 376.

Melbourne M. Martin, for appellant.

Downie & Schoggen, for appellee.

HUMPHREYS, J. This suit was brought by appellant against appellees in the circuit court of Pulaski County, Second Division, to recover $4,400 as damages on account

of an alleged breach of contract in the sale and purchase of $53,500 of the district's bonds. The alleged breach consisted in the refusal of the district, through its qualified and acting officers, to deliver said bonds to appellant upon payment to them of $48,963.11, in addition to his certified check for $1,000 which he had deposited with them as purchase money when the contract was signed.

Appellees filed an answer, denying a breach of the contract on the part of the district in refusing to deliver the bonds upon payment of $48,963.11, alleging that the $1,000 check had been garnished in an action in the circuit court of Pulaski County wherein M. W. Elkins was plaintiff and appellant was defendant. The cause was submitted on the pleadings and testimony, which resulted in a judgment upon an instructed verdict in favor of appellees, from which is this appeal.

The contract alleged to have been breached is as follows:

"CONTRACT OF PURCHASE.

"September 29, 1924.

"To Commissioners of Street Improvement District No. 376, Little Rock, Arkansas.

"For the approximately $54,000 bonds of Street Improvement District No. 376, to be in denominations of $500 or $1,000, at our option, to be dated August 1, 1924, and to mature serially 1926 to 1945, said maturities to be approved by the attorney of the district and our attorney, and to draw interest at the rate of six per cent. (6%) per annum, payable semi-annually on February 1 and August 1 of each year, both principal and interest to be payable at St. Louis Union Trust Company, St. Louis, Mo., we will pay you ninety-seven and 50/100 dollars for each one hundred dollars of the par value or face value of the bonds delivered to us in St. Louis, Mo., subject to the following conditions:

"1. Prior to the delivery of the bonds to us we are to be furnished a complete certified transcript of the proceedings authorizing the issuance of the bonds, which shall evidence to the satisfaction of a firm of recognized

bond attorneys, Rose, Hemingway, Cantrell & Loughborough, selected by us, that the bonds are a legal and binding obligation of Street Imp. Dist. No. 376. The fee of said attorneys to be paid by the district.

"2. The bonds are to be prepared and printed under our direction and the cost of same to be paid by the district.

"3. The fee for certifying these bonds to be borne by the district, and it is understood that we are to have no expense whatsoever.

"4. The bonds are to be delivered in accordance with the conditions of this proposal, to us in St. Louis, Mo., on or before November 1, 1924, otherwise thereafter at our option.

"5. It is hereby agreed that we are to have the right, at our option, of converting the interest rate on the bonds to 5½ per cent., all other features of this proposal to remain unchanged, except that the purchase price above stipulated for 6 per cent. bonds will be changed to conform to the same income basis price for 5½ per cent. bonds based upon standard tables of bond values.

"6. As evidence of our good faith, we attach hereto cashier's check No. 31030 of the Nat'l City Bank, St. Louis, in the amount of $1,000, indorsed to your order, which check is to be held uncashed as earnest money and eventually utilized as part payment for said bonds, when delivered to us in accordance with the terms of this proposal; or returned to us in case the aforesaid attorneys are unable to approve the legality of the bonds; or forfeited as liquidated damages in full settlement of our liability in the event that we fail to comply with the above terms of this proposal.

"This proposal is made for immediate acceptance or rejection, and, if rejected, the cashier's check attached hereto is to be returned.

"BURKHOLDER BOND CO.
"By G. E. Burkholder.

"The above and foregoing proposal is hereby accepted, and a copy thereof is ordered spread upon the

minutes of the proceedings of this meeting held at Little Rock, Arkansas, this twenty-ninth day of September, 1924.

"Street Imp. District No. 376,
"Little Rock, Ark.
"By W. D. Braddock, Secy.
"A. V. Smith, Chm'n.
"W. M. Rankin, Com's'r."

The facts material to a determination of the controlling questions on this appeal are undisputed. On November 17 W. M. Rankin, one of the commissioners of the district, and W. W. Shepherd, one of its attorneys, presented the bonds to appellant at his place of business in St. Louis for acceptance and payment in cash of the full consideration, amounting, by agreement, to $49,963.11. Appellant agreed to accept the bonds if the district would allow him a credit of $1,000 on the cash payment for the certified check he had given them when the contract was executed. The credit was refused on the ground that a writ of garnishment had been served on the district on the 3rd day of October, 1924, impounding the check in a suit in the circuit court of Pulaski County, wherein M. W. Elkins was plaintiff and appellant was defendant, which suit had been transferred to the chancery court and was undecided at the time the bonds were presented. It appears that on October 14, 1924, the district filed its answer to the garnishment, setting out the contract between appellant and defendant, praying for its dismissal. On October 28, 1924, the appellant filed a motion to quash the writ of garnishment. On October 31, 1924, the motion was overruled, and the suit in which the garnishment was issued was transferred to the chancery court.

We do not think the district breached the contract by refusing to accept the $1,000 check as part payment for the bonds. Under the terms of the contract the check became the property of appellant after November 1, 1924, for it was optional with him, after that time,

whether he would buy the bonds. The district could not have appropriated the check after November 1, either as part payment for the bonds or as liquidated damages for appellant's refusal to take the bonds. In other words, the district had no interest in the check after November 1, 1924, and it, being the individual property of appellant, was subject to garnishment. The refusal of the court to quash the writ and transfer the action carrying the garnishment proceedings therein to the chancery court justified the commissioners of the district in refusing to accept the check, thus impounded, as part payment for the bonds. The validity of the writ of garnishment was a question for the court, and not the commissioners of the district, to determine. The burden did not rest upon the district after November 1, 1924, to make further defense to the suit of M. W. Elkins seeking to recover the proceeds of the check to apply on appellant's indebtedness to him, as it no longer had any interest in the check. It would indeed be a harsh and unjust rule to require commissioners of an improvement district, acting in the capacity of trustees for public funds, to accept in part payment of the district's bonds, checks of a purchaser which had become the subject-matter of litigation. Appellant, having refused to exercise his option by paying full consideration therefor, was not entitled to recover damages for the alleged breach of the contract by the district.

No error appearing, the judgment is affirmed.

LEMON v. TANNER.

Opinion delivered March 28, 1927.

1. DEEDS—DESCRIPTION.—A description of land in a deed is sufficient if the descriptive words furnish a key for identifying the land.
2. EASEMENT — RESERVATION OF ROAD — UNCERTAINTY.—A reservation in a deed of land of a road, described as beginning at the northeast corner of the land, "thence west along line through small field, thence southwest around the foot of steep hill on right-

of-way now cut out for wagon road, 30 feet wide," was void for uncertainty, where there was no road cut through the land 30 feet wide or approaching that width.

3. EMINENT DOMAIN—COMPENSATION FOR LAND TAKEN.—Property of an individual cannot be taken for public use as a road without compensation.

Appeal from Washington Chancery Court; *Sam Williams,* Chancellor; reversed.

Appellants *pro se.*

J. Wythe Walker, for appellee.

HUMPHREYS, J. This is a suit to enjoin John Tanner and his successor as road overseer of Lee's Creek Township, Washington County, Arkansas, from maintaining a public road through the southeast quarter of the southwest quarter of section 7, in township 13 north, range 30 west, in said county, for the use of the public.

The road was ordered opened and improved by the county court on the theory that the public was entitled to the particular route adopted under and by virtue of reservations contained in deeds to the land from John M. Tucker to F. B. Scott and from F. B. Scott to appellants. The reservation following the description of the land in each deed is as follows: "Except wagon road described as beginning at the northeast corner of above described forty-acre tract, thence west along line through small field, thence southwest around the foot of steep hill on right-of-way now cut out for wagon road thirty feet wide for public use through above described forty-acre tract."

Several issues were joined in the pleadings, but, at the inception of the trial of the cause, an agreement was entered into between the parties in open court limiting the controversy to the single issue of whether the road was laid out and improved along the route described in the reservations in said deeds. The agreement is as follows:

"It is further agreed by the parties in open court that the order of the county court mentioned in the pleadings in this case undertaking to establish a county road through the land described in the deeds heretofore intro-

duced was intended to establish such county road along the line as described in the reservation in said deed. And plaintiffs (appellants) concede that, if said road was established on said line, they should fail in this action, and it is conceded by the defendants (appellees) that they have no right to a county road over any other part of said lands than what is mentioned in said reservation."

The undisputed testimony in the case reflects that the right-of-way referred to in each reservation had not been cut out at the time the reservations were made, and was never attempted to be cut out until the overseer and his assistants cut a strip of timber 30 feet wide along the trail running from the field referred to, southwest through the 40-acre tract. This was done after the appellants purchased and moved on the land. In other words, the road was not laid out, after leaving the field and turning southwest, along the line of a right-of-way which had been cut out 30 feet wide, or any other width. The line along which the road was built, after turning southwest, was a trail through the woods. There was a road, after leaving the field, running almost west through the 40-acre tract which had been used by the public for forty or fifty years, known as the Jahagan road, but that road had never been cut out 30 feet wide, and was referred to by some of the witnesses as a trail through the woods also. There was no road which had been cut out 30 feet wide, or approaching that width, on the 40-acre tract at all when the reservations were made. The testimony does not reflect which side of the steep hill the road reserved ran upon, or how long the hill was.

The rule is that a description of land is sufficient if the land can be located by evidence *aliunde* from the description itself. If the descriptive words themselves furnish a key for identifying the land conveyed, nothing more is required. *Tolle* v. *Curley*, 159 Ark. 175, 251 S. W. 337. Applying this rule to the descriptive words contained in the reservation it will be observed that the only key or guide by which the land embraced therein might be located by even *aliunde* evidence is the reference to a cut-

out right-of-way 30 feet wide. No right-of-way appears to have been upon the land when the reservations were made. The reservations therefore, after leaving the field, were and are void for uncertainty in description. *Burns* v. *Harrington,* 162 Ark. 162, 257 S. W. 729. Being void by reason of indefiniteness in description, the road was not, and could not, be laid out over them. Under the agreement, appellees were not entitled to a road over any part of said land other than such portion thereof as could be definitely located by the descriptive words in the reservation. Appellants' property could not be taken for public use without compensation.

The decree is therefore reversed, and the cause is remanded with directions to the chancery court to enjoin the road overseer of said township from maintaining the road for public use across appellants' land, unless and until the county court shall lay off the road as a public road and provide for damages and compensation to appellants.

BARNES v. BALZ.

Opinion delivered March 28, 1927.

1. VENUE—WAIVER OF OBJECTION.—Under Crawford & Moses' Dig., § 1176, 1178, providing that certain causes of action may be instituted in the county where the defendant or one of several defendants resides or is summoned, a defendant summoned in a county not of his residence, who appears and makes no objection to the suit proceeding against him before judgment, is deemed to have waived his right to do so.
2. JUDGMENT—AUTHORITY TO ENTER DEFAULT AFTER SUSTAINING DEMURRER.—Where the court sustained a demurrer to a complaint, it could not subsequently, without amendment of the complaint and without setting aside the order sustaining the demurrer, enter a default judgment against the defendants.
3. PLEADING—PROOF TO SUSTAIN COMPLAINT.—Where the allegations of a complaint are specifically denied by answer, it was error to enter judgment for plaintiff by default; the action not being founded on a verified account, and in the absence of an affidavit that no good and valid defense existed.

4. VENUE—OBJECTION TO VENUE AVAILABLE WHEN.—Under Crawford & Moses' Dig., § 1776, defendants, not residents of the county in which the action is brought, after dismissal of the action as to defendant, whose joinder authorizes suit in that county, have a right to object to any judgment being rendered against them.

Appeal from Randolph Circuit Court; *John C. Ashley*, Judge; reversed.

STATEMENT BY THE COURT.

Appellee commenced this suit in the Randolph Circuit Court on a $4,000 policy issued by the South Arkansas Mutual Fire Insurance Association, and alleged that he became a member of said association by application made by his agent, George William Balz, on November 14, 1924, for fire insurance on the Balz Hotel, paying for the membership and premium for insurance $80 required; that, under the agreement, the insurance was to be effective from the date of the application; that, subsequent to the execution of the application for insurance and payment of premium, the property insured, the hotel building, burned on November 22, 1924, and was a total loss; that, subsequent to the fire, a policy from the South Arkansas Mutual Insurance Company was delivered to him, which stipulated the divisions in which plaintiff was to have insurance, designated as Division Nos. N-298, amount of insurance $1,000; R-187, amount of insurance $1,000; S-182, amount of insurance $1,000; T-182, amount of insurance $1,000.

It was further alleged that, without the knowledge of plaintiff, $1,800 in insurance had been taken out on the building by a creditor, upon which had been realized the sum of $1,240, the proportionate part due from this company, and that the proportion due under the said $4,000 policy is $2,760; that the said South Arkansas Mutual Fire Insurance Association, subsequent to the fire, was taken over by the Modern Mutual Insurance Company, defendant, "under an arrangement to the effect that the said Modern Mutual Insurance Company should be liable for its obligations."

Plaintiff states that the said South Arkansas Fire Insurance Association was a mutual assessment association, and that the said Modern Mutual Fire Insurance Company is a mutual assessment association; alleged further that the insurance was in divisions containing a certain number of members; that the members in these respective divisions "have already been assessed by the defendant's officers on the basis of a $4,000 liability," and that, in view of the fact that the membership in said divisions was charged the levy and assessment of $5 on each member, which would yield the sum of $1,500, one-third of which was to go toward the payment of expense of management of defendant company, two-thirds of which amount was to be paid to the beneficiary; "that the membership in each of the aforesaid divisions is now far below the number sufficient to yield the said amount of $1,500 on assessment, and that the assessments, if collected in full on each of the divisions in which plaintiff has $1,000 insurance, will amount to not more than $2,760;" alleged the proof of loss was made to the defendant and the aforesaid South Arkansas Mutual Fire Insurance Association, and that assessments were made on the membership within which defendant's insurance was placed on a basis of a $4,000 liability, and that the said assessments have been collected by the defendant, two-thirds of which sum amounts to more than the sum of $2,760.

A judgment was prayed against the defendant in the sum of $2,760. A copy of the certificate from the South Arkansas Mutual Fire Association was filed as an exhibit, and summons was issued directly to the sheriff of Pulaski County on the 17th day of June, 1925.

Plaintiff next moved to make X. O. Pindall a party, who was receiver of the defendant, Modern Mutual Insurance Company, which had gone into his hands as receiver since the service of summons on it. The summons was issued to Pulaski County, and served on the receiver on the 29th day of June.

Plaintiff then filed an amendment to the complaint and a motion to make the bondsmen parties, alleging that the predecessor of the Modern Mutual Insurance Company, defendant, was the South Arkansas Mutual Fire Insurance Association, which was taken over and became the Modern Mutual Insurance Company about the first day of March, 1925; that it had executed a bond on the 10th day of December, 1923, as required by law, and approved by the Insurance Commissioner, with appellants sureties thereon, and that the bond had been breached by the South Arkansas Mutual Fire Insurance Association, to plaintiff's injury in the sum of $2,760; that the defendant took over the assets of the South Arkansas Mutual Fire Association on such terms that it became responsible for all the liabilities of its said predecessor, executed its bonds by its president, Joe Bailey, and Wm. B. Womack, its secretary, and with Joe Bailey, L. W. Watson, W. B. Womack, John A. Cobb and Z. A. Copeland as sureties, conditioned as required by law; that this bond was approved by the Insurance Commissioner on February 11, 1925; that each of said bonds is in the sum of $20,000 and, "plaintiff states that the defendant, Modern Mutual Insurance Company, took over the assessments collected for the plaintiff by the South Arkansas Mutual Fire Insurance Association, and plaintiff alleges that the bond of both the South Arkansas Mutual Fire Insurance Association and the said bond of Modern Mutual Insurance Company and the sureties thereon are each jointly and severally liable to this plaintiff for the amounts sued for." Prayed judgment that all such sureties, naming them, be made parties defendant, and that his original complaint with the amendment be considered his complaint against all the defendants and prayed judgment accordingly.

This motion and amendment to the complaint was verified by plaintiff's guardian and next friend on January 21, 1926, and process issued to Union and Pulaski counties on the 30th of June, 1925.

On the 22d day of July, 1925, the bondsmen filed a general demurrer and separate answer to the motion to make them parties and amendment to the complaint, and, without waiving their rights under the demurrer, denied the execution of the bond of December 5, 1923, or any other date; denied the execution on February 11, 1925, or any other date, of bond for the Modern Mutual Insurance Company; denied that said company took over any assessments collected for the plaintiff by the South Arkansas Mutual Fire Insurance Association, and that the bond of said fire insurance association or the sureties is liable to the plaintiff in any way, for any amount sued for, or any other amount; denied that the sureties on the bond of the Modern Insurance Company were in any way liable to the plaintiff for the amount sued for, or any amount; that any assessments were collected for the plaintiff, either by the Modern Mutual Insurance Company or the South Arkansas Mutual Fire Insurance Association.

The demurrer was confessed and sustained, and the plaintiff given thirty days leave to amend its complaint, and the defendants were given thirty days to answer, and the cause continued until the 5th day of the next term of court.

On January 18, 1926, the attorney for the defendants, upon leave of the court, withdrew from the case, and, on the 22d, the fifth day of the regular January term, plaintiff took a nonsuit and dismissed his case as to the defendants, Modern Mutual Insurance Company, the receiver, and each and all of the sureties on its bond.

The judgment recites it appeared that appellants had been duly served in Union County, Arkansas, on July 3, 1925, and that said defendants did, on the 22d day of July, 1925, file an answer herein, which answer was unverified, denying the allegations of the complaint of the plaintiff, and that the attorney for the defendants had withdrawn from the case by leave of the court; that they were no longer represented, and failed to appear; recited that the complaint was verified; that the South Arkansas

Mutual Fire Association had ceased to exist as a corporation, and that, prior to then, it had collected $2,760 of the policy holders of the company on the policy of insurance issued to the plaintiff, which it had failed to pay over, and that the said bondsmen were liable to the plaintiff for that sum, less a small balance, and rendered judgment therefor, with interest, from which an appeal was granted by the clerk of the Supreme Court.

Allyn Smith, for appellant.

KIRBY, J., (after stating the facts). Appellants insist that none of them was ever served with process in Randolph County, where the fire loss occurred and the suit was brought, and that suit was not brought against the insurance company of which they were sureties on the bond, and no service was ever had upon it, and that judgment could not be rendered against them there.

The statute does provide that certain causes of action may be brought in the county in which the defendant or one of several defendants resides or is summoned, and also that, where the action embraced in said section of the statute (1176 Crawford & Moses' Digest) is against several defendants, plaintiff shall not be entitled to judgment against any of them on the service of summons in any other county than that in which the action is brought, where no one of the defendants is summoned in that county or resided therein at the commencement of the action, unless judgment is recovered against the defendant upon whom service was had in the county. If the defendant summoned in another county appears, however, and makes no objection to the proceeding against him before judgment rendered, he is deemed to have waived his right to do so.

The statutes also provide that actions against insurance companies of the kind herein may be brought in any county in the State where the loss occurs, and that the sureties on the bond given by the company may be joined in such action. This suit was not brought in the first instance against either the sureties on the bond of the South Arkansas Mutual Fire Association nor against it.

The South Arkansas Mutual Fire Association was never made, or attempted to be made, a party to this suit, and a motion to make additional parties as an amendment to the complaint was filed, and these appellants, residents of Union County, sureties on the bond of said company, and also the sureties on the bond of the Modern Mutual Fire Insurance Company, were made parties defendants, and brought into court.

They filed a general demurrer to the complaint and amendment, and, without waiving any rights thereunder, filed an answer, denying the execution of the insurance bond or any liability to the plaintiff on any account whatever. The demurrer was thereupon confessed and sustained, and the plaintiff given thirty days to amend and defendants thirty days in which to answer the amended pleading. No amendment to the pleadings was filed, however, the attorney for defendants was allowed to withdraw from the case, the suit was dismissed as to the Modern Mutual Insurance Company, the original defendant and all its bondsmen, and on the same a judgment rendered by default, and without any evidence introduced against these appellants, sureties on the bond of the old South Arkansas Fire Insurance Association.

The court having determined by order, on confession of the demurrer, that the complaint did not state a cause of action against defendants, and granted leave to amend, could not thereafter, without overruling and setting aside such order, proceed to trial on the original complaint adjudged insufficient. No amendment having been made or proposed under permission granted therefor, the complaint should have been dismissed. Certainly the court could render no judgment by default thereon without proof against these parties to the suit, whose answer was properly filed, denying all the material allegations of the complaint. *Hurst* v. *Davis*, 291 S. W. 799.

The verification of the complaint in the instant case, the action not being founded upon an account, nor the affidavit in form such as is required to prove an account (§ 4200, Crawford & Moses' Digest), and it not being

in form an affidavit on the merits that no good and valid defense existed to the action, made no other or greater proof necessary on the side of the adverse party, the defendants. (§ 1214, C. & M. Digest).

Since appellants, the sureties on the South Arkansas Mutual Fire Association bond, could not be made parties to a suit over their objection in any county but that of their residence, except upon their being joined in the suit against their principal and maybe its successor in liability, they would have had the right to object after the nonsuit or dismissal of the action as against the defendant, Modern Mutual Insurance Company, and the sureties on its bond, to any judgment being rendered against them at all.

For the errors committed in rendering judgment by default against them on a complaint already adjudged insufficient as not stating a cause of action, and without the introduction of testimony to support the claim over the allegations of the answer denying specifically and generally the allegations of the complaint and any liability thereunder, the judgment must be reversed, and the cause remanded for a new trial. It is so ordered.

OLD AMERICAN INSURANCE COMPANY v. JACKSON.

Opinion delivered March 28, 1927.

1. APPEAL AND ERROR—CONCLUSIVENESS OF VERDICT.—Though the verdict of a jury is against the weight of conflicting evidence, it will not be disturbed on appeal.
2. INSURANCE—RIGHT TO INTRODUCE BY-LAWS.—Where the answer in an action on a life insurance policy alleged that the insurer's by-laws were part of the contract, and generally denied the allegations of the complaint, *held* that insurer could introduce the by-laws to show that the liability was less than the amount claimed, though it would have been better pleading to allege specifically a limited liability provided in such by-laws.
3. PLEADING—INDEFINITENESS—REMEDY.—Where plaintiff deems defendant's answer indefinite and uncertain, his remedy is a motion to make it more definite and certain.

4 INSURANCE—LIMITATION OF LIABILITY—EVIDENCE.—Where an insurer alleged that its by-laws were part of its contract, and offered to prove by its by-laws a limitation of liability, refusal to admit such proof was error.

5. EVIDENCE—PAROL PROOF OF CORPORATE BY-LAWS.—In an action under a life insurance policy which made the by-laws of insurer a part of the contract, it was competent to prove such by-laws by the president of the company.

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

STATEMENT BY THE COURT.

This suit was brought on a policy of the Old American Insurance Company issued by said company on the life of Buck Jackson to Jener Jackson, beneficiary.

It was alleged that the premium had been paid in accordance with the terms of the contract providing for payment of $1,000 to the beneficiary on the death of the insured; that the insured had died while the policy was in full force, and that proofs of death had been duly made, and the company had refused to pay the policy and denied liability thereunder.

The answer denies each and every material allegation in the complaint, except those specifically admitted; admits the issuance of the policy; alleged that the policy, application and by-laws of the company constituted the contract between it and Buck Jackson, insured; that both provide the insured, at the time of obtaining the policy, must be in good health, and all answers made in the application for insurance are warranties; that the insured had denied therein ever having had tuberculosis, lung trouble of any kind or influenza, and that he answered "No" to a question that he had been treated by a physician in the past two years; that the answers to these questions were false, and were warranties, but for which policy would not have been issued; and alleged further that Buck Jackson was not an insurable person at the time he obtained the policy, that he was suffering from chronic ailments, and receiving medical treatment therefor from the time policy was issued, and died on the 20th day of May, 1925;

that, if all his condition had been disclosed, and it would have been if true answers had been given to the questions asked, the policy would never have been issued.

The testimony shows that deceased died with tuberculosis, or consumption, as some of the witnesses called it. Some of the proof was positive to the effect, judging from the result and certainty of diagnosis of the disease, that it had existed and insured was suffering from it for some time at the time of, and long before, the application was made and policy issued. The evidence was in conflict, however, on this point.

Other witnesses testified that there was no such indication, at the time of the issuance of the policy, that deceased was afflicted with this disease, of which he afterwards died, and that he was in apparently good health.

The insurance company offered to prove by its president, who had a copy of the by-laws, which were made part of the policy by its terms, that they were the by-laws and provided for the payment in full satisfaction of the policy, the amount collected by assessment on members for payment of the loss for the death of the last decedent in the month preceding the death of the insured; that the by-laws provided, as the limit of the liability, the amount paid under such assessment, to be determined by the certificate from the secretary and treasurer. The court refused to permit the introduction of this testimony, over defendant's objection, and also refused to give its requested instruction No. D as follows:

"The court instructs the jury that, if you find from a preponderance of the evidence in favor of plaintiff, that your verdict cannot exceed the amount of $575.70, that being the gross yield or amount paid in by the policyholders in assessments or premiums for the month of June, 1925, in the twenty thousand series, in which Buck Jackson was classified."

The jury returned a verdict against appellant for $1,000, the maximum amount of the policy, and, from the judgment thereon for said amount, with penalty and attorney's fees, this appeal has been prosecuted.

John L. Clark, for appellant.

Otis Gilleylen, for appellee.

KIRBY, J., (after stating the facts). It is contended that the judgment is not supported by the evidence, which shows that the answers to the questions relative to insured's health made in his application were warranties and false; that he was suffering, at the time of application made for insurance, with, and had been treated for, tuberculosis, of which disease he later died.

The weight of the evidence is in favor of the falsity of these warranties, it is true, but the testimony is not undisputed, and the jury, upon conflicting testimony, have found against the appellant, and its verdict will not be disturbed.

It is next contended that the court erred in refusing to admit the proof of the by-laws of the association by its president, Mr. Judd, and in excluding his testimony regarding the amount of the assessment recoverable thereunder and also in refusing to give its requested instruction D, limiting the amount of the recovery to $575.70. Appellee insists that, it not being specially pleaded in the answer, the by-laws relating to limiting the amount of the recovery to the one assessment producing less than the amount expressed in the policy, could not be considered.

Section 3, article 5, of the by-laws offered to be proved by the president of the company, provides:

"All policies shall be placed in series in numbers as the board of directors or the president shall designate, and no policy-holder shall be entitled to a greater benefit or a greater policy value than the yield which one single assessment on the series in which he was classified will produce in the month succeeding the approval of the claim of the policy-holder or beneficiary. This shall be the maximum limit of liability of the company. The sworn statement of the secretary or assistant secretary as to the yields shall be the basis of settlement under this clause. This clause shall apply to all policies issued by this company or association."

The president, Mr. Judd, also stated in his deposition which was excluded that the amount of $575.70 was yielded by the assessment of the twenty thousand series in which Buck Jackson was classified in the month succeeding his death, and exhibited the sworn statement of the assistant secretary of the company showing that sum.

The answer expressly denied every material allegation of the complaint except such as are specifically admitted, one of which is that the company would insure the life of the said Buck Jackson in the sum of $1,000 to be paid in the case of his death to Jener Jackson upon proof of death, no admission of which is made in the answer. It also alleged that the policy, application and by-laws of the said defendant constituted the contract between the company and the insured, and, although this allegation is in a clause relating to the warranties made in answer to questions in the application as to the insured's good health, it was nevertheless such an allegation as entitled the company to introduce in support of it the provisions of the by-laws relating thereto, which the policy also provides shall constitute a part of the contract of insurance.

It had been better pleading to deny specifically the liability for the payment of the maximum amount expressed in the policy and to set up or allege liability only to the payment of the amount of the one assessment as provided in the by-laws. But, if the answer was regarded indefinite and uncertain, the defect could have been remedied by a motion to make it more definite and certain.

The court erred in refusing to admit the proof of the by-laws of the association and also in excluding the president's statement that the yield of the assessment for which the company was liable to payment under the policy, upon the death of the insured, was $575.70.

This court has often held that, although a certified copy of the charter under which a corporation is organized is the best evidence of its existence, it may be established by other and parol testimony. *Kelley* v. *Stern Pub. & Nov. Co.*, 147 Ark. 383, 227 S. W. 609; *Stur-*

divant v. *Ka-Dene Medicine Co.,* 169 Ark. 535, 275 S. W. 921; *Amer. Trnst. Co.* v. *Netherlands-Amer. Mtg. Bk.,* 169 Ark. 869, 276 S. W. 1010.

Under the same principle as well as the authority of the ruling in *Knight* v. *American Insurance Union,* 172 Ark. 303, 228 S. W. 395, it was competent to prove the by-laws of the corporation by its president, who also could testify to the amount of the yield of the assessment for which the company was liable to payment under the terms of the policy, and this without regard to whether his testimony exhibiting the affidavit and certificate of the assistant secretary showing the amount of the assessment was admissible or not. If this testimony erroneously excluded had been admitted, appellant was entitled to have its requested instruction D given also. For the errors designated the judgment is reversed, and the cause remanded for new trial.

GARRETT *v.* LION OIL & REFINING COMPANY.

Opinion delivered March 28, 1927.

1. DEEDS—EFFECT OF SURRENDER OF UNRECORDED DEED.—Where the grantee in an unrecorded deed returned the deed to the grantor without executing a reconveyance, and the grantor executed to the grantee a new deed to one-half of the land, the title to the other half was not revested in the vendor.
2. MINES AND MINERALS—NOTICE OF PRIOR CONVEYANCE.—Where a lessee in an oil and gas lease had notice that the lessor had conveyed one acre of the leased tract to another, part of which was under fence, and such acre was specifically excepted from the lease, there was no fraud practiced on the lessee in excepting the acre.
3. MINES AND MINERALS—NOTICE OF PRIOR CONVEYANCE.—Lessees under an oil and gas lease, excepting one acre previously conveyed by the lessor, were not innocent purchasers of a lease of the entire tract, but took with knowledge of the rights of the purchaser of the one acre, regardless of whether the lessor subsequently reacquired the acre or not.

Appeal from Union Chancery Court, Second Division; *George M. LeCroy,* Chancellor; reversed.

Kitchen & Harris, Marsh, McKay & Marlin and *Powell, Smead & Knox,* for appellant.

Mahony, Yocum & Saye, for appellee.

MEHAFFY, J. In 1908, and for some time prior thereto, Jesse T. Murphy was the owner of a 65-acre tract of land in Union County, Arkansas, described as all of the NE¼ of the NE¼ of section 8, except 5 acres in a square in the NW corner of said 40-acre tract, and the W¾ of the SE¼ of the SE¼ of section 8, all in township 16 south, range 15 west, Union County, Arkansas, containing 65 acres.

On January 27, J. T. Murphy and his wife, Mattie Murphy, conveyed one acre out of the 65-acre tract to Louis Hicks. The one acre conveyed to Hicks was described in the deed to Hicks as follows: "Begin at NE corner of the SE¼ of SE¼ section 8, Twp. 16 S. range 15 W. run west one hundred and seventy (170) yards, thence run south (22) twenty-two yards to the place of beginning, thence run south 70 yards, thence west 70 yards, thence north 70 yds., thence east 70 yds. to place of beginning, containing one acre." The deed stated "do hereby grant, bargain, sell and convey unto the said Louis Hicks and unto his assigns forever." It did not contain the word heirs. The *habendum* clause also omitted the word heirs, and stated "unto his assigns forever, for a graveyard." The acre of land conveyed to Hicks was used by him as a graveyard or burial place, and Hicks cleared about ½ of the acre after it was conveyed to him, but he did not put his deed on record.

The graves of the persons buried were marked, and the remaining 64 acres was still held by Murphy as open and unimproved land until March 17, 1922, on which date Murphy and his wife executed and delivered to W. G. Sanford an oil and gas lease to the 65 acres, excepting one acre, now used as a cemetery, and describing it as containing 64 acres more or less. The lease provided for an annual rental of $64. Whether the exception of the one

acre was valid or not, Sanford's lease was upon 64 acres only. And if the lease from Murphy to Sanford had included the one acre used as a burial place, it would have been 65 acres. Sanford thereafter assigned a portion of this lease to Marshall Spoonts, trustee for the Oil Operators' Trust. This assignment recites the original lease and contains the description as it is in the original lease. Spoonts thereafter resigned as a trustee, and C. F. Spencer was selected trustee in succession. Later C. F. Spencer and Dan Lydick were appointed receiver for the Oil Operators' Trust.

The Lion Oil & Refining Company submitted an offer to the receivers to purchase the property, and, in itemizing the property that they proposed to buy, they described this tract, and in the description was "less one acre used as a cemetery." An assignment was afterwards executed by Spencer and Lydick as receivers, and Spencer also acted as trustee, conveying the property to the Lion Oil & Refining Company. From the time the deed was made to Hicks, 1908, until some time in 1924, Hicks had kept his deed in his possession, but had never had it recorded. On April 5, 1924, Hicks returned the deed to the one acre and Murphy executed a new deed conveying one-half of the original acre tract. There was no reconveyance by Hicks, but he simply delivered the original deed to Murphy. The one-half acre that contained the graves was under fence. Murphy paid Hicks nothing for the surrender of the deed. In March, 1925, Hicks executed a warranty deed to the one-half acre which was not inclosed, to G. D. Hayes, describing the one-half acre as follows: "Beginning at the northeast corner of the southeast quarter of the southeast quarter of section 8, township 16 south, range 15 west, running west 633 feet, thence south 66 feet for a point of beginning, thence south 210 feet, thence east 105 feet, thence north 210 feet, thence west 105 feet, to point of beginning, being one-half (½) acre more or less."

Hayes, on the same day, executed an oil and gas lease on the one-half acre to Fred W. Bowen. Bowen

assigned one-half interest to M. L. McCorkle, who assigned an interest to Thurman. The owners of the lease on the one-half acre conveyed to him by Hicks drilled an oil well upon the property, which is still producing large quantities of oil. Shortly after the drilling of said well, appellees brought a suit in the chancery court to enjoin the appellants from drilling and taking oil from said one-half acre, alleging that they were the owners of said one-half acre tract, under the original lease from Murphy to Sanford.

After this suit was filed, Murphy was unable to locate the deed which Hicks had returned to him, and parol evidence was introduced, and a decree rendered to the effect that the evidence of the execution of the deed was insufficient. Before the term of court adjourned, Murphy found the deed, the court set the original decree aside for the purpose of hearing further evidence. The deed was then introduced, and the court again found in favor of appellees, holding that the deed to Hicks conveyed only the surface right for a graveyard, and did not convey a fee simple estate, nor any interest in oil and gas, and again entered a decree in favor of appellees. This deed from Hicks to Hayes was placed on record in March, 1925. The suit brought not only asked for an injunction, but for a cancellation of the deed, lease, and assignments. There is practically no dispute about the facts, and the appellant states that the case presents only the following propositions of law:

1. Did the deed from Murphy to Hicks in 1908 convey the oil and gas to Hicks?

2. Did Sandford, by his lease from Murphy in 1922, acquire any interest in this one-acre tract of land?

3. Did Murphy acquire any title to the Hayes half-acre by reason of the fact that Hicks, in 1924, surrendered the original deed covering one acre to him and took a new deed to the one-half acre?

4. If Murphy did acquire title by this transaction, did such title inure to the plaintiffs under the doctrine of after-acquired title?

We think the proof is clear and convincing that Murphy executed and delivered to Hicks a deed in 1908. This deed was not recorded, and it was afterwards surrendered to Murphy, and Murphy executed and delivered to Hicks a deed to one-half of the acre, and this deed was put on record.

It is earnestly insisted by the appellee that, in cases like this, where the deed was delivered back to the grantor with the intention of revesting title in him and a new deed was executed to the grantee, a court of equity will treat the transaction as vesting the equitable title in the grantor, and in effect that the grantee holds the naked legal title as trustee for the person to whom he surrendered the deed. Appellees admit that the case of *Strawn* v. *Norris,* 21 Ark. 80, has no particular bearing on this case. And we think also that the case of *Neal* v. *Speigle,* 33 Ark. 64, has no particular bearing. The facts in that case are wholly unlike the case at bar, and the court said: "At the time the deed and mortgage were burned, Jones being dead, the legal title to the lands was in his heirs at law by virtue of the mortgage, and the equitable title was in Shaver, and the destruction of the deed did not divest his title and revest it in the heirs of Jones. The legal existence of the deed and mortgage continued, though the papers on which they were written were burned. * * * A court of equity would not have permitted Shaver to take advantage of the fraudulent registration of the deed, but would have opened the agreement upon which the mortgage, note, and deed were burned. Nor can the appellant in equity and good conscience be allowed to avail himself of a fraud of which he had full knowledge and which he aided Shaver in attempting to perpetrate." *Neal* v. *Speigle,* 33 Ark. 64.

The situation in the case at bar is wholly different, and this is true, we think, of the other cases relied on by appellees, but they state when Murphy executed the lease to Sanford, which is now owned by the appellees, Murphy, as well as Hicks, and also Sanford, clearly

understood that Murphy had title to all the 30 acres of land except that being used as cemetery. The land being used as a cemetery was fenced, and its limits therefore unmistakably defined. We do not think the evidence justifies the statement of the appellees, but we think, on the contrary, that Sanford knew he was getting 64 acres and no more.

A number of cases of other states are referred to, but this question is so thoroughly settled by the decisions of our own court that we think it unnecessary to discuss them, and our court has stated, in the case quoted from by appellees, that the decided weight of authority is that the surrender of a deed, though not registered, will not operate to revest the grantor with the title. We therefore hold that the surrender of the deed to the one acre by Hicks to Murphy did not operate to revest the title in Murphy.

Appellees next discuss the mutual mistake in the deed of 1908, and state that it is their belief that the fence was constructed at the very time that the deed was executed, and on a wholly different tract of land from that described in the deed. Admitting this to be true, appellees had notice that Hicks had one acre, and if he did, and had one-half of it fenced, as they say he did from the beginning, there was certainly no fraud practiced by anybody against the lessee, because, in the lease itself, granting the right to Sanford, it states specifically, "excepting one acre now used as a cemetery," and, if he had only one-half of it fenced, they were bound to take notice from the lease itself that he had one acre, and, to make it more certain, the lease further stated, after the description of the part, "containing 64 acres more or less," there were 65 acres in the tract, the lease expressly exempted one acre used as a cemetery, and expressly stated that there was conveyed 64 acres more or less. The evidence does not show that Murphy reacquired the title by adverse possession. He was not claiming it adversely, and, as late as 1922, the time he executed the lease to Sanford, the statement in the lease,

excepting one acre, we think, shows that he did not claim it by adverse possession, and, whatever may have been the situation between Hicks and Murphy, Murphy did not intend to convey the one acre formerly granted as a cemetery. He did not intend to convey more than 64 acres, and Sanford knew that one acre was exempt and knew that only 64 acres was being conveyed to him.

Appellees next contend that the deed from Murphy to Hicks did not convey a fee simple title, and the first case they call attention to is in the 112 Arkansas. In that case the deed contained the following:

"Now therefore, in consideration of the premises above recited and of the sum of $1 to us in hand paid, we, the said Theodore Maxfield and Charles W. Maxfield, do grant, bargain, sell and convey unto the said C. R. Hanford, W. H. Hallett, and J. S. Hanford, partners as C. R. Hanford & Co., their and each of their assigns, the said parcel of land hereinabove last described, being the width of 30 feet, to have and to hold the same to their use and behoof for a public railroad or other public roadway, to be kept open and free to the public."

The court said: "In construing a deed, the object sought is to ascertain and give effect to the intention of the parties, and this is to be effected by giving to all parts of the deed such consideration, if possible, that they will stand together. But, if there is repugnancy between the granting and the *habendum* clauses, the former will control. * * * In the application of these cardinal rules of construction it may be said that the strip of land 30 feet in width, in controversy in this action, was granted to appellees in fee simple, and by the *habendum* clause the restriction was added that the land granted should be used by the public for a public roadway and for a public railroad." *Mt. Olive Stave Co.* v. *Hanford,* 112 Ark. 522, 166 S. W. 532.

They next call attention to the case of *Dempsey* v. *Davis*, 98 Ark. 570, 136 S. W. 975, and *Whetstone* v. *Hunt*, 78 Ark. 231, 93 S. W. 979, 8 Ann. Cas. 443. Both of these cases, however, hold, like the other cases, that.

in the construing a deed, you should ascertain the intention of the parties, and, if there is a repugnancy between the granting clause and the *habendum* clause, the granting clause controls and the repugnant clause is void, unless, as stated in the 78 Ark. case, such a construction may be put upon it as that they may be consistent and not conflicting. Appellees argue that the *Mt. Olive Stave Co.* v. *Hanford,* 112 Ark. 522, relied on by appellants, is not in point. They say the court in that case did not discuss and evidently did not consider the omission of the word heirs, and if the court's attention had been called to that, it might have placed a different construction on that deed. The court's attention in the briefs of counsel may not have been called to the absence of the word "heirs" specifically, but the briefs, as published, do show that appellees were claiming in fee simple with a condition, and numerous authorities were cited. The contention was also made that the *habendum* may enlarge and extend, but not abridge, the estate limited in the premises. They also contended that a deed should be construed more strongly against the grantor, and cited numerous authorities, among others, Arkansas cases.

Appellees' next contention is that they are innocent purchasers. We think a complete answer to this is that they had notice, and it was stated in the lease itself that one acre was excepted as a burial place, and that they purchased with this knowledge, and with the further statement that they were getting 64 acres, and while the $64 for the 64 acres does not specifically state $1 per acre, yet we think that all the facts, taken together, that is, that one acre was excepted and that 64 acres was mentioned in the lease and that $64 was fixed as the rental, show conclusively that Sanford purchased with the knowledge or notice of Hicks' right.

In conclusion, we think that, no matter what view may be taken of the transactions between Murphy and Hicks, the appellees secured the right to 64 acres only, and, as to them, it is wholly immaterial who owns the

one acre, whether Murphy or Hicks owns it. We think it certain, from the facts in this case, that appellees had no right to it. The decree of the chancery court must be reversed. It follows, of course, that the appellees were entitled to nothing on their cross-appeal, because their contention as to that is based wholly on their right to the oil from the one-half acre. The decree is therefore reversed, and remanded with directions to dismiss the case.

CONNECTICUT FIRE INSURANCE COMPANY v. BOYDSTON.

Opinion delivered April 4, 1927.

1. INSURANCE—AUTHORITY OF AGENT TO WAIVE PROVISIONS OF POLICY.—Any condition inserted in a policy for the benefit of the insurer may be waived by it, and an insurance agent authorized to waive a forfeiture may do so orally, though the policy provides that the waiver must be indorsed on the policy.
2. INSURANCE—NONWAIVER AGREEMENT CONSTRUED STRICTLY.—An agreement providing that the insurance company might investigate the cause of fire and the resulting loss without waiving any rights, being written by the insurance company's adjuster, will be construed strictly against the insurer and liberally in favor of the insured.
3. INSURANCE—WAIVER OF FORFEITURE.—Though a nonwaiver agreement stipulated that the insurer might investigate the cause of fire and the resulting loss without waiving any rights, the insurer will be held to have waived the right to a forfeiture for failure of insured to keep his inventory and books in a fire-proof safe by requiring plaintiff to make a trip at his own expense for examination under oath.
4. INSURANCE—CONSTRUCTION OF CONDITIONS.—Conditions written in an insurance policy will be construed strictly against the insurer and liberally against the insured.
5. INSURANCE—CONDITION AS TO EXAMINATION UNDER OATH.—A condition in a fire policy that the insured should submit to examination under oath as often as required, or that the property should be examined as often as deemed necessary, *held* to apply only while the policy was running and not after loss has occurred, and hence such provision did not prevent the insurer from waiving a warranty clause by requiring insured to submit to examination after loss.

6. INSURANCE—PROOF OF EXTENT OF LOSS.—Any competent evidence which tends to prove the extent or amount of loss for which an insurance company is liable is admissible.
7. EVIDENCE—SECONDARY EVIDENCE ON PROOF OF LOSS OF BEST.—Where the evidence showed, in an action on fire insurance policies, that the invoices and books showing sales were lost, it was proper to admit secondary evidence to prove the loss.
8. EVIDENCE—BEST AND SECONDARY EVIDENCE.—Where it was shown that primary evidence of the extent of insurance loss has been burned, secondary evidence of the inventory and cash sales and estimates of other merchants familiar with insured's stock were admissible to prove insured's damages.

Appeal from Poinsett Circuit Court; *G. E. Keck*, Judge; affirmed.

STATEMENT OF FACTS.

W. H. Boydston instituted separate actions against the Connecticut Fire Insurance Company and the National Union Fire Insurance Company to recover the sum of $1,000 in each case upon a policy of insurance upon a stock of merchandise. The suits were consolidated, and defended on the ground that the insured had forfeited his policies by noncompliance with the conditions thereof.

The policies were introduced in evidence. They are very lengthy, and need not be set out in full. Each policy is for $1,000 upon the stock of merchandise of W. H. Boydston, at Tyronza, in Poinsett County, Arkansas. The policies are practically alike in their terms. Each one contained what is called a "record warranty clause," requiring an inventory to be made at least once a year, and that a set of books be kept showing completely the business transacted since the date of the inventory, and also requiring the inventory and set of books to be securely kept in a fireproof safe at night, when the store was not open for business. The policy also contains the following:

"The insured, as often as required, shall exhibit to any person designated by this company all that remains of any property herein described, and submit to examination under oath by any person named by this company, and subscribe to the same; and, as often as required, shall

produce for examination all books of account, bills, invoices and other vouchers, or certified copies thereof if originals be lost, at such reasonable place as may be designated by this company or its representative, and shall permit extracts and copies thereof to be made."

The policy also contains a clause that the company shall not be deemed to have waived any conditions of the policy unless by written agreement, or unless there is an indorsement upon the policy of the terms of the waiver.

The storehouse containing the stock of merchandise insured during the life of the policy caught on fire by a fire communicated to it from adjoining buildings, and thereby burned the stock of merchandise. After the fire loss occurred, the adjuster of the companies came to the scene of the fire, and, on the 7th day of May, 1925, made with W. H. Boydston a nonwaiver agreement, which reads as follows:

"It is mutually agreed and understood by and between Boydston Bros., of the first part, and the named-below insurance company of as below, and other companies signing this agreement, parties of the second part, that any action taken by any adjuster or representative of the said parties of the second part in investigating the cause of or investigating or ascertaining the amount of loss and damage to the property of the party of the first part caused by fire alleged to have occurred on April 26, 1925, shall not waive or invalidate any of the conditions of the policies of the parties of the second part, held by the party of the first part, and shall not waive or invalidate any rights whatever of either of the parties to this agreement. The intent of this agreement is to preserve all the rights and defenses of all parties hereto, and to provide for an investigation of and the determination of the amount of the loss or damage only, for the interest of 'whom it may concern,' without regard to the liabilities of the parties of the second part."

Subsequent to this time the adjuster required Boydston to appear before him for the purpose of being examined under oath. W. H. Boydston, at his own

expense, made a trip from Tyronza, in Poinsett County, where he lived and where the loss occurred, to Jonesboro, Arkansas, and there, on the 30th day of June, 1925, submitted to an examination by a representative of the defendant.

At the time of the fire the books and invoices of the plaintiff were not in a fireproof safe. He had been using them during the day, and, being very tired that night, went home, and forgot to put them in the safe. His inventory was at the home of his son, where it was being used in the preparation of his income tax report. Before the non-waiver agreement was executed, the adjuster of the companies had been informed of the facts with regard to the breaking of the Record Warranty Clause. At the trial of the case the plaintiff introduced in evidence duplicate invoices, which he had obtained from the persons from whom he had purchased the goods, and, from the testimony of himself and other merchants who were familiar with his stock of goods and the prices of such goods, he proved the value thereof.

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

The jury returned a verdict in each case for the sum of $1,000, and from the judgment rendered each defendant has duly prosecuted an appeal to this court.

Mardis & Mardis and *R. Lee Bartels*, for appellant.

Hawthorne, Hawthorne & Wheatley, for appellee.

HART, C. J., (after stating the facts). It is the contention of counsel for the plaintiff that the forfeiture of the policy occasioned by the failure of the plaintiff to comply with the record warranty clause was waived when, after the loss by fire occurred, the adjuster, with knowledge that the plaintiff had failed to comply with the conditions of the policy with regard to keeping his books and inventory locked in a fireproof safe when the store was not open for business, required the plaintiff to be put to the trouble and expense of going from Tyronza, in Poinsett County, where the fire occurred, to Jonesboro, in Craighead County, for the purpose of being examined

under oath with regard to the conditions of the policy. It is the settled law of this State that any condition inserted in a policy for the benefit of the insurer may be waived by it, and that an insurance agent authorized to waive a forfeiture in a policy may do so orally, though the policy provides that the waiver must be indorsed on the policy. *German-American Ins. Co.* v. *Humphrey,* 62 Ark. 348, 35 S. W. 428; *Phoenix Ins. Co.* v. *Public Parks Amusement Co.,* 63 Ark. 187, 37 S. W. 959; *Queen of Arkansas Ins. Co.* v. *Forlines,* 94 Ark. 227, 126 S. W. 719; and *Queen of Arkansas Ins. Co.* v. *Malone,* 111 Ark. 229, 163 S. W. 771.

It is also settled by these decisions that an adjuster with the authority of the adjuster in this case may waive the performance of the conditions of the policy. But it is contended by counsel for the defendants that, under the provisions of the non-waiver agreement, there was no waiver of the conditions of the policy in respect to the issue involved in this case. We have set out the non-waiver agreement in our statement of facts, and do not deem it necessary to repeat it here. It specifically states that it was the intention of the parties to provide for an investigation of and a determination of the loss or damage only. By its terms it merely gives the adjuster or any other representative of the company the right to investigate and ascertain the cause of the fire and the loss or damage to the property, without being in any danger of waiving any rights under the policy. The rights of the plaintiff and the defendants were settled by the terms of the policy when the fire occurred and the property was damaged or destroyed by the fire. The parties simply agreed that no waiver of the terms of the policy should be implied from an investigation of the cause of the fire and of the amount of the loss or damage to the property insured. The non-waiver agreement was written by the adjuster of the companies, and its stipulations and agreements, like the provisions of the policy, should be considered strictly against the insurer and liberally in favor of the insured. *Penn. Fire Ins. Co.* v.

Draper, 187 Ala. 103, 65 So. 923; *Tinsley* v. *Ætna Ins. Co.,* 199 Mo. App. 693, 205 S. W. 78; *Modlin* v. *Atlantic Fire Ins. Co.,* 151 N. C. 35, 65 S. E. 605; *Beaucamp* v. *Retail Merchants' Assn. M. F. I. Co.,* 38 N. D. 483, 165 N. W. 545; *German Alliance Ins. Co.* v. *Ft. Worth G. & E. Co.* (Tex.), 257 S. W. 273; *Springfield F. & M. Ins. Co.* v. *Fine,* 90 Okla. 101, 216 Pac. 898; *Henderson* v. *Standard F. I. Co.,* 143 Ia. 572, 121 N. W. 714; *Corson* v. *Anchor Mut. F. I. Co.,* 113 Ia. 641, 85 N. W. 806; *McMillan* v. *Ins. Co. of N. A.,* 78 S. C. 433, 58 S. E. 1020; and *German Ins. Co.* v. *Allen,* 69 Kan. 729, 77 Pac. 529.

The non-waiver agreement is, by its terms, limited to investigating the cause of the fire or ascertaining the amount of the loss and damage to the property caused by the fire. It contemplated action on the part of the companies and gave them the full right to make such investigation, through its adjuster or claim agent, or in any other way, it might deem proper. In the present case, however, the plaintiff was required to go from his residence and place of business to another city for the purpose of being examined under oath. He was thereby put to trouble and expense which, under the authorities we have cited above and many others which might be cited, show that the company waived the conditions of the policy with regard to the record warranty clause. If the insurance companies wished to avoid a waiver or forfeiture of the policy because the insured had not complied with the record warranty clause, they should not have required him to be put to the trouble and expense of going to Jonesboro for examination under oath. They knew all the facts with regard to the non-compliance to the record warranty clause that they could know from an examination under oath. In other words, they knew, before they required the plaintiff to go to Jonesboro for examination under oath, that he had not complied with the record warranty clause and that they had a right, under the terms of the policy, to forfeit it for that reason. The plaintiff had a right to assume that they had waived any forfeiture on this ground, and that he was required

to go to Jonesboro to be examined as to the cause of the fire and the amount of loss sustained by him. The undisputed evidence shows that the fire did not originate in the store of the insured and that he did not in any manner, directly or indirectly, aid or have anything to do with starting the fire. It originated from causes with which he had nothing whatever to do. At the trial of the case the plaintiff introduced his inventory and duplicate invoices of goods received since the taking of the inventory. He also produced his bank book, showing the amount of his cash sales, and, in every way possible, attempted to make a correct estimate of the amount and value of the goods destroyed by fire. As we have already seen, he had a right to assume that this was the purpose of requiring him to go to Jonesboro for examination under oath; and, under the terms of the non-waiver agreement, there was nothing to prevent the insurer from waiving any grounds of forfeiture which it knew about before such non-waiver agreement was executed.

Again, it is insisted that the act of the companies in requiring the plaintiff to go to Jonesboro for examination does not waive any ground of forfeiture, because, under the terms of his policy, the plaintiff was required to submit to examination under oath. As we have already seen, these conditions were written in the policy by the insurer, and should be construed liberally in favor of the insured. *Lord* v. *Des Moines F. I. Co.*, 99 Ark. 476, 138 S. W. 1008, and *Great Southern F. I. Co.* v. *Burns*, 118 Ark. 22, 175 S. W. 1161, L. R. A. 1916B, 1252 Ann. Cas. 1917B 497.

Here again we refer to our statement of facts for the exact provisions of this clause of the policy. It is fairly inferable that the parties had in mind an examination of the stock of goods and of the insured himself under oath in order to ascertain whether or not he was over-insuring his stock of goods. This is shown by providing that he should submit to such examination as often as required, or that the property should be examined as often as deemed necessary. If, by this provision, it

had been meant to provide for an examination after the fire, it would have been very easy for the policy to have provided that, in case of loss by fire, the books of the plaintiff should be open to the insured, or that the plaintiff should submit to an examination for the purpose of ascertaining the cause or extent of the loss. Such was the case in *Phoenix Insurance Co.* v. *Flemming,* 65 Ark. 54, 44 S. W. 465, 39 L. R. A. 789, 67 A. S. R. 900. If the insurance companies wished the policy to contain a provision requiring the insured, as often as demanded, to submit to examination under oath relating to all matters material to the adjustment of the loss, it should have used language which plainly meant that, instead of using language which was susceptible of a construction that it was to apply to the policy while it was running instead of after the loss had accrued.

Counsel for the defendant also seek a reversal of the judgment on the ground that the court erred in the admission of evidence to the jury. It is elementary that any competent evidence is admissible to prove the extent or amount of the loss for which the defendant is liable, which tends to prove that fact. The object of the clause requiring the plaintiff to keep an inventory, including invoices of the goods purchased since his last inventory, and a book containing a record of his sales, was to enable the insurer to have record evidence upon which it might adjust the loss after the fire. The evidence on the part of the plaintiff shows that such a record was kept by him. The invoices and the books showing the sales made were destroyed when the fire occurred. As we have already seen, the fire was communicated to the property from other buildings, and the plaintiff was in no wise at fault in the matter. By inadvertence he had omitted to put his books in the iron safe that night, and they were destroyed when his goods were burned. Proof of these facts was sufficient to let in secondary evidence. *Arkansas Mutual Fire Ins. Co.* v. *Woolverton,* 82 Ark. 476, 102 S. W. 226. The plaintiff found the last inventory which he had taken at the house of his son, after the

fire. He obtained duplicate copies of the invoices of the goods purchased by him since his last inventory. He obtained from the bank an account of his cash sales. From the testimony of himself and other merchants, who were familiar with his stock of goods and the prices of same, he made as near an estimate as possible of the value of the goods at the time of the fire. This was the best evidence obtainable after it was shown that the record had been burned, and the court properly admitted it to go before the jury to establish the extent of the loss.

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

KULL v. DIERKS LUMBER & COAL COMPANY.

Opinion delivered April 4, 1927.

1. CORPORATIONS—REPRESENTATION BY OFFICERS.—A corporation can act only through its officers and agents, and therefore an affidavit by a corporate officer on its behalf is regarded as the act of the corporation itself.
2. MECHANICS' LIENS—AFFIDAVIT—COMPLIANCE WITH STATUTE.—Where, in a suit by a corporation to enforce a mechanics' lien, the statutory affidavit was filed by its manager without stating that he was manager, the affidavit will be treated as amended to conform to proof that he was such officer, if no objection was made to the form of the affidavit in the trial court, as substantial compliance with the statute is all that is required.
3. MECHANICS' LIENS — NOTICE. — Where materials are furnished under a direct contract with the owner of land, who is liable on an original undertaking, the notice required by the statute is not necessary.
4. MECHANICS' LIENS—EVIDENCE.—In a suit to enforce a mechanic's lien, evidence *held* to warrant a finding that the materials were furnished to the owner of the premises, and that a verified account was filed by the lienor within 90 days after the last item of materials was furnished.

Appeal from Sevier Chancery Court; *C. E. Johnson*, Chancellor; affirmed.

STATEMENT OF FACTS.

This action was instituted in the chancery court by the Dierks Lumber & Coal Company against F. H. Kull to enforce a materialman's lien in the sum of $175.32 for material furnished and used in the construction of a boiler plant on the defendant's land.

J. F. Hinds was the manager of the Dierks Lumber & Coal Company at DeQueen, Arkansas, and represented it in the transaction involved in this case. According to his testimony, F. H. Kull and Dick Adams came to the company's place of business at DeQueen and made arrangements to purchase certain material to be used in the construction of a boiler plant. Kull stated that he was the owner of the plant, and directed the material ordered to be delivered to a driver, who would be sent for it. The materials were furnished as directed, and the last item was purchased on March 5, 1924. The sales ticket on this purchase is as follows:

"Office Record.
Dierks Lumber & Coal Company.
Retail Yard.
DeQueen, Ark.,
March 5, 1924.

"Sell to E. Sperling & Son. Ordered by Knox. Del. by Knox.

"11 pcs. 8 ft. galv. iron, 312 ft. at $4.90.....$15.28."

The Dierks Lumber & Coal Company filed with the clerk of the circuit court of Sevier County, in which the boiler plant was erected, a just and true account of the demand due, after allowing all credits, and containing a correct description of the property to be charged with said lien, verified by affidavit. The account was signed "Dierks Lumber & Coal Company, by J. F. Hinds," and was sworn to before a notary public and duly filed in the office of the circuit clerk of Sevier County on June 3, 1924.

John Seals, bookkeeper of the Dierks Lumber & Coal Company, was a witness for it, and corroborated in all respects the testimony of J. F. Hinds. The material was

delivered and the witness duly posted the materials purchased, as shown by the sales tickets on the books of the company.

Dick Adams and F. H. Kull were witnesses for the defendants. According to their testimony, the defendant, Kull, did not have anything to do with purchasing the material in question. They admitted that he was present at the time the arrangement was made for the purchase of the material, but stated that he had nothing to do with the transaction. They admitted that the material was used in the replacement of a boiler plant on the land of the defendant, Kull, but said that the material was ordered and used by the lessee of the defendant in the construction and replacement of a boiler plant, which had become worn out by use by the lessee during the term of his lease.

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, providing for the foreclosure of the plaintiff's lien as materialman for the materials furnished. The case is here on appeal.

June R. Morrell, for appellant.

Abe Collins and *Lake, Lake & Carlton,* for appellee.

HART, C. J., (after stating the facts). The first ground upon which it is sought to reverse the decree is that the account was verified by the affidavit of J. F. Hinds, and that it does not appear that he had authority to make the affidavit. The record shows that the account was signed "Dierks Lumber & Coal Company, by J. F. Hinds." Now, the manager of the corporation had charge of its business at DeQueen and represented it in the particular transaction under consideration. In the eye of the law a corporation can only act through its officers or agents, and therefore an affidavit by a corporate officer is regarded as the act of the corporation itself. In such a case the officer is exercising the corporate powers of the corporation in the only way in which they can be exercised at all. *Wales-Riggs Planta-*

tions v. *Caston,* 105 Ark. 641, 152 S. W. 282, and *American Soda Fountain Co.* v. *Stolzenbach,* 75 N. J. Law 721, 68 Atl. 1078, 16 L. R. A. (N. S.) 703, and case-note, 127 Am. St. Rep. 822.

But it is insisted that the affidavit does not show that J. F. Hinds was the manager of the Dierks Lumber & Coal Company. It is true that the affidavit itself does not show that fact, but the deposition of J. F. Hinds was taken by the plaintiff, and this deposition shows that he was not only the manager of the plant of the plaintiff at DeQueen but that he represented it in the sale of the materials to the defendant. This court has held that an affidavit for attachment may be amended. The court said that swearing the affiant was the essential fact, and that, if this were done and the officer administering the oath neglected to attest the fact, this would not render the affidavit a nullity, but that the defect might be cured by amendment. *Fortenheim* v. *Claflin, Allen & Co.,* 47 Ark. 49, 14 S. W. 462. It would be putting form ahead of substance to hold that the affidavit should not be treated as amended to conform to the facts when J. F. Hinds was put upon the stand and testified that he was the manager of the corporation and had authority to act and did act for it in the transaction under consideration; and this is especially true when we consider that no objection was made by the defendant to the form of the affidavit in the chancery court. A substantial compliance with the statute is all that is required, and this was done when the manager of the corporation actually made the affidavit to the account in compliance with the terms of the statute. Rockel on Mechanics' Liens, § 119, page 318.

The next ground on which it is sought to reverse the decree is that the ten days' notice required by the statute was not given. This court has held that, where the material was furnished under a direct contract with the owner, who is liable as on an original undertaking, the notice required by the statute is not necessary. *Leifer Mfg. Co.* v. *Gross,* 93 Ark. 277, 124 S. W. 1039, and *Hess* v. *A. L. Ferguson Lbr. Co.,* 155 Ark. 240, 244 S. W. 5. The

chancellor found that the materials were furnished to the owner, and we do not think that his finding in this behalf can be said to be against the clear preponderance of the evidence. It is true that the defendants, Kull and Adams, both testified that the material was not purchased by Kull himself, but they both admit that he was present when arrangements were made for the material to be furnished, and that he was asked to go to the place of business of the plaintiff for that purpose. The manager of the plaintiff and its bookkeeper both testified that Kull purchased the material in question, and told the manager of the plant that he was the owner of the boiler plant to be erected with the material. There would seem to have been no use for the defendant to have gone with his lessee to be present when the arrangement was made for the purchase of the material if he had no interest.

Another ground for reversal of the decree is that the account was not filed within ninety days after the last item of the material was furnished. On this point we have again a direct conflict in the evidence. Kull and Adams testified that the last item was furnished more than ninety days before the verified account was filed. On the other hand, the plaintiff introduced in evidence the sales tickets, and the one in question shows that the item was furnished on the 5th day of March, 1924, and the verified account was filed on the 3rd day of June, 1924. The oral evidence for the plaintiff showed this to be true. The chancellor also found this issue for the plaintiff, and we think correctly so.

The result of our views is that the decree of the chancellor was correct, and should be affirmed.

POWELL v. STATE.

Opinion delivered April 4, 1927.

1. BURGLARY—SUFFICIENCY OF EVIDENCE.—In a prosecution for burglary under Gen. Acts, 1921, p. 69, evidence *held* sufficient to authorize the jury to find defendant guilty.
2. CRIMINAL LAW—EXPRESSION OF OPINION IN ARGUMENT.—In a prosecution for burglary, a remark of the prosecuting attorney in argument that this was no ordinary case, an opinion warranted by the evidence, was not ground for reversal.
3. CRIMINAL LAW—STATEMENT BY PROSECUTING ATTORNEY.—In a prosecution for burglary, a statement by the prosecuting attorney that a newspaper dated prior to the burglary and addressed to defendant's father-in-law was found in the abandoned car used by the burglars was not objectionable where the newspaper was introduced in evidence though not read to the jury, and showed that it was addressed to defendant's father-in-law.
4. CRIMINAL LAW—STATEMENT BY PROSECUTING ATTORNEY.—In a prosecution for burglary, remarks of the prosecuting attorney, not intentionally misleading, that certain witnesses had made certain statements, when they had not done so, was not reversible error, where the court instructed the jury that they were the judges of the evidence and should consider only the evidence and not the argument of the attorney on evidence not introduced.
5. CRIMINAL LAW—STATEMENT BY PROSECUTING ATTORNEY.—In a prosecution for burglary, a statement by the prosecuting attorney that he did not know what sort of coat defendant wore, but that the jury could notice that he was in his shirt sleeves at that time, was not erroneous as a comment on defendant's failure to testify.
6. CRIMINAL LAW—ARGUMENT OF PROSECUTING ATTORNEY.—The prosecuting attorney should not be prevented from commenting on the testimony given by other witnesses because defendant refrained from testifying as a witness.

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

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

Will Steel, for appellant.

HART, C. J. Nig Powell prosecutes this appeal to reverse a judgment of conviction against him for the crime of burglary. Under our statute, burglary is the unlawful entering a house, tenement, railway car or other

building, boat, vessel or watercraft with the intent to commit a felony. General Acts of 1921, page 69.

The first assignment of error of the defendant is that the evidence is not legally sufficient to support the verdict.

G. E. Atkins, cashier of the Garland City Bank, at Garland, in Miller County, Arkansas, was a witness for the State. According to his testimony, on August 9, 1926, about ten o'clock in the morning, two men entered the bank, and, pointing a gun at him, made him put up his hands. They then went over to the cash drawer and took $360, and left the bank by the rear door. The money belonged to the bank. One of the men wore a blue suit and the other wore a khaki or gray suit. The defendant is practically the same size and his hair is the same color as one of the men who held him up and took the money. The defendant looks like one of the men.

According to the testimony of Dr. Cook, he left the bank a short time before it was held up, and went home. He saw a car with two men pass his house at a rapid rate of speed, and, about that time, he was told that the bank had been robbed. The car was a Baby Overland touring car, and was being driven as fast as it could go. The defendant looks mighty like the man who was driving the car. The witness knew where Bud Ward lives in the country, and had seen the defendant there a number of times. The defendant is a son-in-law of Bud Ward.

Ralph Stokes was also a witness for the State. According to his testimony, he had known the defendant about two years, and saw him on the morning of the 9th of August, the day the bank was robbed. The defendant was in a Baby Overland car traveling towards Garland. The car was being driven at a moderate rate of speed.

Another witness for the State testified that he saw two men walking along in Garland on the day the bank was robbed. One of them had on a blue suit and was carrying a pistol. The witness did not know the defendant at that time, but the man with the blue suit on, carrying the pistol, looked like the defendant.

Another witness testified that she was working in the postoffice, and saw an Overland car parked there. The bank is just around the corner from the postoffice.

Another witness testified that he could recognize the defendant when he saw him, and that he saw him standing back of the postoffice, by an Overland car, on the day the bank was robbed. The defendant had on a blue serge suit.

Another witness, who had known the defendant about two years, testified that, a short time after the robbery occurred, and on the same morning, he saw the defendant and another man coming from Garland and going towards McKinney. The defendant was driving the car, and it was going about thirty miles an hour. In a few minutes the witness met an officer, who told him about the bank being robbed, and asked him if he had seen a car. The witness replied that he had, and the officer went on in the direction that the car had been going. In a short time the officer found an abandoned Baby Overland car near the residence of Bud Ward. It contained a paper of the issue of August 7, 1926, addressed to Bud Ward. It also had two or three khaki shirts in it. On the next day the officer saw one of Bud Ward's boys wearing a shirt just like the ones found in the Baby Overland car.

This evidence was sufficient to warrant the jury in convicting the defendant. The undisputed evidence shows that the bank was robbed on the morning in question by two men. One of them wore a blue serge suit and the other a khaki suit. The defendant was recognized by a person who had known him for two years, going towards the town of Garland in a Baby Overland car, with a companion. The car was being driven at a moderate rate of speed. This same kind of a car was seen parked near the postoffice in the town of Garland on the same morning. The defendant was seen standing by the car. He had on a blue suit. Another witness saw him walking along the streets of Garland that morning with a pistol in his hands. Soon after the robbery the defendant was seen

driving hurriedly away from Garland with a companion in a Baby Overland car. The car was abandoned near the home of the father-in-law of the defendant. One of the witnesses testified that he had seen the defendant at his father-in-law's house several times. This witness thought the defendant was one of the men who drove rapidly by his house in a Baby Overland car, a few minutes after the robbery. The jury might legitimately infer from this evidence that the defendant was one of the persons who entered the bank and took the money from it on the morning in question.

It is next insisted that the judgment should be reversed because the prosecuting attorney told the jury that this was no ordinary case. It is apparent, from the brief history of the case given above, that the prosecuting attorney was correct in his remarks to the jury, and it is no reversible error for him to express to the jury his opinion derived from the evidence in the case. *Blackshare* v. *State,* 94 Ark. 548, 128 S. W. 549, and *Sanders* v. *State,* 164 Ark. 491, 262 S. W. 327.

It is next insisted that the judgment should be reversed because of the statement of the prosecuting attorney that the newspaper dated August 7, 1926, was found in the abandoned Baby Overland car. The basis of this objection is that the newspaper was not introduced in evidence; but the record shows that the newspaper was introduced in evidence before the jury, although it was not read to them. The newspaper showed that it was addressed to Bud Ward, who, according to the testimony of one witness, was the father-in-law of the defendant; and the abandoned car was found near his house. Therefore we hold that this objection was not well taken.

It is also insisted that the judgment should be reversed because the prosecuting attorney argued to the jury that certain witnesses had testified to certain facts, when such was not the case. On this point the court told the jury that it was the judge of what evidence had been introduced, and that it should not consider any evidence

except that introduced before it, and that they should not consider the argument of the prosecuting attorney based on evidence that was not introduced. It was not shown that the prosecuting attorney willfully referred to evidence that was not in the record, and we think that the remarks of the court removed any prejudice that might have resulted from the misstatement of the testimony by the prosecuting attorney. *Adams* v. *State,* 165 Ark. 308, 264 S. W. 858.

It is also insisted that the judgment should be reversed because the prosecuting attorney referred to the fact that the brother-in-law of the defendant was in the court room, when this fact had not been proved in evidence. One witness, in testifying, referred to the fact that this boy was in the court room. The court again told the jury not to consider any argument of the prosecuting attorney based upon matters that had not been introduced in evidence. Hence we conclude that there was no prejudicial error resulting to the defendant.

Finally, it is insisted that the judgment should be reversed because the prosecuting attorney commented upon the fact that the defendant had not testified as a witness in the case. Hence, under the authority of *Davidson* v. *State,* 108 Ark. 191, counsel for the defendant insist upon a reversal of the judgment. The remarks complained of in the present case which are construed by counsel for the defendant as a comment on the failure of the defendant to testify is that the prosecuting attorney stated to the jury that he did not know what sort of a coat the defendant had on on the day of the robbery, but that the jury could notice that he was in his shirtsleeves at that time. We do not think that this could, by any means, be construed as a comment on the failure of the defendant to testify. The jury could see whether the defendant was in his shirtsleeves on the day of the trial or not. That fact was apparent to any one. The witnesses who knew the defendant and saw him on the day of the robbery testified that he had on a blue coat. It certainly should not be said that the prosecuting attorney

should refrain from commenting on the testimony given by other witnesses because the defendant refrained from testifying as a witness.

We have carefully examined the record, and find no reversible error in it. It follows that the judgment will be affirmed.

ST. LOUIS SOUTHWESTERN RAILWAY COMPANY v. JONES.

Opinion delivered April 4, 1927.

1. APPEAL AND ERROR—CONCLUSIVENESS OF VERDICT.—A verdict based upon conflicting evidence is conclusive upon appeal.
2. APPEAL AND ERROR—NECESSITY OF MOTION FOR NEW TRIAL.—Refusal to grant service of a summons is not reviewable on appeal where it was not assigned as error in the motion for new trial.
3. APPEAL AND ERROR—NECESSITY OF SPECIFIC OBJECTION.—In an action by an employee for injuries received while loading ice into a car, where it was a question whose negligence caused the fall of ice and the injury therefrom, an instruction that, before the jury could find for plaintiff, they must find that a fellow servant on top of the car negligently let the ice fall, to which only a general objection was made, cannot be objected to on appeal for not requiring that plaintiff should have exercised ordinary care.
4. APPEAL AND ERROR—HARMLESS ERROR—MODIFICATION OF INSTRUCTION.—It was not prejudicial error to strike out a portion of a requested instruction which was fully covered by the remainder of the instruction which was given.

Appeal from Miller Circuit Court; *James H. McColluum*, Judge; affirmed.

T. J. Gaughan, J. T. Sifford, J. E. Gaughan and *E. E. Godwin*, for appellant.

J. M. Carter and *B. E. Carter*, for appellee.

SMITH, J. Appellee brought suit in the Miller Circuit Court against the St. Louis Southwestern Railway Company of Texas to recover damages to compensate an injury sustained by him in the State of Texas while employed by the defendant railroad company. He alleged, and offered testimony tending to show, that, while in the discharge of his duties as a coach cleaner,

he was assisting another employee in loading ice into a dining-car. The method employed was for appellee, while standing on the ground, to pitch pieces of ice to the other employee, who stood on top of the car. The employee on the car negligently allowed one of the pieces of ice so pitched to fall from the top of the car as appellee was getting another piece of ice from his truck, and the piece of ice so allowed to fall struck the forefinger on appellee's left hand and injured it so severely that its amputation became necessary. Appellee recovered a judgment which is not assailed as being excessive if the railroad company is liable at all in this action, and this appeal is prosecuted to reverse that judgment.

Appellee's injury occurred in Texarkana, just across the State line, in the State of Texas, and this suit was begun by service had on both the baggage agent and the ticket agent of the railroad company in the city of Texarkana, the offices of these employees being on the State line, that of the baggage agent in Arkansas and that of the ticket agent in Texas.

A motion was filed to quash the service upon the ground that the defendant railroad is a foreign corporation organized under the laws of the State of Texas, and does not engage in any business in the State of Arkansas, and has no agent in this State upon whom service of process can be had. Testimony was offered tending to support these allegations, but the trial court overruled the motion to quash the service.

Reserving this question in its answer, the defendant railroad company alleged that appellee's injury was occasioned by his own negligence, and denied that it was guilty of any negligence. Testimony offered in support of these allegations was to the effect that appellee pitched a block of ice, which slipped from his hand and struck the eave of the car, and, falling back, struck appellee's hand.

The question of fact in the case is whether appellee's own negligence caused the injury, or whether it was caused by the negligence of the employee on top of the

car. The evidence was in irreconcilable conflict on this question, and the verdict of the jury in appellee's favor is conclusive of this conflict.

The action of the court in refusing to quash the service of summons was not assigned as error in the motion for a new trial, and, this being true, the correctness of that ruling is not presented to us for review.

In the case of *Prairie Creek Coal Mining Co.* v. *Kittrell,* 106 Ark. 138, 153 S. W. 189, it was said: "The appellant also assigns as error the rulings of the court in refusing to grant its motion to quash the service, and in refusing to grant motions to have the complaint made more specific, and to strike out certain portions thereof. These assignments are the proper subjects for bills of exceptions, and they are not made grounds of the motion for a new trial, and hence we cannot review them" (citing cases).

The court gave, at appellee's request, an instruction numbered 1, reading as follows:

"If the jury find from the evidence that plaintiff, Tom Jones, was in the employ of the defendant railroad, and that he was in the discharge of his duties in such employment, loading ice into a dining-car of the defendant, which car was to be used in one of the defendant's trains which carried interstate passengers, and that another employee of defendant negligently let fall a piece of ice from the top of the car, which ice struck and injured plaintiff, then you will find for the plaintiff."

Only a general objection to this instruction was made at the trial, and it is now insisted that the instruction was erroneous in that it did not require the jury to find, before returning a verdict in appellee's favor, that appellee was in the exercise of ordinary care for his own safety at the time of his injury.

This is an objection which we think should have been specifically made at the trial, and especially so in view of the issue of fact here joined. The question of fact in the case is, "Whose negligence was responsible for

the falling of the piece of ice?" It is not contended that there was concurring negligence, and the instruction required the jury to find that the employee on top of the car negligently let the piece of ice fall before returning a verdict in appellee's favor.

The court, after correctly defining negligence, gave, at the request of the defendant railroad company, an instruction which told the jury that there could be no finding for the plaintiff unless he had proved, by a preponderance of the evidence, "first, that the defendant's servant on top of the car actually caught the piece of ice alleged to have been thrown up to him by the plaintiff, and, second, that, after catching it, the said servant on top of the car negligently let the said piece of ice fall out of his hands and on to the plaintiff's hand." This instruction fully and fairly submitted the issue of fact to the jury. The instruction as requested contained a third essential for the jury to find before returning a verdict for the plaintiff, which reads as follows: "and, third, that such piece of ice fell out of the hands of the servant on top of the car, if it did fall out of his hands, as a result of negligence on the part of such servant." An exception was saved to the action of the court in striking out the language last quoted, and it is argued that the requirement there stated should also have been imposed. We think there was no prejudicial error in striking out this third condition, for the reason that it was substantially covered in the other two conditions stated as essential to a recovery which were given by the court.

We think the instructions as a whole fully presented the issue of fact to the jury, and correctly declared the law applicable thereto, and, as no other errors are assigned except those herein discussed, the judgment must be affirmed, and it is so ordered.

McGREGOR v. MILLER.

Opinion delivered April 4, 1927.

1. COUNTIES—FISCAL YEAR.—Under Amendment 11 to the Constitution authorizing counties, cities and towns to refund their existing indebtedness by issuing bonds, and prohibiting them from making any contracts or issuing any warrants in excess of the revenue for the current fiscal year, *held* that, the Legislature having declared, by Acts 1925, p. 608, that the fiscal year for issuing bonds shall begin on January 1 and end on December 31, the fiscal year as thus declared will be held to be the fiscal year for all purposes, including the determination whether allowances by the county court exceeded the county revenues during the fiscal year.
2. COUNTIES—NEGOTIABILITY OF COUNTY WARRANTS.—County warrants are not negotiable instruments within the law merchant, and persons taking them take with notice of the purpose for which they were issued and of the order of the county court authorizing their issuance.
3. COUNTIES—WARRANTS IN EXCESS OF REVENUE.—Under Const., Amdt. 11, county warrants issued, as well as contracts made, in excess of revenues for a fiscal year, are void, and the action of the county court in issuing such a warrant or in making an allowance on which such a warrant might later be issued is *coram non judice.*
4. COUNTIES—WARRANTS PARTLY IN EXCESS OF COUNTY REVENUE.—A warrant for $30, issued by the county court, which was $12.50 in excess of the county's revenue for the fiscal year, was not entirely void, but was void only to the extent of such excess, and the county court could reissue a warrant for $17.50.
5. COUNTIES—WARRANTS IN EXCESS OF REVENUE.—Under Const., Amdt. 11, a county warrant issued for an obligation incurred in the preceding year in excess of the revenues for that year is void, though the revenues for the year in which it was issued had not been expended when it was issued.
6. COUNTIES—RIGHTS OF HOLDER OF VALID WARRANT.—The holder of a valid county warrant may, by appropriate action, compel the receipt and payment of his warrant to the exclusion of an invalid warrant, and may, if necessary, enjoin the redemption of an invalid warrant, and a collecting officer of the county receives an invalid warrant at his peril, and is not entitled to take credit for it in his settlements.

Appeal from Woodruff Circuit Court, Northern District; *W. D. Davenport,* Judge; affirmed.

W. J. Dungan, for appellant.

R. D. Smith, J. F. Summers and *Roy D. Campbell,* for appellee.

SMITH, J. The judgment here appealed from was rendered upon an agreed statement of facts. After declaring as a matter of law that the fiscal year for determining whether allowances made by the county court, under Amendment No. 11 to the Constitution, exceeded the county revenues, begins on January 1 and ends December 31, the court recited in the judgment the following facts:

Warrants for the fiscal year 1926 were issued in excess of the revenues for that year, and certain of these warrants found their way into the hands of the collector of the county, who sought, by mandamus, to compel the treasurer of the county to receive them from him in settlement of his collections for the county's account. Warrant No. 622, which was for the sum of $30, was $12.50 in excess of the 1926 revenues. The court found that this warrant was void as to this excess, but might be reissued for the sum of $17.50. That certain warrants were issued in 1926 upon claims arising in 1925, and, when issued, were in excess of the 1926 revenues. Certain other warrants were issued for such claims as the construction of a bridge (the necessity therefor being urgent), the fees of a juror, and electric current for lighting the courthouse, etc. All these warrants were declared invalid for the reason that their allowance and issuance made the county's expenses exceed the county's revenues, and this appeal is prosecuted to review that judgment.

The present appeal involves the further construction of Amendment No. 11 to the Constitution, it being contended that the cases of *Kirk* v. *High,* 169 Ark. 152, 273 S. W. 389, 41 A. L. R. 782, and *Nelson* v. *Walker,* 170 Ark. 170, 279 S. W. 11, in which the amendment was interpreted, are not decisive of the questions raised on the present appeal.

So much of the amendment as it is necessary here to consider reads as follows: "The fiscal affairs of coun-

ties, cities and incorporated towns shall be conducted on a sound financial basis, and no county court or levying board or agent of any county shall make or authorize any contract or make any allowance for any purpose whatsoever in excess of the revenue from all sources for the fiscal year in which said contract or allowance is made; nor shall any county judge, county clerk, or any other county officer, sign or issue any scrip, warrant, or make any allowance in excess of the revenue from all sources for the current fiscal year; nor shall any city council, board of aldermen, board of public affairs, or commissioners of any city of the first or second class or any incorporated town, enter into any contract or make any allowance for any purpose whatsoever, or authorize the issuance of any contract or warrants, scrip or other evidences of indebtedness, in excess of the revenue for such city or town for the current fiscal year; nor shall any mayor, city clerk, or recorder, or any other officer or officers, however designated, of any city of the first or second class or incorporated town, sign or issue any scrip, warrant or other certificate of indebtedness in excess of the revenue from all sources for the current fiscal year."

It is pointed out that neither of the opinions above referred to define the "fiscal year" mentioned in the amendment, and we are asked to decide when this year begins and ends.

The amendment was adopted by the people at the general election in 1924, as declared in the case of *Brickhouse* v. *Hill,* 167 Ark. 513, 268 S. W. 865, the opinion in that case being delivered February 16, 1925. Thereafter the General Assembly, which was in session at the time of the rendition of this opinion, passed act No. 210, which was an act entitled "An Act to facilitate the funding of the debts of counties, cities and incorporated towns." This act was approved March 23, 1925. Acts 1925, p. 608.

This was an enabling act to make effective the provisions of the amendment authorizing counties, cities and towns to refund their existing indebtedness by issuing bonds. Section 7 of this act reads as follows: "The fiscal

year of each county, city and town in this State shall begin with the first day of January and end at midnight on the 31st day of December of each year."

Having declared when the fiscal year shall begin and end for one purpose, we perceive no reason why, within the meaning of the amendment, the year designated should not be the fiscal year for all purposes of the amendment. We do not think the amendment contemplated that there would be one fiscal year for some purposes of the amendment and a different fiscal year for other purposes. The amendment itself did not provide when the fiscal year should begin and end, and this was done by the enabling act herein referred to, and, having declared that the fiscal year should begin on the 1st day of January and end December 31 for one purpose, we hold that the year thus defined is the fiscal year for all purposes of the amendment.

Counsel recognizes the effect of our decisions in the cases of *Kirk* v. *High* and *Nelson* v. *Walker, supra.* Indeed, there appears to be no reason to misapprehend their purport. They construe the amendment to mean what it plainly says, that is, that counties, cities and towns shall not expend in any year or make allowances covering obligations incurred in excess of the revenues for the year in which such expenses were incurred or obligations made. We recognized and declared the drastic effect of the amendment, and it is unnecessary to repeat here what was there said.

Counsel for appellant argues that these former decisions do not relate to warrants actually issued, although they were in excess of the revenues. It is argued that these warrants are negotiable instruments and that title thereto passes by delivery, and that, if the county issues these negotiable obligations to pay, many innocent purchasers may acquire them, and that it would be a fraud to declare such warrants void.

In answer to these contentions it may be first said that county warrants are not negotiable instruments in the sense of the law merchant, and persons acquiring

them take them with notice of the purpose for which they were issued and of the order of the county court authorizing their issuance. *Vale* v. *Buchanan,* 98 Ark. 299, 135 S. W. 848; *Watkins* v. *Finger,* 120 Ark. 476, 179 S. W. 653.

But another and more effective answer is that warrants issued, as well as obligations incurred, which are in excess of the revenues, are void, and the action of the court in issuing a warrant, or in making an allowance upon which a warrant might later be issued, is *coram non judice,* and said warrants and allowances are void.

We think the court was correct in holding that the $30 warrant was not entirely void, but was void only to the extent that it was in excess of the revenues of the county for the year in which it was issued, and the county court may therefore reissue that warrant as ordered by the court below.

The judgment of the court below accorded with the views here expressed, and the judgment to that effect is affirmed.

SMITH, J., (on rehearing). Counsel, in the petition for rehearing, calls attention to the fact that one of the county warrants here involved was issued in 1926 for a claim arising in 1925, and points out that, at the time this allowance was made, the 1926 revenues had not been expended. This does not alter our conclusion. This claim was void because it was an obligation incurred in the year 1925 in excess of the revenues of that year. We think we have made it plain that a county cannot incur any obligation in any year which exceeds the revenues of that year, and, if this is done, such obligations are void, and cannot be paid out of the revenues of a succeeding year. If this could be done, obligations could thus be carried from one year to another. The revenues of one year would be applied to the discharge of obligations of a previous year, and one of the purposes of the amendment was to prevent this from being done.

The brief on the petition for rehearing discusses the question of priority of warrants issued by a county where the total amount of warrants issued exceeds the

revenues. This is a condition which the amendment was intended to prevent. If such a condition arises, those warrants issued in excess of revenues are void. Those warrants are valid which, at the time of their issuance, do not exceed the revenues. All others are void. The holder of a valid warrant may, by an appropriate action, compel the receipt and payment of his warrant, to the exclusion of an invalid warrant, and he may, if necessary, enjoin the redemption of an invalid warrant. More than that, the invalid warrant cannot be received by any collecting officer of the county, and the officer who does receive it does so at his peril, and is not entitled to take credit for it in any settlement of his accounts, because the warrant is void. It is issued without authority, and the action of a collecting officer in receiving it cannot give it validity.

It is argued that this construction will in some cases work hardships, and has done so in the instant case. If this is true, it can only be answered, as we said in the original opinion herein as well as in the previous cases there cited, that the plain and obvious purpose of the amendment was to prevent counties from expending in any year, for any purpose, any sum in excess of the revenues for that year.

The petition for rehearing is therefore overruled.

HUFF v. UDEY.

Opinion delivered April 4, 1927.

1. STATUTES—PASSAGE OF ACT—PRESUMPTION.—Where the legislative journals recite the final passage of an act in legal form by a yea and nay vote, it will be presumed that the act was read in conformity to Const. art. 5, § 22, providing that every bill shall be read three times, unless the journal entries show the contrary; and this presumption cannot be overcome by oral testimony that the bill was not read at length.
2. STATUTES—ACT BROADER THAN TITLE.—The fact that an act is broader in effect than is indicated by its title does not render

the act invalid, as the Constitution does not require that the caption should indicate all of the subject-matter of the act.

3. STATUTES—CONSTRUCTION WITH REFERENCE TO TITLE.—The fact that the title of an act is more restricted than the act itself will not be considered in determining the legislative intent where the act itself is unambiguous.

4. STATUTES—CONSTRUCTION OF STATUTES ADOPTED AT SAME SESSION.—Sp. Acts 1923, p. 1562, relating to prohibition of the running of live stock at large, cannot be read together with Sp. Acts 1923, p. 843, passed at the same session, relating to hogs, sheep and goats only, the subject-matter, territory and dates of passage being different.

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

Mehaffy & Mehaffy, for appellant.

Rose, Hemingway, Cantrell & Loughborough, for appellee.

HUMPHREYS, J. Appellant, a citizen of Pulaski Restricted District No. 3, in Pulaski County, Arkansas, brought suit in the chancery court of said county against appellee, impounder of said district, to enjoin him from impounding the stock of appellant and other taxpayers, upon the alleged ground that act 639 of the Acts of the General Assembly of 1923, under which the district was created, is void. The district was established by order of the county court of Pulaski County on November 20, 1925, under § 4 of said act, and embraced certain territory in Pulaski County south of the Arkansas River.

The validity of the act is first attacked because the journals of the Legislature failed to show that the act was read at length on three different days in each House, or that the rules were suspended so that it might be read a second or third time on the same day, as required by § 22, article 5, of the Constitution. The Constitution does not require that the journal show that the act was read at all, provided the journal recites the final passage of the act in legal form by a yea and nay vote, for the court will presume that the act was read in conformity to the Constitution. *Glidewell* v. *Martin,* 51 Ark. 559, 11 S. W. 882; *Waterman* v. *Hawkins,* 75 Ark. 120, 86 S. W.

844; *Pelt* v. *Payne,* 90 Ark. 601, 30 S. W. 426; *Helena Water Co.* v. *Helena,* 90 Ark. 597, 216 S. W. 26; *Rice* v. *Road Imp. Dist.,* 142 Ark. 457, 221 S. W. 179; *Ewing* v. *McGehee,* 169 Ark. 448, 275 S. W. 766. This presumption is conclusive, unless the journal entries themselves show to the contrary. The presumption cannot be overcome by oral testimony, as has been attempted in this case. *State* v. *Crowe,* 130 Ark. 272, 197 S. W. 4, L. R. A. 1918A, 567 Ann. Cas. 1918D, 460; *Harrington* v. *White,* 131 Ark. 291, 199 S. W. 92; *Perry* v. *State,* 139 Ark. 227, 214 S. W. 2; *Booe* v. *Sims,* 139 Ark. 595, 215 S. W. 659; *Road Imp. Dist. No. 16* v. *Sale,* 154 Ark. 551, 242 S. W. 825; *Ruddell* v. *Gray,* 171 Ark. 547, 285 S. W. 2.

The records of both houses not only show that the bill was read a third time and passed by a majority vote on a call of the yeas and nays, but also reflects that the act was read the first time on a different day, and on the day of the first reading the rules were suspended and the act was read a second time. There is nothing in the record reflecting that it was not read at length. The record does not state that it was read by title only.

The validity of the act is next assailed on the ground that the title was not as broad as the subject-matter of the act. The title or caption of the act is as follows:

"An act to prohibit the running at large of live stock in certain portions of Pulaski County, north of the Arkansas River."

Section one of said act not only prohibits running at large of cattle, horses, hogs, sheep or goats in that portion of Pulaski County, Arkansas, lying north of the Arkansas River and east of the main line of the Missouri Pacific Railway, but it also prohibits them from running at large in any stock-restricted district in Pulaski County created by order of the county court of Pulaski County, as provided for in § 4 of said act. Section 4 of said act is as follows:

"Upon the petition of a majority of the owners of acres in any area of Pulaski County containing 640 acres or more of land in one body, it shall be the duty of the

county court to lay off into a stock-restricted district the territory described in the petition, for the purpose of preventing the running at large in said area of any cattle, horses, hogs, sheep or goats, and to name as impounder of the district the person whose name appears in the petition, if the petition contains the name of an impounder recommended by the property holders, and, if not, then some one whom the county court thinks fitted for the place. All or any portion of any incorporated towns or cities may be included in such district."

It is obvious that the title is not as broad as the act, but there is no provision in our Constitution to the effect that the caption of an act must indicate all the subject-matter embraced in the act itself. *Dickinson* v. *Cypress Creek Drainage Dist.*, 139 Ark. 76, 213 S. W. 1; *Ewing* v. *McGehee*, 169 Ark. 453, 275 S. W. 766.

Lastly, appellant assails the validity of the order of the circuit court creating the restricted district upon the alleged ground that, if said act is valid, it does not apply to territory in Pulaski County south of the Arkansas River. The contention is that, when the title of the act is considered along with the act itself, and read in connection with act 698, relating to the same subject and passed at the same session of the Legislature, the manifest intention of the lawmakers was that said act 639 should not apply to or affect any territory south of the Arkansas River. The title or caption of act 639 is repugnant to the act itself and cannot be considered in arriving at the intention of the Legislature. If the act contained any ambiguity with reference to the territory covered, and the title was not repugnant to the provisions of the act, it might be looked to as an aid in arriving at the intent of the Legislature. The act, however, is not ambiguous as to the territory covered by its terms. Under § 1 thereof the county court is permitted to create a restricted stock district in Pulaski County, except the territory therein north of the Arkansas River and east of the main line of the Missouri Pacific Railway, in the man-

ner provided by § 4 of the act. By reference to § 4 it will be observed that the restricted district may be created by the court on petition of a majority of the owners of acres in any area of Pulaski County containing 640 acres or more of land in one body, meaning in any part of the county not north of the river and east of the railway. By reference to act No. 698, it will be observed that it does not cover the entire subject-matter covered by act 639, but related to hogs, sheep and goats only, in townships in the county lying south of the Arkansas River, and exempting a number of townships in the county entirely from its provisions. The acts cannot be read together as one act in arriving at the intention of the Legislature in either or both, because they cover different subjects and apply to different territory. Act 639 was a later act than act 698, and for this reason, as well as the reason given above, was not repealed by act 698.

No error appearing, the decree is affirmed.

AMERICAN INVESTMENT COMPANY v. HILL.

Opinion delivered April 4, 1927.

1. HIGHWAYS—VALIDITY OF ORDER LEVYING IMPROVEMENT ASSESSMENTS.—An order of the county court levying road improvement assessments against lands, pursuant to Road Acts 1919, p. 1251, § 9, is not void because entered in a separate record book from the regular book in which the court's orders were entered, which separate record was for road improvement district matters, and contained no opening or adjourning orders, and was not signed by the judge.
2. COURTS—SIGNING RECORDS.—The requirement that the judge sign this record before final adjournment cannot avoid orders made and judgments rendered by him without signing the record, as such requirements are directory.
3. JUDGMENT—FAILURE TO ENTER.—Orders made and judgments rendered by courts of record are not void on account of failure to enter them in the record book, since, if actually made, they may be entered *nunc pro tunc* at any subsequent time.

4. APPEAL AND ERROR—QUESTION NOT RAISED BELOW.—In a suit to cancel a sale of land for improvement tax, contention that the order levying the tax was void because it did not show the estimated cost of the improvement cannot be raised for the first time on appeal.
5. APPEAL AND ERROR—QUESTION NOT RAISED BELOW.—In a consolidated suit to foreclose a mortgage and to cancel a sale of land for highway improvement tax, the question whether a *lis pendens* was filed in the tax foreclosure proceedings, not raised in the trial court, cannot be raised for the first time on appeal.
6. EQUITY—DECREE IN VACATION.—Under Crawford & Moses' Dig., § 2190, the chancery court is authorized, under Crawford & Moses' Dig., § 2190, to render opinion and sign decree in vacation, where the cause was submitted and tried in term time.
7. EQUITY—REQUIREMENT OF SIGNING DECREE.—Parties *held* to have waived the requirement that the chancellor sign a decree by approving it.

Appeal from Prairie Chancery Court, Northern District; *John E. Martineau,* Chancellor; affirmed.

Craig & Wimmer and *Evans & Evans,* for appellant.

Emmet Vaughan, for appellee.

HUMPHREYS, J. This is an appeal from a decree rendered by the chancery court of Prairie County, Northern District, and entered in vacation, in consolidated cases Nos. 752 and 773. Case numbered 752, entitled American Investment Company *v.* Robert Hill, is a foreclosure suit, and case numbered 773, entitled R. W. Kenyon and American Investment Company *v.* Robert Hill, is a suit to cancel a tax sale of the real estate described in the mortgage sought to be foreclosed, made on the 31st day of December, 1922, by E. E. Stock, commissioner in chancery, for road improvement taxes assessed against same for the year 1920.

The consolidated case was heard upon the pleadings, exhibits thereto, and oral and documentary testimony, which resulted in a finding that the tax sale was valid, and a decree in words and figures as follows:

"Thereupon it is considered, ordered and adjudged and decreed by the court that the plaintiff, the American Investment Company, have and recover of and from the defendant, R. W. Kenyon, the sum of $431.41, and all cost

of this proceeding, for which execution may issue at law. It is further considered, ordered, adjudged and decreed by the court that the complaint of the plaintiffs against the defendant, Robert Hill, be and the same is dismissed for want of equity, and the cost as to the proceedings against the said Robert Hill be and the same are hereby adjudged against the plaintiff, the American Investment Company and R. W. Kenyon, and that the title to the said north half of the southeast quarter and south half of the northeast quarter of section 30, township 4 north, range 5 west, be and the same is hereby forever quieted in the said Robert Hill as against said plaintiffs, the American Investment Company and R. W. Kenyon, and that the said Robert Hill is entitled to a writ of possession thereto, upon application to the clerk of this court."

Appellants seek a reversal of the decree upon the alleged grounds, first, that there was no legal levy of improvement assessments; second, that no *lis pendens* was filed in the suit foreclosing the lien for improvement taxes; and, third, the decree was void because entered in vacation and not signed by the chancellor.

(1). The contention is made that the order of the county court levying the improvement assessments on the 29th day of March, 1920, against the lands in the district, is void because entered in a separate record book from the regular record book in which decrees and orders were entered, which separate record contained no opening nor adjourning orders of the court, and which was not signed by the county judge; it also appeared that the county judge did not sign the order of adjournment which was found on the regular record of the county court of date March 29, 1920. Section 9 of act 302 of the Acts of the Legislature 1919, Road Acts, vol. 1, page 1251, requires that the county court shall, at the time the assessment of benefits is filed, or at some subsequent time, enter upon its records an order, which shall have the force of a judgment, providing that there shall be assessed upon the real property of the district a tax sufficient to pay the

estimated cost of the improvement, with 10 per cent. added for unforeseen contingencies. It appears that the order in question was spread on the road improvement district record. We know of no good reason why the county court could not provide a separate record for the entries of orders pertaining to road improvement district matters, for purposes of convenience, rather than spreading them upon the same record book provided for entering orders made and judgments rendered by him. The requirement that a judge sign the record before final adjournment cannot void the orders made and judgments rendered by him, because such requirements are directory, and not mandatory. *Fernwood Mining Co.* v. *Pluma*, 136 Ark. 107, 205 S. W. 822. Orders made and judgments rendered by courts of record are not void on account of a failure to enter same in a record book. If actually made, such orders and judgments may be entered *nunc pro tunc* at any time subsequent to making the orders or the rendition of judgments.

Appellant also contends that the order is void because the testimony of the county judge was to the effect that he did not approve the original order of March 29, 1920, levying the taxes in said road improvement district. We do not so construe the testimony of the county judge. He seems to have at first thought that the district was organized before he became county judge, but finally stated that he supposed he approved the assessments against the lands filed with the county clerk.

The further contention is made that the order is void because it did not show the estimated cost of the improvement contemplated. We do not understand that act 302, Acts 1919, makes such requirement. Section 7 of the act provides that the assessment list shall be filed with the clerk, and the record reflects that this was done. The question, however, may be disposed of on the ground that it was not raised in the court below and that it is too late to raise it on appeal,

(2). We are unable to determine from the record brought up whether a *lis pendens* was filed pending the

tax foreclosure proceedings. As we understand, that question was not raised in the trial court, and is raised here for the first time. It is too late to raise the question for the first time on appeal. *Keller* v. *Whittington,* 106 Ark. 525, 153 S. W. 808.

(3). The record reflects that the consolidated case was submitted on November 3, 1925, which was a regular day of the November term of court, and that the decree was rendered in vacation, and, after being approved by the attorneys for appellants and appellee, was spread of record. We think that, when the record shows that the case was submitted and tried in term time and decided in vacation, it necessarily follows that the court took the cause under advisement. Having taken the cause under advisement, the court was authorized by § 2190 of Crawford & Moses' Digest to render an opinion and sign a decree in vacation. It is true that the decree was spread of record without being signed by the chancellor, but appellants waived this requirement by approving the decree. The decree was approved by the attorneys for both appellants and appellee.

Appellants did not bring this suit and offer to redeem from the tax sale within the time provided for redemption from tax sales.

No error appearing, the decree is affirmed.

McCLURE v. HARRINGTON.

Opinion delivered April 4, 1927.

TRIAL—INSTRUCTION ASSUMING DISPUTED FACT.—In a suit for damages to an automobile and contents, alleged to have been negligently pushed off a ferryboat into the river, it was error to assume total destruction of the car in submitting the issue as to the value of the property damaged, where the evidence showed that the car was recovered and had some value.

Appeal from Miller Circuit Court; *James H. McCollum,* Judge; reversed.

Will Steel, for appellant.

HUMPHREYS, J. This suit was brought by appellees against appellant in the circuit court of Miller County to recover $1,000 damages for a second-hand Buick automobile, valued in the complaint at $400, and certain cooking utensils, clothes and suitcases, valued in the complaint at $600, alleged to have been negligently pushed off appellant's ferryboat by his ferryman, after same had been received or accepted by said ferryman for transportation across Red River at the McClure ferry. It was alleged that the property belonged to Hill Harrington, one of the appellees, and that the other appellee, Motor Mart Company, held a lien upon the car for a part of the purchase money.

Appellant filed an answer, denying *seriatim* the material allegations in the complaint, and interposing contributory negligence on the part of appellee, Hill Harrington, in further defense of the cause of action. Appellant also alleged in his answer that appellees made no effort to minimize their damages by taking or disposing of the car and its contents after being pulled out of the river by appellant.

The cause was submitted upon the pleadings, testimony adduced by each party, and the instructions of the court, which resulted in a verdict and consequent judgment in favor of appellees for $400, from which is this appeal.

The testimony adduced presented three issues of fact for determination by the jury, as follows:

First. Whether or not appellant, as a ferryman and common carrier, had received the property for transportation and had exclusive custody of it at the time it fell into the river.

Second. Whether the automobile and its contents fell into the river through the contributory negligence on the part of appellee, Hill Harrington; and,

Third. Whether or not the car and its contents were lost and destroyed, or merely damaged by falling into the river.

The first and second issues of fact were submitted to the jury on conflicting testimony, under proper instructions, and the trial court did not err in refusing to set the adverse verdict to appellant aside.

The third issue of fact was not submitted to the jury for determination, under proper instructions, as it should have been. The court assumed that the property was totally lost or destroyed, and instructed the jury, if they found for appellees upon the issue of liability, that they should return a verdict in their favor for the value of the property at the time it was lost. In other words, the court submitted this issue to the jury upon the assumption that appellant had totally destroyed the property by allowing it to fall out of the ferryboat into the river. This was error, for the undisputed evidence did not reflect that the property was totally destroyed by falling into the water. At the time the automobile fell into the river the water was high. The river fell sufficiently, after two weeks, for appellant to pull the automobile and contents out of the water, which he did. The automobile was standing upright in the water on its four wheels, when reclaimed, and about the only injury it had sustained, in addition to the wetting and the time it remained in the water, was to the fenders. They were bent to some extent. One of the witnesses who helped pull the car out of the water said that he had had about two years' experience with second-hand automobiles, and the automobile in question was worth about $75 or $100.

On account of the error indicated the judgment is reversed, and the cause is remanded for a new trial.

OLD AMERICAN INSURANCE COMPANY v. ESKUE.

Opinion delivered April 4, 1927.

1. INSURANCE—AGE OF INSURED—PRESUMPTION.—The presumption that the age of insured in his application was truly stated was not overcome by a recital of a greater age in the proof of death by the beneficiary, signed by her, as she states, without reading and without knowing his age.
2. INSURANCE—SETTLEMENT UNDER MISTAKE.—A settlement and release executed by the beneficiary to the insurer, under a mutual mistake as to the insured's age, thereby reducing the amount payable under the policy, was not binding.

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

STATEMENT BY THE COURT.

Appellee, the beneficiary in the policy of $1,000, brought suit against the insurance company for recovery of the amount thereof, with penalty and attorney's fees; alleged that the settlement made with her by the adjuster of the company for $45 was procured by false and fraudulent representations made in reaching the settlement, and denied that she was bound thereby.

Demurrer to the complaint was filed and overruled, and the company answered, alleging the settlement of the claim for $45 in payment thereof, and exhibited with the answer its paid check made to the order of Mary Eskue, beneficiary, and the full release executed by her.

It appears from the testimony that the policy was issued and delivered, was in force at the death of the insured, and that there was due under its terms, if the settlement was not effective, $423.25.

The testimony also shows that, in the application for insurance written by the beneficiary at the request of the insured, who could not write, it was stated that he was born the 29th day of June, 1873, and his age at the next birthday was 53 years. The application signed September 1, 1924, also showed that a person over fifty-five years of age could not become a member of the company. Certificate and proof of death by the beneficiary,

Mary Eskue, stated that the insured was born on the 29th day of June, 1866. In the physician's certificate as to the proof of death, he answered question 3, "Give apparent age of deceased? 59 the 29th day of this month," which was sworn to on the 8th day of June, 1925.

When the proofs of death were received, showing that the insured was more than fifty-five years of age at the time of the application and issuance of the policy, an adjuster was sent to the beneficiary, who told her the company was not liable for payment of the policy, because the insured was more than fifty-five years of age at the time of the application therefor and issuance of it, and offered to return the premiums paid in settlement.

The beneficiary stated she did not know the age of the insured, had never known it, and asked that she have some little time to look into the matter. The adjuster insisted upon immediate settlement, and she finally accepted $45 in settlement, with the statement of the adjuster that the insured was too old to become a member of the association.

She testified that she did not make out or write her answer in proof of loss, and did not state that deceased was born on June 29, 1866; that she did not know his age, did not have the application for insurance by her when the agreement for settlement was made and the money paid; that, when she wrote the application, she wrote down the statement of deceased correctly and as he gave it, according to which he was within the age for insurance when the application was made and the policy issued.

There was also some other testimony tending to show that deceased was not beyond the insurable age at the time of taking out the policy.

The adjuster stated that he told the beneficiary that the proof of loss showed that the insured was over the insurable age when application was made and the policy issued, and there was no liability at all for the payment of the policy, but that the premiums would be returned.

The beneficiary acquiesced in his statement, but insisted that she ought to have $45, as that would pay off a mortgage on their mules, and she agreed to this, a check was given in payment, and the release executed.

Another witness stated that she was present when the settlement was agreed upon; that the adjuster offered $18.20 as the premiums and $25 more, and that it was finally agreed to pay and accept $45 on account of the mortgage on the mules.

Appellant, at the conclusion of the plaintiff's testimony, moved the court to instruct a verdict in its favor, because the evidence introduced was not sufficient to warrant a verdict for the plaintiff, and because of no evidence of fraud or duress in procuring the release. The court thereupon asked if there were any allegations in the complaint on mistake of facts, and, being answered in the negative, said that the plaintiff could allege either fraud, duress or mistake of fact, whereupon plaintiff asked to amend the complaint to show that the release was given on account of a mistake of fact, and the amendment was made and the motion to instruct the verdict overruled.

Testimony was introduced by defendant, the policy itself being exhibited, showing a memorandum written on the margin: "This policy canceled and surrendered to company; settled in full for $45," signed by the adjuster.

Mr. Judd, president of the company, testified that insured died on May 31, 1925; that the blanks of proof of death were sent out, and the physician's certificate returned showed the answer already stated above. He then sent an adjuster to the beneficiary to make settlement under the policy by return of the premium, $18.20, which was all she was entitled to, and that, upon the age represented in the application, the maximum amount of the policy would have been $423.25. He said, too, that he was an expert on handwriting, and believed that the date of birth written in the proof of loss was written by the beneficiary, insured's wife.

It was conceded that Mr. Judd had stated correctly the amount that could be recovered under the terms of the policy, if it was valid.

Appellant asked for a special finding by the jury, which was denied, and the court instructed the jury, which returned a verdict in appellee's favor for the amount agreed which was the maximum that could be recovered under the policy, and, from the judgment thereon, the appeal is prosecuted.

John L. Crank, for appellant.

George G. Stockard, for appellee.

KIRBY, J., (after stating the facts). The appellant contends that the testimony shows conclusively that the insured was over the insurable age of fifty-five years at the time of the application for and issuance of the policy and that the verdict is not supported by the evidence.

If the statements of the proof of death was the only evidence in the case, this contention would be correct, since the undisputed testimony would show such to be the fact; but there was other testimony, and the positive statement in the application made by the insured himself, according to the testimony of the beneficiary, who wrote it, giving the day and year of insured's birth, which showed him within the insurable age, and there was also other testimony tending to show that he was not beyond the insurable age, and the jury found in appellee's favor on the conflicting testimony.

In Joyce on Insurance it is said: "A presumption exists that the applicant has truly stated his age, in the absence of proof to the contrary, and the burden is upon assurer to disprove such statement, and such presumption is not overcome by the statements made in proofs of death furnished by one of the beneficiaries under the policy. This presumption will, however, be overcome by proper evidence; * * * but a misstatement as to age is not established by insufficient evidence."

Mrs. Eskue, the appellee, stated that she signed the proof of death, which was not written by her and which she did not read, but that she made no such statement as written therein relative to insured's age, which she said she did not know and never had known. It is urged, in any event, that there was a settlement in full of all lia-

bility under the policy and a release executed to the company by the beneficiary, that it was a compromise settlement of a disputed claim, and binding.

It is true that an agreement of settlement for $45 was made, the money paid and the release executed, and that no fraud was perpetrated by the insurance company in its procurement, but the undisputed testimony also shows that this was done under the mistake of facts by both parties as to insured's being over the insurable age at the time of issuance of the policy, and the settlement would not have been made otherwise. It is stated in 5 Joyce on Insurance, § 3319: "As a general rule, the statements made in the proofs of loss or of death are not conclusive upon the claimant, where they are made in good faith and with no attempt at fraud, and mistakes therein may be corrected."

This court has allowed releases consummating settlements of claims for damages set aside and held no defense to an action for the injury, where the settlement was based upon mutual mistake of fact. *St. L. I. M. & S. R. Co.* v. *Hambright*, 87 Ark. 614, 113 S. W. 803; *St. L. I. M. & S. R. Co.* v. *Morgan*, 115 Ark. 529, 171 S. W. 1187.

The jury having found, under proper instructions, that the release was executed under a mutual mistake of fact, the settlement had no effect as a compromise settlement of a disputed claim, and did not bar appellee's right to recover, having no such effect as a compromise of a disputed claim.

We find no error in the record, and the judgment is affirmed.

NATIONAL LIBERTY INSURANCE COMPANY v. TRATTNER.

Opinion delivered April 4, 1927.

1. INSURANCE — FOREIGN COMPANY — JURISDICTION. — Under Const. 1874, art. 12, § 11, and Crawford & Moses' Dig., § 6063, relating to foreign corporations doing business in the State and providing for service of process on the Insurance Commissioner in actions against foreign insurance corporations, an insurance corporation of another State cannot be sued in Arkansas on a contract of insurance made in the other State with a resident of that State, covering property located therein.
2. CORPORATIONS—LIABILITY TO BE SUED.—At common law, corporations could not be sued out of the State of their domicile, under the laws of which they were created or organized.
3. VENUE—TRANSITORY ACTION.—An action on a fire insurance policy is transitory, and at common law could be brought in any jurisdiction where the defendant could be found or lawfully summoned to appear, or where defendant voluntarily appeared without objecting to the jurisdicition of the court.
4. STATUTES—EXTRATERRITORIAL EFFECT.—The Legislature is presumed to intend that its statutes shall not apply to acts or contracts done or effected beyond the limits of the State and having no reference to or effect upon persons or property in the State.

Appeal from Craighead Circuit Court; *G. E. Keck*, Judge; reversed.

STATEMENT BY THE COURT.

Appellee brought this suit in the Craighead County Circuit Court to recover for the loss of his stock of merchandise, of the value of $10,500, and fixtures of the value of $1,500, on seven policies of fire insurance, aggregating $12,000, the property having been destroyed by fire. The goods and fixtures, at the time the policies were issued and the loss occurred, were contained in a store on South Broadway, city of St. Louis and the State of Missouri, in which city and State the plaintiff lived and the policies, which were standard fire insurance policies, were issued.

Summons was served on Bruce T. Bullion, Insurance Commissioner, agent for service, by the sheriff of Pulaski County, Arkansas, in that county.

The defendants are foreign corporations authorized to do business in this State, having complied with the conditions required by law. They appeared specially for that purpose, and filed a motion to quash the summons, alleging that they are foreign corporations authorized to do business in this State.

"Having authorized, pursuant to the laws of this State, service upon it of legal process in actions upon contracts entered into solely in this State; that defendant has at no time consented in any wise to the service of legal process upon it by service upon the Insurance Commissioner and Fire Marshal of this State in actions upon contracts made by it without this State; that the contract of insurance sued upon herein was made in the State of Missouri, where the plaintiff at the time resided, and where the property insured at the time of the insurance and the time of its alleged loss was located, and that the plaintiff has, at all times since the execution of said contract of insurance, been, and is now, a resident of the city of St. Louis and State of Missouri; that the said policy of insurance sued upon herein was issued by the defendant as a foreign contract, executed by it in the State of..... and delivered to the plaintiff in the State of Missouri, and is no more subject to regulation by the laws of this State than any other contract, and, consequently, any law prescribing special service upon defendant to enforce collection because it is a contract of insurance is a special law, and is in contravention of both the Constitution of the State of Arkansas and the Constitution of the United States; that § 6063, Crawford & Moses' Digest of the Statutes of the State of Arkansas, 1921, whereunder service is attempted to be had in this action, upon the defendant, upon a contract of insurance not entered into in this State, is in violation of the Constitution of the United States, § 1 of the Fourteenth Amendment to said Constitution. * * *

"That the said section of said statute is also in violation of the Constitution of the State of Arkansas, §§ 3 and 18 of article 2.

"That, under and by virtue of the said provisions of the Constitution of the United States and the Constitution of the State of Arkansas, the defendant, a foreign insurance company, which has not consented to service upon it upon causes of action arising in other states, is entitled to the same rights and privileges as any other citizen of the United States, and consequently, in view of the constitutional provisions hereinabove set forth, the said purported service of the writ of summons as aforesaid is null and void, and the said writ of summons and the return of service on said writ of summons should accordingly be quashed.

"Defendant further moves to quash the writ of summons herein and return thereon for the following reasons:

"Defendant now is, and, during all of the times mentioned in said complaint, was, a foreign corporation, licensed to do business in this State under and by virtue of the provisions of article 12, § 11, of the Constitution of the State of Arkansas; that, under and by virtue of said provisions of said Constitution and the statutes of the State of Arkansas enacted in aid thereof, this defendant is not required to consent to, nor has it consented to, service upon it of any process by serving the Insurance Commissioner, Fire Marshal or other authorized agent, except as to contracts made or business done in this State. The contract sued on herein is a contract of fire insurance, made and executed by the defendant at its home office in the State of.....and delivered to the plaintiff in the State of Missouri, and is a contract to insure against loss by fire to property located in the city of St. Louis, and State of Missouri. That the loss complained of occurred in the city of St. Louis and State of Missouri, and the plaintiff now is, and was at the time of the filing of the complaint herein, a resident of the State of Missouri. That the service of summons in this cause upon the Insurance Commissioner and Fire

Marshal of the State of Arkansas was without authority of law, and was and is void."

Another motion to quash was also filed, under special appearance, denying the jurisdiction of the court because no service of summons had been made upon any one authorized to receive service for the corporation, because the insurance policy sued on was not issued in Arkansas; the property insured was not in Arkansas; the loss did not occur in Arkansas; the plaintiff is not and has not been a resident of Arkansas; because, under the statute authorizing it to do business in the State, it was required only to accept service in certain cases in suits arising from contracts entered into in this State, and for the benefit of those holding claims properly payable in this State; alleged the attempt to secure service herein was a violation of the defendant's right under the Fourteenth Amendment of the Constitution of the United States; that the statutes of Arkansas do not authorize the service of process in the manner herein upon cause of action of the kind sued on, and that the application of the statute to this action is prohibited by §§ 3 and 18 of article 2 and § 11 of article 12 of the Constitution of Arkansas.

A response was filed to the motions to quash, and, upon a hearing, they were overruled and exceptions saved, and, without waiving their rights under the motions to quash, the answers were filed.

Testimony was introduced tending to show the value of the goods and fixtures insured, the loss, and the denial of liability by the companies. The testimony showed that the plaintiff was a resident of the State of Missouri; that the goods and fixtures covered by the policies were contained in a store or building in the city of St. Louis, that State, where the plaintiff was a citizen and resident, and where the policies of insurance were delivered and the loss occurred.

The evidence was conflicting as to the value of the property and cause of the fire and loss, some of the testi-

mony tending to show that the fire and loss was due to an explosion, for which the company could not be held liable.

After the testimony was in, the appellant asked leave to amend its answer, striking out the clause admitting the complete denial of liability, which was refused.

The jury were instructed, and returned a verdict in favor of the insured, and, from the judgment thereon, this appeal is prosecuted.

Leahy, Saunders & Walther and *Gautney & Dudley,* for appellant.

Abbott, Fauntleroy, Cullen & Edwards and *N. F. Lamb,* for appellee.

Greensfelder, Dyott & Grand, and *Hawthorne, Hawthorne & Wheatley, amici curiae.*

KIRBY, J., (after stating the facts). Appellant contends that the court erred in not sustaining its motion to quash the summons; that it did not consent to service of summons upon it in this State in such actions, but only in order that it might be authorized to do business here in compliance with the requirement of the laws in that respect, and that the court was without jurisdiction to render judgment against it herein.

The facts are undisputed that appellant company is a foreign insurance corporation authorized to do business here under our laws; that the contract for insurance was made in Missouri, where the property insured was located, in the building in the city of St. Louis, of which State the plaintiff is a citizen and resident, and was at the time of the issuance of the policy, and when the loss occurred; that plaintiff and defendant, a foreign corporation, are non-residents of the State of Arkansas, the corporation only doing business in this State as a foreign insurance corporation.

Section XI, article 12, of our Constitution, provides:

"Foreign corporations may be authorized to do business in this State under such limitations and restrictions as may be prescribed by law; provided that no such corporation shall do any business in this State except while it maintains therein one or more known places of busi-

ness and authorized agent or agents in the same, upon whom process may be served; and, as to contracts made or business done in this State, they shall be subject to the same regulations, limitations and liabilities as like corporations of this State." * * *

Section 6063, Crawford & Moses' Digest of the Statutes, provides: "No insurance company, not of this State, nor its agents, shall do business in this State until it has filed with the Insurance Commissioner and State Fire Marshal a written stipulation, duly authenticated by the company, agreeing that any legal process affecting the company, served on the Insurance Commissioner and State Fire Marshal, or the party designated by him, or the agent specified by said company to receive service of process for the company, shall have the same effect as if served personally on the company within this State. And if such company should cease to maintain such agent in this State, so designated, such process may thereafter be served on the Insurance Commissioner and State Fire Marshal; but, so long as any liability of the stipulating company to any resident of this State continues, such stipulation cannot be revoked or modified, except that a new one may be substituted, so as to require or dispense with the service at the office of said company within this State, and that such service, according to this stipulation, shall be sufficient personal service on the company. The term 'process' includes any writ, summons, subpoena or order, whereby any action, suit or proceeding shall be commenced, or which shall be issued in or upon any action, suit or proceedings."

Under the provisions of the Constitution, such foreign insurance companies may be authorized to do business in the State upon the appointment of an agent upon whom process may be served, and, "as to contracts made or business done in this State," are subject to the same limitations and liabilities as like corporations of the State, and, under the statute requiring the appointment of such agent, "so long as any liability of the stipulating company to any resident of this State continues, such

stipulation cannot be revoked or modified, except that a new one may be substituted so as to require or dispense with the service at the office of said company within this State, and that such service, according to this stipulation, shall be sufficient personal service on the company." C. & M. Dig., § 6063.

In *American Casualty Co.* v. *Lea,* 56 Ark. 511, 20 S. W. 416, it was held that a foreign insurance company, authorized to do business in this State, after having appointed the Auditor its agent to receive service of process, could be sued by a resident in the courts of this State for libel committed here. That was a petition by the insurance company to this court, praying a writ of prohibition against the circuit court from proceeding in the cause pending therein, the suit for libel in which process was issued against defendant and served on the Auditor of State as agent for the insurance company, alleged to be a foreign corporation, organized in the State of Maryland, "and doing an accident, casualty and liability insurance business in this State, and no other business in this State." The insurance company contended that it could be sued in this State only upon liability growing out of its insurance contracts, while it was doing no other than insurance business in the State, and that it could not be held to answer upon this service in a suit for libel committed in the State.

The writ was denied, the court saying: "We are not prepared to accede to the proposition that a foreign insurance company, doing only an insurance business in this State, can be sued only upon liabilities arising out of its insurance contracts made in this State. * * * We understand that, when the foreign corporation agrees to 'be found' in the State, it may be sued as a domestic corporation or a citizen of the State upon any liability upon a cause of action arising within the State." The cause of action arose out of or was an incident to "contracts made or business done in this State," the publications complained of being made in advertising the company's business.

In the other Arkansas cases cited, wherein judgment was rendered upon causes of action arising outside of the State, all the parties were either not nonresidents of the State or no proper objection was made to the jurisdiction of the court on that account; in other words, the precise question raised by this motion to quash the service has not been heretofore involved or decided in any cause determined by this court.

At the common law, corporations could not be sued out of the State of their domicile under the laws of which they were created or organized.

This is a transitory action, it is true, which, under the common-law rule, could be brought in any jurisdiction where the defendant could be found or lawfully summoned to appear, and a recovery could have been had here had the insurance company voluntarily appeared and defended, without objection to the jurisdiction of the court. Timely objection was interposed, however, and insisted upon throughout the proceedings in the trial court, and this court is now urged to reverse the judgment of the lower court for erroneously holding that service of summons could be effectively made upon appellants within this jurisdiction.

The State has no special interest in enforcing the rights of citizens and residents of other States on causes of action arising outside its boundaries against foreign corporations doing business in the State, but is chiefly interested in administering justice under the forms of law, to all persons entitled to seek remedies in its courts, for protection and enforcement of their rights, and for redress of injuries and wrongs, promptly and without delay.

A fair construction of our law under the provisions of which foreign corporations are authorized to do business in the State upon the appointment of an agent upon whom process can be served, made primarily to secure local jurisdiction in respect of contracts made and business done within the State, would seem to require only that such corporations shall be subject to suit for any

liability arising from or growing out of contracts made or business done in the State or necessarily incident thereto, and not that they shall be required by service of summons upon said agent to be subjected to suits of nonresidents of the State upon foreign causes of action, transactions and causes of action arising outside the State and in no wise incident, related to, or connected with contracts made or business done in the State.

The Legislature (quoting syllabus) is presumed to intend that its statutes shall not apply to acts or contracts done or effected beyond the limits of the State, and having no reference to or effect upon persons or property in this State. *State* v. *Lancashire Fire Ins. Co.*, 66 Ark. 466, 51 S. W. 633, 45 L. R. A. 348.

We are not unmindful of the decisions of the courts of other States holding a different view and giving larger scope to statutes of like kind in their construction, but we do not think comity requires that our courts shall be unduly burdened with litigation of actions of nonresidents against foreign insurance corporations doing business here, upon causes of action arising entirely outside of our jurisdiction and having no relation whatever to the contracts made or business done by such foreign corporation within the State, under the requirements of our laws providing therefor.

The Supreme Court of the United States, which follows the construction of such statutes put upon them by the courts of the State of their enactment, has expressed a leaning toward such construction of like statutes as that made by this court of the statute under consideration herein. In *M. P. R. Co.* v. *Clarendon Co.*, 257 U. S. 533, 42 S. Ct. 210, 66 L. ed. 354, Chief Justice Taft, for the court, said: "In dealing with statutes providing for service upon foreign corporations doing business in the State upon agents whose designation as such is especially required, this court has indicated a leaning toward a construction, where possible, that would exclude from their operation causes of action not arising in the business done by them in the State."

It follows, from the view expressed, that the court erred in not sustaining the motion of appellant to quash the summons, and for such error its judgment will be reversed, and the cause dismissed. It is so ordered.

FEDERAL LAND BANK OF ST. LOUIS v. GOODMAN.

Opinion delivered April 4, 1927.

1. BILLS AND NOTES—TIME FOR PRESENTING CHECK.—In the absence of special circumstances excusing delay, where the payee of a check and the bank on which it is drawn are in the same place, reasonable diligence requires the check to be presented for payment not later than the day after it is received, and delay beyond that time without excuse will discharge the drawer from liability if he is injured by the delay.
2. BILLS AND NOTES—TIME FOR PRESENTING CHECK.—A check must be presented for payment within a reasonable time; the question what is a reasonable time depending on the circumstances of the particular case.
3. BILLS AND NOTES—PRESENTATION OF CHECK—REASONABLE TIME.—What constitutes "reasonable time" for presenting a check for payment depends on the circumstances of the particular case, and means such time as a prudent man would exercise or employ about his own affairs.
4. BILLS AND NOTES—TIME FOR PRESENTING CHECK.—One residing in Memphis, Tenn., who received exchange drawn on a Memphis bank on Friday after banking hours, acted within a reasonable time in depositing the exchange with another local bank on Saturday following, the exchange being presented to the drawee bank on the following Monday morning.
5. MORTGAGES—PLACE OF PAYMENT.—A mortgagee residing in Memphis, Tenn., is not concluded by his refusal to accept payment tendered in Arkansas when the contract required payment to be made in Memphis.
6. MORTGAGES—CANCELLATION OF RELEASE.—Where a deed of release of a mortgage was executed and recorded under mistaken belief that the debt had been paid, and the mortgagee, immediately upon discovery of that fact, placed on the margin of the record a statement that the release was canceled, he is *held* to have acted with due diligence.
7. BANKS AND BANKING—PAYMENT—WHAT LAW GOVERNS.—Whether a drawee bank, which had on deposit money of the drawer,

could refuse payment of exchange on the drawer bank's insolvency, on the ground that the drawer bank was indebted to the drawee on unmatured notes, was for determination under the law of the place of payment.

Appeal from Crittenden Chancery Court; *J. M. Futrell,* Chancellor; affirmed.

J. R. Crocker and *R. V. Wheeler,* for appellant.

Davis & Costen, for appellee.

MEHAFFY, J. Appellee began suit in the Crittenden Chancery Court, and, on October 19, 1925, the court rendered its judgment in favor of appellee and against the appellants. Tommie Hollowell was the owner of a tract of land, and he executed note and mortgage to Abe Goodman, trustee, of Memphis, Tennessee, for $827. Hollowell applied for a loan from the Federal Land Bank of St. Louis, pledging the same land as security for payment of the loan. The application was made through the Tri-County National Farm Loan Association, and James C. Moore was secretary and treasurer of this association, and he was also the active vice-president of the Bank of Commerce of Earle, Arkansas. George F. Scott was an abstracter, and was assistant to Moore as secretary and treasurer of the National Farm Loan Association. Hollowell's application for loan was approved, and, on November 1, 1924, a note and mortgage were executed by Hollowell and his wife in favor of the Federal Land Bank of St. Louis. The mortgage was duly recorded in Crittenden County, Arkansas.

The Federal Land Bank of St. Louis issued its check for the sum of $938.75, mailed said check to J. C. Moore, as secretary and treasurer, and to the borrower. It was given to pay the debt due to Abe Goodman.

Moore received the check November 19, and credited the amount on the books of the Bank of Commerce to Tommie Hollowell and issued exchange of the Bank of Commerce, drawn upon the First National Bank of Memphis, Tennessee, in favor of Abe Goodman, for $827.

Moore delivered the exchange to Scott for the purpose of delivery to Goodman, in satisfaction of the lien

held by Goodman. On the 22d day of November Scott wrote to Goodman, asking him to execute and send to the Bank of Marion, Arkansas, the release which he inclosed in that letter, and, upon presentation, he would pay the bank the amount due.

Goodman wrote Scott, declining to send the release, as the notes were made payable in Memphis, and stated that, if they would have their bank instruct their correspondent here to pay him the amount stated, he would deliver them the notes, marked paid, and also execute the quitclaim deed Scott inclosed.

Scott went to Goodman's office in Memphis, Tennessee, Friday afternoon, November 28, 1924, after the Memphis banks were closed for the day, arriving between three and four o'clock. There was some testimony that he arrived there and delivered the exchange to Goodman between 1:30 and 2 P. M. on the 28th.

Scott, who delivered the deed, was dead at the time of trial. Goodman executed the release deed upon delivery to him of the exchange. The Bank of Commerce of Earle was open for business during the banking hours of Saturday, November 29, but did not open for business Monday morning.

Goodman, after receiving the exchange on the 28th, having received it too late to deposit it, put it in his safe, and, on Saturday morning, the 29th of November, deposited it in the Bank of Commerce & Trust Company, at Memphis, Tennessee.

Memphis, Tennessee, has a clearing-house association, and the exchange was presented to the First National Bank, through the clearing-house, on Monday morning, December 1, 1924, and payment refused because the Bank of Earle was reported closed.

Goodman's office in Memphis is within forty feet of the First National Bank. The release deed executed by Goodman was placed on record in Crittenden County immediately, having been filed for record the same day it was executed, November 28, 1924, at 4 o'clock P. M.

The Bank of Commerce of Earle had on deposit to its credit in the First National Bank of Memphis, on December 1, subject to check, over $6,000, but the Bank of Earle was indebted to the First National Bank in the form of notes not matured. When the exchange was returned unpaid, Goodman placed on the margin of the record of the release deed a statement that it was erroneously given and without consideration, and canceled the release deed, certifying that it was void. This was done on December 19.

Appellee's complaint set up the facts which are in substance outlined above, and the Federal Land Bank answered, and stated that the advance was made, secured by a mortgage upon the faith of a release deed, and that plaintiff, by his own negligence, failed to collect the exchange, as the same would have been paid to Goodman on either the day of its receipt or the following day. It filed a cross-complaint against the First National Bank of Memphis and the original plaintiffs, Bank of Commerce of Earle, and Loid Rainwater, Bank Commissioner.

The Bank Commissioner entered his appearance, but no service appears upon any of the other cross-defendants. The answer of the appellants also denied the allegations in plaintiff's complaint.

The chancellor found in favor of appellees against the appellants and others in the sum of $811.59 and interest, and decreed that the release deed executed by Goodman should be canceled and set aside; dismissed the cross-complaint of the Hollowells, held that the deed from the Hollowells to the Federal Land Bank was valid, but was subject to the first deed in favor of Goodman, and ordered the sale of the land to pay Goodman's judgment.

The appellant contends, first, that, if the holder of a check and the bank on which it is drawn reside in the same place, the check must be presented for payment not later than the day after its receipt. This presents the only real controversy in the case. The authorities cited by appellant, while announcing this rule, state that it is not absolute, and that the holder of a check must use due

diligence in the presenting of a check for payment. The authorities cited also hold that, if a bank fails after the holder, using due diligence, could have gotten the money on the check, the loss is his. Both parties agree that this question should be determined or decided under the laws of the State of Tennessee. The law with reference to this matter in the State of Tennessee is the same, however, as the Arkansas statute, and both statutes provide, in substance, that a check must be presented within a reasonable time after its issue.

One of the cases relied on by appellant in discussing this question is an Arkansas case, and the court said in that case: "In the absence of special circumstances excusing delay, the reasonable time for presenting a check, where the person receiving the same and the bank on which it is drawn are in the same place, is not later than the next business day after it is received; and, where they are in different places, reasonable diligence requires the check to be forwarded to the place of payment not later than the next business day after it is received by the payee, and presented not later than the day after it is there received. Inexcusable delay will discharge the drawer from liability if he is injured by the delay."

But the court also said in the same case: "A check, like a bill of exchange, must be presented for payment within a reasonable time, and what is a reasonable time will depend upon the circumstances of each particular case." *Burns* v. *Yocum*, 81 Ark. 127, 98 S. W. 956.

The above case was decided in 1906, before we had any uniform negotiable instrument law in Arkansas. The court in that case, however, as we have said, recognized the rule that all that was required of the holder of the check was to present it in a reasonable time, and that a reasonable time depended upon the circumstances of each particular case. It may be said that what is a reasonable time in any case depends on the circumstances of that particular case, and means such time as a prudent man would exercise or employ about his own affairs. It, of course,

does not mean indulgence in unnecessary delay on the one hand nor does it mean that he is to act without any regard to the circumstances and convenience of transacting business of that kind. It is whatever time is necessary to conveniently do what should be done in the particular case. It has been said that it means such length of time as may fairly, properly and reasonably be allowed or required, having regard to the nature of the act or duty and to the attending circumstances.

Since the establishment of clearing-house associations, and especially in cities as large as Memphis, it would be very inconvenient, if not practically impossible, for each person who received a check drawn on a bank in Memphis to present it to the particular bank upon which it was drawn. It would very greatly interfere with business, and due diligence does not require this.

It has been said: "The usage of trade and business in presenting checks for payment has been incorporated in the banking business of the State and country, and would be seriously affected if immediate payment to the bank was required. Bearing in mind the general commercial law, that the paying bank is required to satisfactorily identify the payee, * * * and bearing in mind also the vast number of checks daily used in the city of New York, it is apparent that, if the banks and trust companies of New York were required, immediately upon their receipt, to present deposited checks to banks upon which they are drawn in payment, confusion amounting almost to chaos would be the result. * * * A rule which required all the banks in the city of New York to present for payment all the checks deposited by their customers on the day of their deposit would compel them to decline business of that character and defeat the objects, in many cases, for which deposits are made, and put an end to certain facilities which result from obtaining credit for the amount of a check for the day of its deposit, without providing for its payment until the following morning."

The court further said: "I have not overlooked the cases which hold that a check on a bank in a city in which

the payee resides must be presented for payment not later than the day following its receipt. These cases may be distinguished from the case under review. The facts and circumstances in each must, in a great degree, govern the rule to be applied, and the facts in those cases differ materially from those of the present case." *Zaloom* v. *Ganim,* 72 Misc. Rep. 36, 129 N. Y. S., p. 85.

What is said about the business of New York is also true of Memphis, Tennessee, except in a different degree, but it would certainly be very inconvenient and a great interference with business as it is conducted today to require one to go to the bank on which the check was drawn, instead of depositing it as the appellee did in this case. As said by the New York court, it would create confusion and, in many instances, defeat the very purpose for which deposits are made, and we do not think any such conduct is required by law, and we therefore conclude that, in this case, the appellee deposited the check within a reasonable time.

Appellant next insists that the effect of the refusal to accept payment, when tendered, bars recovery. We do not agree with appellant in this contention. The facts are that appellee had a letter from one Scott, whom he did not know, as far as this record shows, but, even if he did, and if it had been from the debtor himself, it did not amount to a legal tender, and the appellee simply called his attention to the terms of the contract, which required payment in Memphis, and practically all the delay thereafter was caused, not by appellee, but by the agents of appellant. The appellee executed the release deed, of course, believing that the exchange was good, but, as soon as he found out that it was not, he put on the record the cancellation, and we think, from the proof in this case, that the appellee acted with reasonable diligence throughout the transactions connected with this case.

As to appellant's contention that the Memphis bank had no right to refuse to pay, that is also a question to be decided under the Tennessee law, and it seems to be the settled law that the bank had the right to refuse to pay.

although the Bank of Earle had money on deposit there, because the Bank of Earle was indebted to the Memphis bank. As we stated in the outset, the main question in the case seems to be whether the appellee presented the check for payment in a reasonable time, under the circumstances, and our conclusion is that he did, and the decree of the chancellor is affirmed.

PURNELL v. NICHOL.

Opinion delivered April 4, 1927.

1. APPEARANCE — FILING ANSWER. — Where the defendant in a divorce suit filed an answer when no summons had been issued, she thereby entered her appearance and could not assert that the decree was invalid for want of jurisdiction of her person.
2. APPEARANCE—WAIVER OF PROCESS.—Both the issuance and service of a summons are waived by a general appearance.
3. COURTS—CONSENT TO JURISDICTION.—Where the court has jurisdiction over the subject-matter, jurisdiction of the parties may be acquired by consent.
4. PROCESS—WAIVER OF OBJECTION.—Defects of jurisdiction arising from irregularities in the commencement of proceedings, defective process or even the absence of process may be waived by a failure to make seasonable objection.
5. APPEARANCE—JURISDICTION.—A court acquires jurisdiction over the person of plaintiff whenever he appears and invokes the power or action of the court in any manner, and when the defendant voluntarily appears in any case, and, without objection, proceeds, the court thereby acquires jurisdiction of his person, whether any summons was issued or served or not.
6. DIVORCE—INSUFFICIENCY OF ALLEGATIONS OF COMPLAINT.—A decree of divorce will not be vacated merely because the allegations of the complaint did not warrant it, where the testimony heard was not preserved but presumably supported the decree.
7. DIVORCE—EVIDENCE.—On a bill to review a decree of divorce, the court's finding on conflicting evidence against a claim of fraud practiced on the court *held* not against the preponderance of the evidence.

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

Martin, Wootton & Martin, for appellant.

MEHAFFY, J. The appellant, who was the plaintiff below, and D. T. Purnell were married in August, 1923, in Texas, and came back to Arkansas, where they lived together a while at Pine Bluff, and, on the 22d day of March, 1924, the chancery court of Jefferson County granted D. T. Purnell a decree of divorce, and D. T. Purnell paid her, at the time of the divorce, $3,500. D. T. Purnell died on September 14, 1924. When he died the appraisement showed the value of his estate to be approximately $60,000. On January 6, 1925, the appellant filed in the Jefferson Chancery Court a bill of review, in which she sought to have the decree of divorce vacated. The following, omitting the caption, is her complaint:

She alleged that the appellees, children and grandchildren of her said husband, combined and confederated for the purpose of alienating his affections from appellant and causing their separation and divorce, to the end that she might not share in his estate; that, being among strangers and surrounded by his relatives, she was so importuned and threatened by her husband that she was compelled to agree to his demands. She alleged that her husband was worth approximately $100,000, but that he solemnly stated to her his entire estate was worth not above $11,000, and proposed to pay her the sum of $3,500, provided she would permit him to get a divorce without defense; that she agreed thereto, induced by her miserable and unhappy condition, and by his said representation as to the value of his estate, and, on the same day, the said D. T. Purnell filed his bill seeking a divorce, and that a decree was rendered, granting a divorce on the same day the bill was filed; that no summons was ever served upon her, but her attorney filed an answer for her; that the case was submitted and decided without appellant being present and without any testimony being taken, and upon its being represented to the court that such decree was agreeable to her and her said husband; that fraud and imposition were practiced upon her and her solicitor by the said

D. T. Purnell assuring her and her solicitor that the entire value of his estate did not exceed the sum of $11,000, which statement, she alleges, was knowingly false and fraudulent upon the part of her said husband; that she accepted said statement, relying thereon, and believing it to be true, unaware of the falsity thereof, until after the death of her said husband, when it turned out he owned a large and valuable estate; that said judgment and decree were obtained by fraudulent imposition upon the court as well as upon her; that by said fraud she has been deprived of her dower and homestead rights in the estate of her husband. Prayer that the divorce decree be set aside and her dower and homestead interest in said estate be decreed.

She afterwards filed an amended complaint, setting out the misrepresentation in greater detail, and charging that fraud was practiced on her and upon the court.

The defendants answered, denying all the material allegations of the complaint.

Adelia Clement testified that she lived in Hot Springs, Arkansas, and that she was the mother of appellant; that her daughter became engaged to be married to D. T. Purnell, and was afterwards married in Texas. Witness was present at the wedding. She testified that they were to have been married earlier, but Purnell stated, on account of the opposition of his children, he could not come to Hot Springs. Later he wrote to her daughter to come to Texas, and she and her daughter went, and they were married in Texas. They afterwards returned to Pine Bluff, Arkansas, where they lived for about six months before their separation. After the separation, Purnell visited witness' daughter again and stated that he was going to remarry her. He said he was going to correspond with her, but the only way he could do it was to secure a postoffice box, because his children got all his mail. Witness' daughter received a telephone message from Mrs. Carter, telling her that Purnell was very ill, and wanted to see her, and she went to see him; that she had seen letters from Purnell to her daughter, and

that the letters were destroyed. After their marriage, when they returned to Arkansas, Purnell went to Pine Bluff and her daughter went to Hot Springs, and later Purnell 'phoned for her to come, and she went to Pine Bluff. She said Purnell had two orange groves in Texas. She testified that Purnell gave her daughter an automobile for a wedding present.

The appellant testified, in substance, that she was 37 years old; had lived in Hot Springs nearly all her life, and she met Purnell there about three months before their marriage; that they were married in August, 1923, at Edinburg, Texas; that she was introduced to Purnell at the Great Northern Hotel by a friend from St. Louis; that their marriage was originally set for September, 1923, in Hot Springs, but that Purnell wrote to her, stating that they would have to postpone the wedding because his daughter was threatening to kill herself, and he was afraid she would kill him. He wrote her from Laferia, Texas, asking her to come, and she and her mother went out there, and she was married; that she and Purnell lived together about seven months, about four months of which was in Pine Bluff; that his family never seemed to like her; she never could have the automobile for her own use; that there were many little things and disagreements; that they got along together fine in Texas; never had any trouble until they got to Pine Bluff, and then it was over the children. She said that Purnell had about fifteen relatives, and they all turned against her; that, one Sunday, she and Purnell were going to church, and that Purnell's son and Purnell drove off and left her ready, and she did not get to go. She finally decided they could not get along, and he asked her what she would take, and she told him she did not know, and he advised her to go see Judge Toney, his attorney. Purnell said he would give me one-third of his entire estate. Purnell offered me an automobile, and I told him I did not want to leave him. Afterwards, at his suggestion, I went to see Judge Toney again. I was being urged on, and then I had a talk with Mr. DeLay, who afterwards represented me.

Mr. DeLay found that a lot of property was listed in the name of Purnell, but Toney assured me and Mr. DeLay that this land had been conveyed to Purnell's children before the marriage, but the deeds had not been recorded. Mr. DeLay came out to see me after I refused to compromise. I did not know what to do. I went to see Judge Toney again, and he told me that my husband had made his estate to his children and he would give me one-third of what he had. I told him that was all right. I was paid $3,500, of which $200 went to my attorney." She testified that she believed, at the time, that this was one-third of the estate; that she was never served with summons, never present at court, nor testified; that they never had any trouble at all except on account of the children. He promised to leave there and go to California. "Mr. Purnell and a notary public came out and gave me a paper to sign, and I refused to sign because I thought it was a stock of goods, but it was a warranty deed. Mr. Purnell talked about moving to Florida. I never knew that he owned more property than he told me until I read his will in the paper, and I knew then that I had not received one-third of his estate."

Witness testified that she had been divorced twice before; that both her husbands got divorces from her, but that she got no alimony from either of them. "Mr. Purnell wrote me letters during the time we were separated. We lived in Pine Bluff right in the same block with practically all the family. We took our meals with his daughter, and she told me I could not stay there, she did not want me. We took some meals with his son, Sherman. I signed some papers at the bank before the divorce was rendered. I did not just understand it. Sometimes I ran little bills, when I could not make the money go far enough, but I always paid them as soon as I got time. At the time we separated my wardrobe bills did not amount to $1,000. I got a dress or two after the separation, but the divorce had not been granted. I had signed the papers, and I called up Mr. DeLay, and, after talking to him, I returned the dresses. When we were

discussing the settlement and a divorce Mr. Purnell and Mr. Toney had offered me, I wanted to see if it was all right. I believed what they told me, and took the money, and did not know that there was any fraud until after he died. After the divorce I went to New York and stayed at the Times Square Hotel."

Witness testified to a good many things about the disagreements being caused by the children, and that, but for them, they would have got along all right, and that she thought she was getting one-third of his property, and that that was the reason she settled.

Mr. DeLay testified, in substance, that he represented Mrs. Purnell, and that he went to see Mr. Toney, who represented Mr. Purnell, and got the impression that $11,000 was all that Mr. Purnell owned; that he did not know what his holdings were; that he was told that Mr. Hunt drew the deeds and took the acknowledgments for Mr. Purnell when he deeded it to his children, and that he thought it was all right, relying on the statements of Mr. Purnell and Mr. Toney. Mr. Toney's stenographer prepared all the writings that were prepared, with the understanding that the settlement was to be upon a basis of one-third of his holdings; that they went into court and presented the pleadings and decree to Judge Elliott, and that he was positive that no witnesses were examined, no witnesses were sworn, nor any testimony taken. The abstract copy furnished showed what purported to be Mr. Purnell's holdings. He had a memorandum before the settlement was made. He did not consult Mr. Hunt with reference to the matter. He said he could have seen Mr. Hunt if he had made up his mind that the statements of Toney and Purnell were not true. He is positive that no witnesses were sworn; knows that he was not, but he was interrogated by the court; could not say what Purnell or his son did or what testimony they gave, as he was not present, does not recall that the bill was filed before the decree.

There was then offered in evidence the will of Purnell, and also offered inventory filed by the executor,

which showed the estate to be worth a little more than $59,000.

Judge Elliott testified that "Toney came into court with some witnesses, and Mr. DeLay was present representing Mrs. Purnell, and I asked about the property rights set out in the decree. I asked Mr. DeLay if he represented the defendant and if she had read the decree and knew the property rights set out in the decree, and he said it was entirely satisfactory as far as the property was concerned. I told them I would hear the testimony, and D. T. Purnell and Sherman Purnell and, I think, a third witness, testified. I always put on the complaint 'cruel treatment.' That was the ground of divorce, and put 'witnesses, D. T. Purnell and Sherman Purnell.' I am not sure about the third witness, but I think there was a third. I administered the oaths to Mr. Purnell and his son. There were present Mr. DeLay, Mr. Toney, Mr. Purnell and Sherman Purnell, and I am not sure about the third witness. The allegations were borne out, otherwise I would not have granted the decree. They testified that Mrs. Purnell was abusive and treated him with neglect. No record was made of the testimony. The papers had been filed in the clerk's office. I never hear a case until the papers have been filed."

H. K. Toney testified about preparing the papers and the witnesses testifying and the agreement as to the property, and as to telling Mr. DeLay about what he thought the property was worth.

Sherman Purnell testified about the divorce, and that he was sworn when the decree was granted.

S. J. Hunt then testified that he had written some deeds and taken some acknowledgments for Mr. Purnell.

Two or three other witnesses testified about Mrs. Purnell's visit after Mr. Purnell took sick. The above is sufficient, we think, to show what the issues are.

Appellant's first contention is that the court never acquired jurisdiction of the divorce action, and she calls attention to § 1049 of Crawford & Moses' Digest, which provides that an action is commenced when a complaint

is filed and summons issued thereon. An action is not commenced until the complaint is filed and summons issued, but we think that this does not mean that the court cannot acquire jurisdiction over the person any other way. He also calls attention to 15 Corpus Juris, 797, to the effect that, where the mode of acquiring jurisdiction is provided by statute, compliance therewith is essential or the proceedings would be a nullity. This is true where the other party does not consent to the proceedings or where he does not appear. But it has been many times held that both the issuing and the serving of a summons may be waived, and it is stated in Corpus Juris: "The general rule is that a general appearance confers jurisdiction *in personam* over the party so appearing, but that a special appearance does not." 15 C. J. 801.

It has been often held that, where the court has jurisdiction over the subject-matter, jurisdiction over the particular action may be conferred by consent; and, where jurisdiction has attached and the cause of action or subject-matter is legally and properly within the power and cognizance of the court, it may proceed on consent of parties with reference to matters before it. It seems to be a general rule that, where the court has jurisdiction over the subject-matter and the cause of action, jurisdiction of both the plaintiff and defendant may be acquired by consent of the parties. This court has held that, even where a court would not have jurisdiction, yet where the persons entered their appearance and submitted themselves to the tribunal, they will be held to have appeared there for the purpose of submitting themselves to the county court as a court of arbitration, and, having elected to do this, they cannot now object that the county court was without jurisdiction in the matter. Having elected to submit themselves to the jurisdiction of the tribunal provided by the statutes, and having taken an appeal in accordance with the provisions of the statute, they must abide the result of their own voluntary action. *Morgan Engineering Co.* v. *Cache River Drain. Dist.*, 115 Ark. 437, 172 S. W. 1020.

"It is well established, as a general rule, that, where the court has jurisdiction over the subject-matter or cause of action, jurisdiction over the person of the parties may be conferred by consent, unless, of course, such a submission to jurisdiction would be violative of some statute. Accordingly, defects of jurisdiction arising from irregularities in the commencement of the proceedings, defective process, or even the absence of process, may be waived by a failure to make seasonable objection." 15 C. J. 808, § 104.

"Broadly stated, any action on the part of the defendant, except to object to the jurisdiction over his person, which recognizes the case as in court, will constitute a general appearance." 4 C. J. 1333.

A court acquires jurisdiction over the person of the plaintiff whenever the plaintiff appears and invokes the power or action of the court in any manner, and when the defendant voluntarily appears in any case, and, without objection, proceeds, the court thereby acquires jurisdiction over his person, whether any summons was issued or served or not. This court recently said: "While a suit upon the note and upon the contract of sale are entirely separate and distinct causes of action, the effect of defendant's answering the complaint and defending the action entered its appearance." *Bernard Mfg. Co.* v. *McRae Model Pharmacy, Inc.,* 171 Ark. 978, 287 S. W. 187.

In the above case the plaintiff proceeded on a different cause of action altogether, and on it no summons was ever issued, but the defendant filed an answer, and the court held that he thereby entered his appearance. In another recent case the court said: "We do not think any error was committed in permitting appellee to amend his complaint to allege a greater damage than that claimed in the original complaint. It is true there was no personal service, but appellants voluntarily filed an answer to the original complaint, and this action entered their appearance as completely as if they had personally been served with process." *Purse Bros.* v. *Watkins,* 171 Ark. 464, 287 S. W. 533.

We therefore conclude that, when Mrs. Purnell, by her attorney, filed an answer, she entered her appearance and thereby gave the court jurisdiction as completely as it would have had by issuing summons and serving on the defendant.

Appellant's next contention is that the allegations of the complaint did not warrant the decree. This is probably true, but it contained a sufficient allegation to give the court jurisdiction, and the court had jurisdiction of the person of the plaintiff and defendant, and, according to the testimony of the chancellor who tried the case, and other witnesses, the court took testimony, and there is no record preserving the testimony or showing what the testimony was, and the presumption therefore is that there was sufficient evidence introduced to justify the chancellor in granting the decree. The mere fact that that the complaint was defective did not prevent the plaintiff from introducing proof sufficient to justify the court in granting a decree, and the presumption is that this was done.

Appellant's next contention is fraud practiced upon the court and the appellant in procuring judgment. The evidence is conflicting on this issue, and we cannot say that the finding of the chancellor was against the preponderance of the evidence. The judge who tried the case testified that he swore the witnesses and took their testimony, and he is corroborated by one or two other witnesses.

There is some evidence that no proof was taken, but, as we have said, we think the preponderance of the evidence shows that evidence was taken. This answers the next contention of the appellant, which is that the decree was rendered without hearing the evidence.

After a careful examination of the record, our conclusion is that the defendant voluntarily appeared, thereby giving the court jurisdiction, and that the presumption is that the evidence taken by the court supplied any defect that there may have been in the complaint, and that, on the question of fraud, and also the question

of the decree being rendered without hearing evidence, the testimony is conflicting, and, since the finding of the chancellor was not against the preponderance of the evidence, his finding should be sustained, and the decree is therefore affirmed.

EL DORADO ICE & COLD STORAGE COMPANY *v.* DINGLE & KINCAID.

Opinion delivered April 4, 1927.

JUSTICE OF THE PEACE—ORDER DISMISSING APPEAL—REFUSAL TO SET ASIDE.—Where a cause was pending in the circuit court on appeal from a justice of the peace for more than nine months, and defendant's manager neglected to inquire when the case would be tried, it was not an abuse of discretion to refuse to set aside an order of dismissal on defendant's failure to be ready for trial on the day when the cause was set for trial.

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

J. R. Wilson, for appellant.

J. S. Brooks, for appellee.

MEHAFFY, J. On the 9th day of January, 1925, the appellees, plaintiffs below, filed suit in the justice court against the appellants for $300 for labor and material furnished defendants by plaintiff. Summons was issued, returnable on the 20th day of January, 1925, and summons was returned, served by delivering copy to M. B. Morgan, manager for El Dorado Ice and Cold Storage Company, more than 10 days previous to the day of trial. On the 31st day of January, 1925, M. B. Morgan filed affidavit for appeal and bond in the sum of $350. The transcript was filed in the second division of the circuit court within 30 days. On the 14th day of September, 1925, the circuit court met and set cases covering a period of two weeks, beginning the 19th of October, and, among others, this case was set. The court announced to the bar, on the 14th day of September, that a term of court would be held beginning on the 19th of October and

to be in session two weeks, in order to try cases and dispose of the crowded condition of the docket. Announcement was made several times during the term of the court, and request was made that all members of the bar be present on the day designated by the court, which was September 26. This case was set on September 26 for the 22d day of October.

When this case was called for trial neither the defendant nor his counsel was present, and no announcement was made by the defendant or his attorney, and the case was dismissed. The court had been informed that the defendant's regular attorney was sick, but that said attorney had employed other counsel to handle this case in order to be ready when the case was called. Shortly after the case was dismissed the defendant's attorney appeared and filed a motion to set aside the order dismissing the appeal, in which he alleged that the defendant's manager had been in Little Rock attending Federal court in the trial of an important case, and did not learn of the setting of the case until the day before the appeal was dismissed. Defendant's motion to set aside the order dismissing the appeal was as follows:

"Comes the defendant, the El Dorado Ice & Cold Storage Company, and represents to the court that the above cause was set down for trial in this court for the 22d day of October, 1925, and neither the manager of defendant company nor his attorney was aware of the setting of said cause for trial, and knew nothing of the setting until the morning that the cause was called for trial.

"The defendant's manager, M. B. Morgan, whose business it was to look after all litigation of the company, had been engaged in the preparation and trial of the cause of King v. The Republic Power & Service Company the entire time since the latter part of the preceding week. That was a suit for damages in the sum of $35,000 claimed against the defendant in that suit, and that trial required the presence of the said M. B. Morgan in the United States District Court, Little Rock, Arkansas, and

the defendant in this case was wholly unprepared and unable to go into the trial of this case when called, and his attorney knew nothing about the facts in the case, and had no opportunity to interview the witnesses, but offered to get the witnesses together if allowed time until 11 A. M. of the 22d day of October, 1925, and, had the defendant's attorney's request been granted by the court, the defendant could and would have been ready to go to trial at 11 A. M., as above indicated.

"The defendant had a meritorious defense to the claim sued on herein, which defense was as follows: The plaintiffs offered to install low-pressure gas burners at defendant's plant at Smackover, Arkansas, and take as their pay one-half the saving in cost of fuel over the preceding month's bill. The result of that experiment was a loss, and not a saving for the defendant.

"The plaintiffs admitted the truth of the above statement, and asked permission to try it another month, and the result of the month's experiment was a loss, and not a saving.

"The plaintiffs, in a further effort to demonstrate the efficiency of their low-pressure burners, got permission from M. B. Morgan to install the same style burners in the El Dorado plant of the above named defendant, and took out of the El Dorado plant six gas burners owned by M. B. Morgan, of the value of $65 each, and took them away, without any authority from the said M. B. Morgan, and appropriated them to plaintiffs' own use, and the plaintiffs have never returned to ascertain the character of service given by the burners installed by plaintiffs at the El Dorado plant. No price was ever made or agreed upon for the new burners, but the price was to be determined by the saving on fuel in the first month's service, just as in the case of the Smackover agreement.

"The first specific claim of plaintiffs' cause of action was made known to M. B. Morgan months afterward, when one Kincaid called and demanded $50 each for the burners, and the said Kincaid was informed that

the said defendant did not care to retain the burners, but wanted them removed and the defendant's old burners restored, to which Kincaid replied that he did not know where the old burners were, and attempted to get the defendant to keep their burners and pay $150 for the whole claim, and the defendant refused because the actual records show a loss on the new burners over the old burners.

"The next the defendant heard from this claim was about sixty days ago, when a laborer for Dingle & Kincaid claimed that Dingle & Kincaid were gone and had no further interest in this claim; that the said Dingle & Kincaid had transferred all their interest in the claim to the said Bland, one of their laborers, and that he was the sole owner of the said claim, and offered to take, and demanded, the sum of $150 in full settlement thereof.

"Your petitioner would represent that the above statement of the facts constitutes a full and complete defense to the plaintiffs' claim and cause of action, and that your petitioner would have established the facts above detailed by at least three competent witnesses, and that these witnesses could have been produced in court in two hours' time after the defendants learned that this case was set down for trial.

"Your petitioner prays the court to set aside its former order dismissing the appeal in this cause and reinstate the said cause upon the said docket of this court, and set the case down for trial on its merits, in order that the defendant may be given an opportunity to show that these plaintiffs have no interest in this cause of action and that the owner of this cause of action is not a party to this record, and that, in truth and in fact, the defendant is not indebted to the plaintiff nor to the owner of the alleged cause of action in the sum of $300 nor any other sum, but that the plaintiffs are indebted to the defendant for the six burners converted by the plaintiffs, in the sum of at least $300 as the cash value of the burners at the time of conversion, and, in order to impose no undue burden on the plaintiffs in this cause of action,

the defendant agrees to be taxed with the cost of the proceedings had on the 22d day of October, 1925, in this cause, including the cost of plaintiffs' witnesses, if any, as shown by the certificates issued in their behalf, and the defendant agrees and offers to comply with such orders and reasonable requirements as the court may make or impose, in order that the parties to this action may have a fair and equal opportunity to have their rights determined by a jury, under appropriate instructions from this honorable court, and for such other and further general relief as may be meet and proper, the defendant will ever pray."

The motion was subscribed and sworn to by M. B. Morgan on the 30th day of October, 1925. And on said day the court denied the motion of defendant, and defendant thereupon filed its motion for a new trial for the following reasons: First, that the order and judgment of the court was contrary to the evidence introduced on the motion; second, that the order and judgment of the court on the motion was contrary to the law; third, that the order and judgment of the court was contrary to both the law and the evidence.

Court overruled defendant's motion for a new trial; defendant excepted, prayed an appeal to the Supreme Court, which was granted, and defendant was given 120 days within which to file its bill of exceptions.

M. B. Morgan testified for the defendant, on the motion to set aside the order of dismissal, that he is manager of El Dorado Ice & Cold Storage Company; that he has heard the reading of this petition to the court, and knows the facts upon which the petition was based. He was asked to state to the court why he was not here and did not know anything about the setting of the case at the time it was set for trial in this court, and replied that, the week before the case was set for trial, "I was in Little Rock, in a case in the Federal court before Judge Trieber, and I was busy the entire week in preparing the evidence in that case, which was a $35,000 damage

suit, and I did not return to El Dorado until late Sunday night, and I did not know of the suit."

Upon further questioning, witness stated that it was Wednesday night that he meant he returned to El Dorado, and did not know of the suit until next morning about 9:15 o'clock, and that he was sick in bed when he was called up for the suit, and that was the reason that he was not at the office so that he could be reached about 8:30, and that he got up here after the case had been dismissed—about 30 minutes after it was dismissed—and that, if he had been given until 11 o'clock, he could have had his witnesses here; the witnesses were in Smackover, and he could have reached them by telephone, and he would have done so. Witness was then asked to state his defense in this action, and he stated it as follows:

"Our defense is this: That Mr. Kincaid came to me here and suggested that they had a low-pressure boiler (burner) which was more efficient than the Victory, which I was using, and asked the privilege of installing two of them in our Smackover plant, with the understanding that he was to receive one-half of the saving effected in the next month's service, so we consented to let him put these in there. Our bill at that time was running normally, if I remember correctly, about $600, and it was increased over the preceding month about $225. He continued to tinker with the burners, and attempted to reduce the bill for possibly sixty days, but all during that time the gas consumption was increasing over our former service. Still thinking that he could reduce our bill, he came to me and stated that, if he could have his men watch them, and see what the trouble was, and asked my permission to put them in at the El Dorado plant, where it would be more convenient for him to look after them; and, with the same understanding we had had before, I gave him permission to install them at the El Dorado plant. After that time Kincaid and Dingle left town, and I had never seen either one of them since then. The reason we are still using the burners is because he took our old burners off, took them away from the premises, and we

didn't have anything to use if we took these burners out. About April or May of this year Mr. Kincaid himself came over from Shreveport, and demanded—in fact, rendered me a bill for $50 apiece for the burners, and I informed him that I had not reached any agreement with Dingle to purchase the burners until they had shown their efficiency, and that they had not done, and I told him the facts of the agreement, and he attempted to settle on the basis of $150, and I advised him, at that time, that we didn't want the burners, that they were not satisfactory, and we would rather have our old burners returned to us."

Witness was further examined and cross-examined at length, but we deem it unnecessary to set out any more of the testimony, because the only question in the case is whether the court abused its discretion in refusing to set aside the order of dismissal.

It appears from the record that the suit was begun in justice court on the 9th day of January, 1925, and, while Morgan states that he was not served with summons, the return of the officer shows that he was served, but whether he was served or not is now immaterial, because, on the 31st day of January, 1925, Morgan filed an affidavit for appeal, and his appeal was perfected by filing his transcript with the clerk of the circuit court, as required by law, and this, of course, had to be done before the expiration of 30 days from the 9th day of January. He therefore knew that his case was pending in the circuit court at least from about the 10th day of January to the 22d day of October, more than nine months. It also appears that his regular attorney was sick, and had made arrangements with another attorney to try the case for him. Since he filed the appeal himself, knew that it was on the circuit court docket, and knew that it would be for trial, he should have made some inquiry as to when it would be tried. Evidently the appellant and his attorney knew that court was in session in El Dorado, and evidently knew the time of its meeting in the morning. Since they knew all these facts, it was their

duty to give some attention to the matter, and Morgan, before he came to Little Rock to try his case here, could have ascertained, or had his attorney ascertain, whether or not his case was set for trial in the Union Circuit Court. The trial court announced, when he overruled the motion, that the court was in session beginning with the 14th day of September; that announcement had been made for the members of the bar to attend, and that this announcement was made several times. These things were all done in open court, and the trial court had a knowledge of all the facts, and the setting aside the order of dismissal is like the granting or refusing a continuance in a case. It is a matter that is in the discretion of the court. It was a question for the trial court to determine whether the appellant had used due diligence to ascertain when his case would be tried, and due diligence in the preparation for the trial.

"Questions as to the trial or the continuance of causes rest so much in the sound discretion of the trial court that it must be a very capricious exercise of power or a very flagrant case of injustice that the appellate court will interpose to correct. * * * Continuances are largely in the discretion of the court, and that discretion will not be controlled unless there is a manifest abuse of it." *Spear Manufacturing Co.* v. *Shinn,* 93 Ark. 346, 124 S. W. 1025.

The trial court heard the motion and the argument on the motion, knew all the facts and circumstances, and this court has said: "The general rule is that continuances in criminal as well as in civil cases are in the sound discretion of the court, and that a refusal to grant a continuance is never ground for a new trial, unless it clearly appears to have been an abuse of such discretion and manifestly operates as a denial of justice." *Eddy* v. *State,* 165 Ark. 289, 264 S. W. 832.

"Granting or refusing a continuance in a criminal case is discretionary, and this court has many times held that the trial court's action will not be disturbed unless it

appears that there was an abuse of discretion. *Burt* v. *State,* 160 Ark. 201, 256 S. W. 361.

We cannot say in this case that the trial court abused its discretion in refusing to set aside its order of dismissal, and the judgment is affirmed.

PARK v. RURAL SPECIAL SCHOOL DISTRICT No. 26.

Opinion delivered April 4, 1927.

1. CERTIORARI—DISCRETION TO ISSUE.—The writ of certiorari is not a writ of right, but is a writ of discretion.
2. CERTIORARI—FUNCTION OF WRIT.—The writ of certiorari will lie to review the action of the county board of education.
3. CERTIORARI—WHEN WRIT DENIED.—Where the action of a board or tribunal sought to be reviewed by certiorari is correct, the circuit court must deny the writ, since it would be required to refuse to quash such action when brought before it.
4. SCHOOLS—AUTHORITY OF COUNTY BOARD OF EDUCATION.—Acts 1925, page 876, creating Rural Special School District No. 26 of Lonoke County, did not authorize the county board of education, nor was it otherwise authorized, to change the boundaries of such district or to dissolve the district.

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

Reed & Beard, for appellant.

Chas. A. Walls, for appellee.

McHANEY, J. Rural Special School District No. 26 of Lonoke County, Arkansas, was created by a special act of the Legislature, same being act No. 291 of the Acts of 1925, page 876, approved March 27, 1925.

On November 2, 1925, appellant, J. I. Park and 123 other electors within the boundaries of said district, filed in the Lonoke Circuit Court their petition for a writ of certiorari to the county board of education of Lonoke County, Arkansas, in which they alleged that the petitioners had, after giving the notice required by law, petitioned the county board of education to dissolve said appellee district, under the provisions of § § 8869 *et seq.*

of Crawford & Moses' Digest; that their petition had been dismissed without a hearing on the merits, and under an erroneous construction of law that it had no jurisdiction to try said cause; that no appeal would lie from said order of dismissal; and they prayed that a writ of certiorari issue to the Lonoke County Board of Education, directing it to send up a transcript of its proceedings therein for review by the circuit court, that the judgment of said board be quashed, and that it be directed to hear and determine their petition as provided by law.

Appellees responded to said petition, and denied that the board of education had dismissed appellant's petition under erroneous construction of law, but that said petition was dismissed on the ground that Rural Special School District No. 26 of Lonoke County was created by the Legislature under the special act above mentioned, and that the action of the Legislature in fixing the boundaries of said district was conclusive, final and binding on the board.

The court heard said petition for writ of certiorari, and, in denying same, said: "That the application for writ of certiorari should be denied and the petition filed herein should be dismissed, because it appears that the county board of education did not act illegally in dismissing the petition asking for a dissolution of Rural Special School District No. 26 of Lonoke County, Arkansas."

From the judgment of dismissal in the circuit court appellants have prosecuted this appeal.

This court has many times held that the writ of certiorari is not a writ of right, but is a writ of discretion. *Arkadelphia Milling Co.* v. *Clark County Board of Equalization,* 136 Ark. 180, 206 S. W. 70. It will lie to review the action of a county board of education. *Mitchell* v. *Directors of School Dist. No. 13,* 153 Ark. 50, 239 S. W. 371.

"Certiorari will not lie to correct a purely ministerial act, even though the performance of the act involves discretion." *Patterson* v. *Adcock,* 157 Ark. 186, 248 S. W. 904.

When it appears to the circuit court, on a petition for certiorari, that the action of the board or tribunal which he is called upon to review is correct, it is the duty of the court to deny the writ, for the reason that it would be required, under the law, to refuse to quash such action, since it was right to begin with.

We think the action of the circuit court was right in refusing to grant the writ, as, in our judgment, this case is ruled by the recent case of *School District No. 25* v. *Pyatt Special School District,* 172 Ark. 605, where the question for determination was whether the county board of education could change the boundary lines of a district created by a special act of the Legislature, and this court, in holding that it could not, used this language:

"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."

We have examined the act creating Rural Special School District No. 26, and there is no authority in the act authorizing the county board of education either to change the boundaries of the district or to dissolve the district. It establishes the boundaries of the district, and necessarily took the territory embraced in the district from other districts already created. The sections of the Digest referred to by appellants, authorizing the county board of education to dissolve school districts and attach the territory thereof to adjoining districts, certainly have no application to a school district created by special act of the Legislature subsequent thereto. More-

over, the act creating this school district expressly repeals all laws in conflict therewith.

It necessarily follows, from what we have said, that the circuit court would have been under the duty of refusing to quash the action of the county board of education, even though it had issued the writ, and its action in refusing to issue the writ, under these circumstances, was correct, and it is therefore affirmed.

JAMES v. BOARD OF COMMISSIONERS GREENE AND CRAIGHEAD COUNTIES DRAINAGE DISTRICT.

Opinion delivered April 11, 1927.

1. DRAINS—SUFFICIENCY OF PROOF OF CLAIMS AGAINST DISTRICT.—Under Sp. Acts 1921, p. 1159, § 3, repealing an act creating a drainage district and providing that claims for preliminary expenses duly verified, as in case of accounts, should be presented to the commissioners and paid by a levy of taxes, *held* that claims of banks for such expenses, duly verified by their cashier, and not contested by the district, should be paid.
2. BANKS AND BANKING—REPRESENTATION BY CASHIER.—Verification of a bank's claim by its cashier was the act of the bank itself, as the bank could only act through its officers.
3. APPEAL AND ERROR—OBJECTION NOT RAISED BELOW.—Objection that a bank's claim was verified by its cashier, instead of by its president, cannot be raised for the first time on appeal.
4. DRAINS—ALLOWANCE OF CLAIMS.—Allowance of claims for preliminary expenses against a drainage district by the commissioners under Sp. Acts 1921, p. 1159, *held* proper procedure, where the project had been abandoned.
5. DRAINS—ALLOWANCE OF CLAIMS FOR PRELIMINARY EXPENSES.—Evidence *held* to sustain a finding that claims allowed to certain banks by the commissioners of a drainage district were for preliminary expenses.
6. DRAINS—AUTHORITY OF DISTRICT TO BORROW MONEY.—Commissioners of a drainage district had authority to borrow money for preliminary expenses and to pay 6 per cent. interest thereon.
7. DRAINS—COLLECTION OF ASSESSMENT—PENALTY.—Provisions of Sp. Acts 1919, p. 516, creating a drainage district, that the preliminary expenses should be paid by a tax levy, and that 25 per cent. penalty for delinquency should be added on a proceeding to collect the assessment, under Acts 1909, p. 829, §§ 23, 24, *held* valid.

Appeal from Greene Chancery Court; *Horace Sloan*, special Chancellor; affirmed.

STATEMENT OF FACTS.

The board of commissioners of Greene and Craighead Counties Drainage District No. 1 brought this suit in equity against J. M. James and other landowners in said drainage district to foreclose a lien on their lands to pay an assessment for the preliminary expenses for organization and preliminary surveys of the lands of the district.

The Legislature of 1919 passed an act creating Greene and Craighead Counties Drainage District No. 1 in Greene and Craighead counties, Arkansas. Special Acts of 1919, page 516. Section 16 provides that, in order to do the work, the board may borrow money at a rate of interest not exceeding six per cent. per annum, may issue negotiable bonds therefor, and mortgage all assessments for the repayment thereof.

Section 27 provides that, in case the work of improvement contemplated by the district is not performed, all expenses incurred by the commissioners, including any obligations that they may have given for the purchase of plans, heretofore made for said improvements, shall constitute a first lien upon said lands and shall be paid by a levy of taxes upon the real property of the district, to be made by the commissioners in the manner hereinbefore set forth, but based upon the assessments for State and county purposes. No assessment of benefits was ever made by the commissioners in compliance with the terms of the act.

The Legislature of 1921 passed an act to repeal the act creating said drainage district, and provided that the affairs of the district should be wound up in compliance with § 3 of the act. Special Acts of 1921, p. 1159.

Section 3 provides that all claims against the district must be presented to the commissioners thereof, duly verified, as required in actions of account; and, if not presented within six months from the date of the

act, they shall be forever barred. The section further provides that it shall be the duty of the commissioners to levy upon the real property of the district a tax sufficient to pay the indebtedness thereof. It provides that, if the assessment of benefits has not been made and approved, it shall be made upon the assessed value of the property for State and county purposes as it appears upon the county assessment.

Within the dates provided by the repealing act, claims aggregating $19,907.38 were filed with the commissioners, and the same were allowed and approved by them at a regular board meeting, and the minutes of the meeting and the resolutions of the commissioners show that said claims were examined and allowed. The board of commissioners also passed a resolution providing that evidence of the indebtedness of the claims that had been allowed and approved for payment should be prepared and certificates of indebtedness given for the various claims. It was also provided that an assessment of 6 per cent. against all the lands in the district should be levied for the payment of said indebtedness. Among the claims allowed was that of the Security Bank & Trust Company for $3,539, and that of the Paragould Trust Company for $10,386.37. The claim of the Security Bank & Trust Company is recited to be a note executed by the president and secretary of the drainage district to said company, date July 6, 1920, due six months after date, with interest from date at 6 per cent. per annum. The claim is signed by the cashier of the company and duly verified by him. The cashier swore that the account was just and correct and that no part had been previously paid.

The claim of the Paragould Trust Company was also signed by its cashier and duly verified by him in the same manner as the account of the Security Bank & Trust Company. The claim of the Paragould Trust Company also recites that it is a note executed by the president and secretary of the drainage district to said company, due six months from date, with interest at the rate of 6 per cent. per annum.

The chancery court found the issues in favor of the plaintiff, and it was decreed that the lien of the drainage district against the lands situated in it and involved in this suit be foreclosed, in default of the payment of the assessment within the time provided in the decree. The case is here on appeal.

Gautney & Dudley, for appellant.

Robert E. Fuhr, for appellee.

HART, C. J., (after stating the facts). It is first contended that the decree should be reversed because the cashiers of the two banks signed the claims which were presented to the commissioners and swore that nothing had been paid towards the satisfaction thereof. It will be remembered that each claim recites that it was a note given to the bank by the commissioners of the drainage district. As we have already seen, the original act creating the district provides that, if the work of improvement is not performed, the preliminary expenses shall be paid by a levy of taxes upon the real property of the district to be made by the commissioners. The Legislature of 1921, in the act repealing the district, provides that the commissioners allow all claims presented to them as required by the act, and that they may levy an assessment upon the real property of the district in the manner provided by the act for the payment thereof. The repealing act provides that all claims must be presented to the commissioners, duly verified as is required in actions of account. Section 4200 of Crawford & Moses' Digest provides that, in suits upon account, the affidavit of the plaintiff, duly taken and certified according to law that such account is just and correct, shall be sufficient to establish the same, unless the defendant shall, under oath, deny the correctness of the account. In the case at bar the cashier of each bank verified the claim and stated that it was just and correct, and that nothing had been paid towards the satisfaction thereof. In addition to this the record recites that the commissioners had signed a note to each bank bearing 6 per cent. interest. No attempt was made by the land-

owners to show that the claims were not just and correct or that any part of them had been paid. The action of the cashiers of the banks in verifying the claims was the action of the banks themselves, for a bank can act in no other way than through its officers, and its cashier is the manager thereof. Michie on Banks and Banking, § 102 (5ca), pages 710-711; *Ib.* § 54, page 274, and § 110 (4), page 772.

But it is claimed by counsel for the defendants that, under § 1215 of Crawford & Moses' Digest, the verification of any pleading of a corporation may be by any officer or agent on whom the summons in an action against the corporation may be served, and that the president is the officer upon whom service of summons must be had under our statute. A sufficient answer to this contention is that no objection was made to the form of the verification of the claim as presented to the commissioners, and no attempt was made to dispute the validity of either claim. Hence, in any event, it would be too late to make the objection for the first time on appeal.

It is next sought to reverse the decree because the repealing act provides for the allowance of the claims by the commissioners. As we have just seen, the presentation to the commissioners and the allowance by them of the claims constituted a compliance with the provisions of the repealing act. Such method of procedure for the ascertainment of preliminary expenses when an improvement district is abandoned has been expressly approved by the court in *Gould* v. *Toland*, 149 Ark. 476, 232 S. W. 434, and other later cases.

It is next insisted that there is no finding that the claims allowed were for preliminary expenses. We think, under the circumstances, no other legitimate inference could be drawn. The act providing for the creation and organization of the district gave the commissioners the power to incur indebtedness for certain preliminary expenses, and provided that it should be a lien upon the lands of the district in case the improvement was not made. The record shows that the commissioners

borrowed certain money from the two banks in question and gave their notes as commissioners therefor. They allowed the claims of these banks when presented to them under the provisions of the repealing act. The attendant circumstances show very plainly that the amounts allowed were expenses incurred in the organization of the district and in making preliminary surveys. This view is strengthened when we consider the kind and character of the claims presented by other claimants and allowed by the commissioners. We are of the opinion that the facts presented by the record show that the claims of the banks were for borrowed money used in preliminary expenses, and we have decided that, under similar circumstances, the banks are entitled, as lenders of the money, to an allowance against the district. *Gould* v. *Sanford,* 155 Ark. 304, 244 S. W. 433; and *So. Crawford Imp. Dist.* v. *Brown,* 156 Ark. 267, 245 S. W. 821.

It is next insisted that it was error to allow interest on the claims. In the first place, it may be said that the act creating the district authorized the commissioners to pay 6 per cent. interest on money borrowed for preliminary expenses, and this was the amount allowed. In the next place, under the two authorities just cited, the commissioners had the inherent power to pay interest on the amount borrowed to be used in paying preliminary expenses. In each of the cases cited the statement of facts shows that the commissioners borrowed money and executed a note bearing interest at the rate of 6 per cent.

It is next insisted that the court erred in allowing a penalty of 25 per cent. Now, the act creating the district provides that, in case the work of improvement is not performed, all expenses incurred by the commissioners shall be paid by a levy of taxes to be made by the commissioners in the manner set forth in the act. Under § 11, where delinquencies are reported to the board of commissioners in payment of assessments, it is made its duty to add to the amount of the tax a penalty of 25 per cent. and to proceed to collect the same in the

manner provided by §§ 23 and 24 of act 279 of the Acts of 1909. The method adopted for the assessment of benefits for paying the preliminary expenses was valid, under our previous decisions. *Standard Pipe Line Co.* v. *Index-Sulphur Drainage District, ante* p. 372, and cases cited.

It follows from the views that we have expressed that the decree was correct, and should be affirmed.

WATERWORKS IMPROVEMENT DISTRICT OF ASHDOWN *v.* RAINWATER.

Opinion delivered April 11, 1927.

1. DEPOSITARIES—LIABILITY ON BOND—RELEASE BY EXECUTING NEW CONTRACT.—Where a bank's depository bond was conditioned that the bank would pay the deposit "on demand, together with interest," the bank's issuance of a new certificate of deposit at the end of the first year did not amount to the execution of a new contract releasing the sureties on its bond.
2. DEPOSITARIES—LIABILITY ON BOND.—The sureties on a bank's depository bond were not liable for payment of a deposit made after the execution of the bond and as a separate transaction from that intended to be secured.

Appeal from Little River Circuit Court; *Otis Gilleylen,* special Judge; reversed.

STATEMENT BY THE COURT.

Appellants instituted this action against appellees to recover the sum of $6,687.74, balance alleged to be due them for failure to pay over on demand funds belonging to appellants as improvement districts.

The record shows that, on the 26th day of July, 1922, the Arkansas State Bank made separate bids to the board of commissioners of Water District No. 1 of Ashdown, Arkansas, and to the board of commissioners of Sewer District No. 1 of Ashdown, Arkansas, to become the depository of the funds of said improvement districts. Each bid contained the following: "It hereby offers to

pay interest upon the daily balance, payable monthly or quarterly, at the rate of five per cent. And also states that if its bid is accepted it will execute a bond as required by the board of commissioners of said District No. 1."

The bid of the Arkansas State Bank was accepted by both of the improvement districts, and, in compliance with the terms of the contract, the bank executed a bond in the sum of $15,000 to each district, with five individuals as sureties. We copy from the body of each bond the following: "The condition of this bond is such, however, that, whereas the board of commissioners of said improvement district has deposited with said bank funds belonging to said districts, which said principal bank shall pay on demand, together with interest on daily balances at the rate of four and one-fourth per cent.

"Now, if said bank shall well and truly pay said funds upon demand, and interest as aforesaid, which interest shall be paid each quarter, then this bond shall be void; otherwise to remain in full force and effect."

At the end of the first year the bank issued to the commissioners what was termed a certificate of deposit in the sum of $4,170. Of this amount $4,000 was the amount which had been deposited in the bank by said improvement district from time to time, and $170 was interest. This certificate of deposit was renewed again on August 15, 1924, for $4,347.22. There was a distinct and separate deposit made at the bank by said improvement districts from time to time, which amounted, on April 9, 1924, to $2,084.84. A certificate of deposit was also issued for this sum.

Three of the sureties on the bond of the bank were members of its board of directors, and the other two had no interest in the bank. None of the sureties on the bond knew of the issuance of the certificates of deposit extending the time of payment for one year. They never authorized such a course or knew that it had been pursued.

The jury returned a verdict in favor of appellees, and appellants have duly prosecuted an appeal to this court.

A. P. Steel and *Norwood & Alley*, for appellant.

Shaver, Shaver & Williams and *A. D. DuLaney*, for appellee.

HART, C. J., (after stating the facts). It is first sought to uphold the judgment on the ground that the bond, by its terms, made the amounts deposited by the improvement districts in the bank payable on demand, and that the granting of the extension of the time of payment for one year by the commissioners constituted a new contract between the bank and the improvement districts which released the sureties on the bond. We do not agree with counsel in this contention.

The body of the bond relating to this phase of the case is copied in our statement of facts, and need not be repeated here. It recites, in short, that the board of commissioners of the improvement districts had deposited with the bank funds belonging to said districts, which the bank shall pay on demand, with interest on the daily balance. We are of the opinion that this language of the bond, when taken in connection with the bid, contemplated that there should be future as well as past deposits, which should be considered as one entire fund, and that it was the intention of the bond to secure the entire fund. The record shows that the funds already deposited and those deposited in the future at the end of one year after the bond was executed amounted to $4,000. This constituted the fund then on hand, after accounting for all deposits made from time to time and the items withdrawn by the commissioners during the course of the year.

An agreement was made to extend the time of payment for another year and to issue what was called a certificate of deposit embracing the principal and interest. This did not amount to the execution of a new contract, but was merely an extension of the time of pay-

ment; and, there being no consideration for its execution, the sureties on the bond were not released.

The clause of the bond undertaking that the bank should pay on demand did not use the word "demand" in the sense of a commercial instrument payable on demand, but it was used in the sense that the sureties on the bond obligated themselves to pay back the amount deposited in the bank and not checked out by the commissioners when required by them to do so. In other words, the bond was given to secure the performance of the contract by the bank as a depository of the two improvement districts. The bank was rightfully in possession of the funds of the improvement districts, and was under no obligation to pay them over to the districts until so required or until demand was made by them to do so. That this is the sense in which the word "demand" was used will be seen by the reasoning in the case of *Talley* v. *State,* 121 Ark. 4, 180 S. W. 330. That was a depository case, and it is evident that, in this case as in that, the word "demand" meant that the depository was not required to pay over the funds until a demand was made on it for that purpose by the treasurer who was entitled to the funds. In this view of the matter there was no change or modification of the terms of the contract which would have the effect to release the sureties on the bond. Neither can it be said that the so-called certificate of deposit was a renewal of the original obligation for a definite period which had the effect to release the sureties because it was a change in the terms of the contract.

As we have already seen, the certificate of deposit amounted to nothing more than an extension of time of payment of the amounts deposited, without any consideration for its execution. They were subject to be drawn out at the time the instrument was executed, and the mere indulgence of the bank for the period of a year without consideration did not have the effect to release the sureties on the bond of the bank for the faithful per-

formance of its contract to pay the funds upon the demand of the treasurer of the improvement districts.

The result of our views on this branch of the case is that, under the facts proved, the court should have entered judgment in favor of the improvement districts for the sum of $4,000 with interest at four per cent. per annum, as provided in the contract between the bank and the improvement districts.

This brings us to a consideration of the item of $2,084.84 for which a certificate of deposit was issued on April 9, 1924. The record shows that the items constituting this amount were a separate transaction from the $4,000, and was so treated by the parties. The amounts were not deposited until long after the execution of the bond, and were deposited as a separate transaction. Hence the bond could in no sense be said to cover them. On this branch of the case, under the facts proved, we hold that there is no liability whatever on the part of the sureties.

The court erred in not rendering a verdict in accordance with the views expressed in this opinion, and for that error the judgment will be reversed, and the cause remanded for further proceedings according to law and not inconsistent with this opinion.

HOWELL v. MILLER.

Opinion delivered April 11, 1927.

1. COURTS—EFFECT OF RECITAL OF APPEAL.—A judgment of the circuit court, reciting that the judgment of the probate court appealed from is vacated and held for naught, is *prima facie* evidence that the appeal from the probate court was taken in the manner provided by law, and must be taken as true, unless by bill of exceptions or otherwise the record contains evidence to contradict the recital of the judgment.
2. APPEAL AND ERROR—PRESUMPTION IN FAVOR OF COURT'S FINDING.—Every presumption must be indulged in favor of the court's findings, which competent evidence would warrant.

3. WILLS—COMPETENCY OF TESTATOR.—A testator has sufficient mental capacity to make a will, notwithstanding great bodily weakness from sickness, or extreme distress of mind, if he is capable of understanding the conditions and extent of his property, his relations to the persons who are entitled to be considered as objects of his bounty, and the scope and bearing of the provisions of his will, without prompting.
4. WILLS—EVIDENCE OF UNNATURAL DISPOSITION.—In a will contest evidence of an unnatural disposition of his property by a testator is admissible as a help to be considered with other evidence as tending to show an unbalanced mind or mind easily susceptible to undue influence.
5. WILLS—RIGHT TO DISPOSE OF PROPERTY.—The right of a person to dispose of his property by will is a property right, which is guaranteed by law.
6. WILLS—CONCLUSIVENESS OF JURY'S FINDING.—In will contests, the finding of the jury cannot be disturbed if there is any substantial evidence to support it.
7. WILLS—MENTAL CAPACITY—EVIDENCE.—In will contests, great latitude is allowed in the introduction of testimony on the issue of mental capacity.
8. WILLS—WANT OF MENTAL CAPACITY—EVIDENCE.—In a will contest evidence *held* to support a finding of want of capacity to make a will.

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

J. M. Carter and *B. E. Carter*, for appellant.

Wade Kitchens, W. H. Arnold, W. H. Arnold, Jr., and *David C. Arnold*, for appellee.

HART, C. J. This was a proceeding to contest a will. Georgia A. Mitchell, a colored woman, died in Miller County, Arkansas, in 1925, at the age of fifty-two years. Her will was offered for probate by her executor, and was contested by her sister, Mollie Miller. It was executed on the 27th day of August, 1923, and W. C. Howell was appointed executor. After giving several small legacies to various persons, she left the residue of her estate to W. C. Howell. The probate court found the issues in favor of the executor, and ordered the will admitted to probate. Mollie Miller gave notice of her intention to

appeal from the order of the probate court admitting the will to probate, and duly filed her affidavit for appeal.

The record shows that, upon a trial anew in the circuit court, a verdict was returned in favor of the contestant, Mollie Miller. The judgment of the circuit court, after reciting this fact, continues as follows: "It is therefore ordered and adjudged by the court that the will of Georgia A. Miller, deceased, be and the same is hereby annulled, set aside, canceled, and forever held for naught, and the decree of the probate court of Miller County, Arkansas, is hereby reversed and set aside, and the letters testamentary issued to the said W. C. Howell are set aside and held for naught, and the order and judgment of the county court appealed from is vacated and set aside and held for naught." The executor has duly prosecuted an appeal to this court.

Counsel for appellant invoke the general rule laid down in *Walker* v. *Noll,* 92 Ark. 148, 122 S. W. 488, and other decisions of this court, to the effect that it is necessary, in order to invest the circuit court with jurisdiction, that it appear from the record that the affidavit and prayer for appeal were presented to the probate court and that the appeal was granted. In the case of *Thomas* v. *Thomas,* 150 Ark. 43, 233 S. W. 808, it was held that the granting of the appeal by the probate court is sufficient to confer jurisdiction upon the circuit court and that the entering of the order granting the appeal upon the order of the probate court is merely evidence that the appeal has been granted. In the present case the record of the circuit court recites that the order and judgment of the probate court appealed from is vacated and held for naught. When the whole of that part of the judgment of the circuit court quoted above is considered, it is apparent that the circuit court found that the judgment of the county court sitting as the probate court in the probate of the will of Georgia A. Mitchell, deceased, should be vacated and held for naught. This constituted a finding on the part of the circuit court that an appeal had been taken from the order of the probate court in

the maner provided by law. Otherwise the circuit court would not have had any jurisdiction in the case. If the judgment of the circuit court had not contained an express finding that the judgment of the probate court appealed from should be set aside, counsel for appellant would have been right in contending that the judgment of the circuit ourt should be reversed for want of jurisdiction.

It is well settled in this State that, where a judgment or decree contains a recital of the facts, this court can review the judgment for errors manifest upon the face of the record. *Strode* v. *Holland,* 150 Ark. 122, 233 S. W. 1033. The judgment of the circuit court, having contained a recital that the judgment of the probate court appealed from should be vacated, constitutes *prima facie* evidence that an appeal was taken in the manner provided by law, and must be taken as true, unless, by bill of exceptions or otherwise, the record contains evidence to contradict the recital of the judgment. *First National Bank* v. *Dalsheimer,* 157 Ark. 464, 248 S. W. 575. This is in application of the well-known rule that every presumption must be indulged in favor of the court's finding which competent evidence would warrant.

This brings us to a consideration of the case on the merits. At the outset it may be stated that it is well settled in this State that, if a testator has sufficient mental capacity to understand the conditions and extent of his property, his relations to the persons who are entitled to be considered as objects of his bounty, and the scope and bearing of the provisions of his will, without prompting, then he has sufficient mental capacity to make a will, notwithstanding great bodily weakness from sickness, or extreme distress of mind. *Tobin* v. *Jenkins,* 29 Ark. 151; *McCulloch* v. *Campbell,* 49 Ark. 367, 5 S. W. 590; *Taylor* v. *McClintock,* 87 Ark. 243, 112 S. W. 405; and *Mason* v. *Bowen,* 122 Ark. 407, 183 S. W. 973, Ann. Cas. 1917D, 713.

It is also inferable from these cases, and expressly decided in *Tobin* v. *Jenkins,* 29 Ark. 151, that evidence of an unnatural disposition of his property by a testator is

admissible as a help to be considered with the other evidence as tending to show an unbalanced mind or a mind easily susceptible to undue influence. In other words, it is a help which the jury may consider in connection with the other evidence in passing upon the soundness of mind of the testator. This is in accordance with the general rule upon the question. Case-note to 13 Ann. Cas., at page 1044.

This brings us to a consideration of the evidence in the case as applied to these well-settled principles of law. It will be impossible, within reasonable limits, to set forth and discuss in detail the evidence introduced at the trial. We shall therefore state our conclusions upon the evidence and confine our discussion to the more salient features of the evidence which we think sustain our holding. We recognize that the right of a person to dispose of his property by will is a property right which is guaranteed by law, yet, as pointed out in the cases above cited, in a will contest the finding of the jury cannot be disturbed on appeal if there is any substantial evidence to support it.

Substantial evidence tending to show lack of testamentary capacity is sufficient to carry the case to the jury, however strongly it may be controverted. In this view of the matter, it will not be necessary to abstract the evidence for the proponent of the will. It will suffice to state that the evidence for the appellant shows that the testator, although weak in body, had a mind which was unimpaired and was stronger than most women in her condition in life. We must test the verdict, however, upon the evidence for the contestant viewed in the light most favorable to her. It is extremely difficult to adopt an absolute or fixed rule as to what will constitute mental capacity to make a will in all cases. Each case must depend in a large degree upon its own peculiar facts. Circumstances, nervous force and physical organization of different persons affect their mental powers in varying degrees. Hence great latitude is allowed in the introduction of testimony.

The testator, at the time of her death, was fifty-two years of age. Her family history in regard to insanity is bad. Her mother and younger sister committed suicide; one cousin had died in an insane asylum, and another had left home, and was found drowned. The testator had been in ill health since her girlhood. She had had several operations, and had passed several stones from her kidneys. She had had a tumor in her womb, tuberculosis of the lungs, and leakage of the heart. She had had "spells" all her life, and during them she would be out of her head; and the older she got the more forgetful she became, and, in the opinion of witnesses who had known her all her life, or for many years, she was mentally unbalanced and incapable mentally of making a will. Mollie Miller had inherited a part of her mother's estate and had deeded it to her sister when her husband was in trouble, for the purpose of helping them. She never got anything for doing this. Great affection existed between the sisters at the time the testatrix's husband died. Some time after the death of her husband Georgia Mitchell became infatuated with W. C. Howell, a negro preacher, and became associated with him in business. The will in question was executed on the 27th day of August, 1923. Mollie Miller visited the testatrix in a sanitarium during that month. The testatrix told her sister there was a little bird coming to her window, and that it came from the cemetery and was coming after her. She begged Mollie Miller to take care of her when she was dismissed from the sanitarium. After her husband's death the testatrix had been in the habit of passing much time at his grave. At one time, when she was ill, she asked them to shoo the chickens from the foot of her bed. She had various hallucinations of that sort. According to the testimony of Mollie Miller and other persons who were associated with the testatrix closely, she had no reason to disinherit Mollie Miller, and never intended to do so. Her mind had become so clouded, from bodily illness during her whole life and from distress at her husband's death, in her weakened condition, that she was not capa-

ble mentally of making a will. It was the opinion of several persons who had known her all her life that, when she had the spells which she had been accustomed to having since her girlhood, she was mentally unbalanced. They told various things which she said and did while in this condition which tended to show that she did not know what she was doing. The jury might have inferred from the testimony of Mollie Miller that the will was executed during one of these spells and that she did not appreciate what she was doing, and that her mental condition was such that she was not capable of making a will in the application of the principles of law to the facts as presented in the record. When the evidence is viewed in its entirety and in the light most favorable to appellee, it cannot be said that it is not legally sufficient to support the verdict.

The evidence introduced and the instructions given by the court to the jury were in conformity to the rules of law announced above. The case was fairly submitted to the jury upon competent evidence, and, under our settled rules of practice, we are not at liberty to disturb the verdict of the jury, even though we might think it contrary to the weight of the evidence.

It follows that the judgment will be affirmed.

OIL FIELDS CORPORATION v. DASHKO.

Opinion delivered April 11, 1927.

1. JOINT-STOCK COMPANIES AND BUSINESS TRUSTS—CONSTRUCTION OF CONTRACT.—A trustee under a common-law trust agreement *held* to have acquired oil property for the association for which he was trustee.
2. JOINT-STOCK COMPANIES AND BUSINESS TRUSTS—CONSTRUCTION OF CONTRACT.—A common-law trust agreement for the purpose of holding, developing and dealing in oil and gas properties *held* to impliedly prohibit the trustee from doing on his individual account any of the things for which the association was organized.

3. LIS PENDENS—COMMON-LAW AND EQUITY RULE.—The common-law and equity rule as to *lis pendens* has been superseded in Arkansas by Crawford & Moses' Dig., § 6979.
4. LIS PENDENS—EFFECT OF FILING.—Under Crawford & Moses' Dig., § 6979, filing for record a *lis pendens* notice does not deprive *bona fide* purchasers of property purchased before notice was filed.
5. LIS PENDENS—EFFECT OF FILING.—Failure of a *bona fide* purchaser of real estate from the defendant in an action to record the evidence of his title before a *lis pendens* notice was filed will not have the effect of depriving him of his title or give plaintiff in such action superior right or title.
6. VENDOR AND PURCHASER—NOTICE.—A party claiming real estate as against a purchaser thereof for value has the burden of showing that such purchaser had notice, either actual or constructive, of such claimant's rights.
7. LIS PENDENS—PAYMENT OF CONSIDERATION BY PURCHASER.—A *bona fide* purchaser paying a valuable consideration for land before notice of *lis pendens* was filed will be protected.

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

Albert L. Wilson, for appellant.

Powell, Smead & Knox, for Dashko; *Mahony, Yocum & Saye,* for Southern Crude Oil Purchasing Co., appellee.

WOOD, J. This appeal is by the Oil Fields Corporation, hereafter called appellant, against John S. Dashko, T. P. Novick, Olga Novick, Anna B. Ingalls, G. W. Ferguson, Laura Ferguson, E. C. Alley, Granville Alley, John Alley, as Alley & Son, and the Southern Crude Oil Purchasing Company (hereafter called purchasing company). The question to be determined is whether or not the appellant is the owner of an oil and gas lease covering the east half of the southwest quarter of the northwest quarter of section 34, township 15 south, range 15 west, Ouachita County, Arkansas, and the oil and gas produced therefrom since October 12, 1923.

The appellant claims to be the owner of the oil and gas lease by assignment from John S. Dashko, as trustee of the Business Men's Royalty Association. The assignment was executed and delivered October 12, 1923, and was filed for record with the clerk of the circuit court and

ex-officio recorder of Ouachita County, Arkansas, July 24, 1924, at 5 o'clock P. M., and was duly recorded in his office in book 45, page 121. The purchasing company claimed to be the owner of the lease and the production thereof since May 8, 1925, under a conveyance executed that day by T. P. Novick to the purchasing company. On April 22, 1922, John S. Dashko organized a common-law trust under the name of the Business Men's Royalty Association, hereafter called royalty association. John S. Dashko is designated in the trust instrument as the trustee of the estate. The trust instrument was recorded in Union County, Arkansas, May 8, 1922, but was not recorded in Ouachita County, where the land in controversy is situated. Three similar trusts were also organized with other parties designated as trustees. The trust instruments consist of 21 articles. The purpose of these trusts is similar, and it is defined in article 8 of the instrument under which the royalty association was created as follows:

"The purpose of this trust shall be to hold the above and foregoing described oil and gas lease and any other oil and gas leases or property, real and personal, that may be acquired by this trust estate, and further to do all the necessary and incidental things for the operation, maintenance and development of such properties, consisting of the following acts: (2) To drill for, produce, refine and market petroleum and its products, and natural gas. (b) To buy, sell, lease, exchange and barter oil and gas leases, royalties and mineral rights. (c) To buy, sell and barter crude and refined oil and petroleum products. (d) To buy, sell and barter and exchange chattels and personal property of every kind and character, necessary and incident, remote or proximate, for the effective execution and accomplishment of the purposes above mentioned. (e) To buy, sell, trade and exchange real estate and chattels real necessary and incident to the above and foregoing purposes, and by these articles the trustee is authorized and empowered to do any act and thing authorized by law, in order to

promote, effect and procure the purposes of this trust, as herein enumerated."

The money with which the property was acquired for the trust estate was raised by soliciting the public to invest therein in amounts of $10, and multiples thereof, paid to the trustee, and, as evidence of such investment, the trustee issued certificates to the beneficiaries showing the amount of the investment in the trust estate. The sum of $1,789,223.75 was invested by the public in this manner in the four trusts. They were all operated from the same office in El Dorado from May 8, 1922, until October 12, 1923, at which time they were legally merged into the Oil Fields Corporation, the appellant, which had been previously organized for that purpose.

Article 16 of the trust instrument provides that all conveyances to the trustee of the estate shall read in the name of Business Men's Royalty Association, in the name of the trustee therefor, and all conveyances from such trustee shall read "Business Men's Royalty Association," by the trustee therefor, and likewise all written instruments pertaining to this trust shall be so executed. Almost unlimited power is given to the trustee. He had the sole management and control of the entire trust estate, having the power to sell or pledge the same and to distribute the proceeds derived from its operation among the beneficiaries in a manner wholly within his discretion. He received such compensation for his services as trustee at such times as, in his discretion, he elected to receive, and was to be reimbursed for any expenses incurred by him in the conduct of his duties as trustee of the estate. In addition to such reasonable compensation as he might elect to award himself, the instrument also provides that the trustee shall be entitled to 10 per cent. of all the profit made from the sale of any lease or leases, or of the profits made from the production of any oil well or wells which may be brought in during the life of this estate. There is a further provision in the trust instrument to the effect that the purpose of the articles was to create an express and active trust, the

management and execution of which was wholly within the discretion of the trustee, without voice and control by any *cestui que trust* whomsoever, but it is also expressed that there was a fiduciary relation created and existing by virtue of the articles; that the beneficiaries were non-associated with the trustee and with each other. There was a provision also to the effect that, if any article of the trust should be declared invalid, such adjudication should not affect the rest of the trust declaration, nor should any construction be placed upon the instrument which should curtail the right of the trustee to manage the trust estate independent of the beneficiaries.

On May 16, 1922, T. C. Joyce executed an oil and gas lease to M. P. Morton, trustee, covering the property in controversy. On August 12, 1922, Morton, trustee, assigned the oil and gas lease to John S. Dashko, in his individual capacity. This assignment was duly recorded on August 18, 1922. On November 15, 1923, Dashko executed an assignment of the lease in controversy to T. P. Novick, his brother-in-law. This assignment was filed for record on March 7, 1924. On May 12, 1925, Novick executed an assignment of the lease to the purchasing company, which instrument was filed for record at 3:45 P. M. of that day.

The merger instrument signed by John S. Dashko, trustee of the royalty association, for the consideration therein named, conveyed unto the Oil Fields Corporation "all of the property and assets of every kind and description of the trust estate, including oil and gas leases and the equipment, wherever situated, and all funds on hand, oil in storage, and all sums due or to become due and payable to the said John S. Dashko, as trustee of the said trust estate, and hereby agrees to execute all necessary assignments and conveyances to convey all the said property unto the said Oil Fields Corporation in exchange for a sufficient amount of its capital stock, at par, to equal the par value of the beneficial certificates, known as trustee's certificates, now issued and outstanding." On October 20, 1923, John S. Dashko, in compliance with the

merger instrument, executed two specific assignments, in one of which he conveyed to the appellant all the property of the royalty association situated in Ouachita County, Arkansas, and in the other all the property situated in Union County, Arkansas. But in neither of these is the property in controversy mentioned or described. No property is conveyed in these specific assignments as belonging to the royalty association except a royalty interest, or an overriding royalty interest. One of these assignments was filed for record on November 6, 1923, and the other on November 8, 1923.

Out of this voluminous record of more than twelve hundred pages we deem it unnecessary, and it would unduly extend this opinion, to set forth in detail either the pleadings or the testimony. Suffice it to say it is only necessary to discuss and decide two issues presented by the record. First, was John S. Dashko the owner of the oil and gas lease in controversy at the time the same was assigned to the purchasing company? Second, if, as between the appellant and Dashko, the appellant, in equity, was the owner of the property in controversy at the time of the assignment thereof to the purchasing company, nevertheless was the purchasing company an innocent purchaser thereof?

1. Was Dashko the owner of the property in controversy? We have set forth the essential provisions of the trust instrument under which the appellant deraigns title. Even if the trust instrument should be construed as not to prohibit Dashko from acquiring gas and oil leases in his individual capacity while he was conducting the business of the trust, still we are convinced that a preponderance of the evidence shows that he acquired the property in controversy for the royalty association of which he was the trustee. But, while the trust instrument does not in express terms prohibit Dashko, as an individual, from doing the things set forth in article 8, nevertheless it occurs to us that the instrument should be construed as prohibiting him from doing any of the things therein specified on his individual account and

for his individual advantage and profit. An analysis of the various separate provisions of the trust instrument and of the instrument as a whole shows that, while the trustee had unlimited power and discretion in the matter of the acquisition, management and disposition of the trust property, and the distribution of the proceeds thereof, independent of any voice or control of the beneficiaries of the trust, nevertheless the trust instrument itself declares that a fiduciary relation was created and existing by virtue of the trust articles, and that Dashko was the trustee of an express and active trust and was to conduct, manage and control the estate to the best interests of the beneficiaries of the trust.

Without reiterating the various provisions of the trust instrument and going into a critical analysis thereof, we are convinced that it was the intention of the trustee, Dashkô, in the creation of this trust, to impress the public who might invest funds in the enterprise that, from the time of the execution and recording of the instrument, he was to be engaged, as set forth in article 8, for the exclusive and sole benefit of those who might invest their money and procure certificates evidencing their interest and ownership in the trust estate. Certainly those who became beneficiaries under the terms of the trust instrument had the right to expect the trustee, so long as he was engaged in the character of business set forth in article 8 of the trust instrument, to conduct same not for his individual and private account, but solely for the beneficiaries. In other words, the trustee, Dashko, was the agent and trustee of the beneficiaries under this instrument to do the things set forth in article 8 of the trust instrument for them. The beneficiaries furnished the capital with which Dashko was to conduct the business set forth in article 8 for them, and for which he was to receive compensation for his services in the discharge of his duties as such trustee, as set forth in article 17 of the instrument. The clear implication from that article (17), as well as others, is that the trustee is not to expend any money for his own profit and advantage

in conducting the business of the trust as set forth in article 8. After making the provision for necessary overhead expenses, such as maintenance of offices, hiring of labor, hiring of necessary legal counsel, article 17 further provides that he shall be entitled to reimbursement to the extent of any reasonable expense incurred in the conduct and discharge of his duties as trustee. It is clearly implied that, if the trustee expended any of his individual funds in the conduct of the business of the trust, he was to be reimbursed out of the trust fund.

In the case of *Haskell* v. *Patterson,* 165 Ark. 65, 262 S. W. 1002, there was a provision in the trust instrument to the effect that the trustees should keep all conveyances running to them for the benefit of the syndicate in a separate receptacle and that they should designate in red ink the documents or property of the trustees individually. In that case we held that, under the above provision, the trustees were not prohibited from investing their own funds in the acquisition of property, because the trust instrument, at least by implication, permitted it. It will be observed that there is no such provision in the trust instrument under review here. In the absence of some such provision we are convinced that it was in the contemplation of the parties to this instrument that the trustees should not have such authority, and it is impossible to escape the conclusion that he could not exercise such authority without being disloyal to his trust. In the case of *Haskell* v. *Patterson, supra,* speaking of the trust instrument, we said: "It is certain that it was not the intention of any of the parties to create a twilight zone of uncertainty in the management of the affairs of the syndicate, in which it might be difficult to discern just when Haskell was representing the syndicate and when he was representing himself. The instrument as a whole shows clearly that it was the intention of all parties that the trustees should give their first thought to the interests of the syndicate. The trustees were to devote their time and services to the syndicate, in consideration of the funds placed in their hands for investment and manage-

ment and the opportunities thus afforded them to make money both for themselves and the syndicate. * * * While, under the trust instrument, there was nothing to inhibit Haskell from acquiring leases individually, yet it must be held, under all the facts of this record, that he did not do so." We further said: "We regard the proof as clear, decisive and convincing that Haskell acquired the properties in controversy under circumstances which constitute a constructive trust, and it would be a fraud on the members of the syndicate to allow him to hold them in his individual right. Under the doctrine announced by Mr. Pomeroy above, the law superimposes upon his transactions the trust relation, and he holds title to the leases in controversy in trust for the syndicate, and must account to the syndicate for his dealings in the premises."

We reach the same conclusion here as to Dashko, and regard the facts of this record even stronger to justify that conclusion than were the facts in the case of *Haskell* v. *Patterson, supra.* In the absence of language authorizing it, certainly no instrument of the character of that under consideration should ever be so construed as to permit a trustee, in the conduct of the business of his trust, to elect to make a good bargain for himself, when, by fidelity to his trust, he could make the same good bargain for the benefit of the beneficiaries of the trust. The law removes the trustee from such temptation to cupidity and unfaithfulness while in the conduct of the business of his trust by requiring him to serve only the one master—the beneficiaries in the trust—and not himself. Mr. Pomeroy says:

"The duty not to accept any position or enter into any relation, or do any act inconsistent with the interests of the beneficiary, is a rule of wide application and extends to every variety of circumstances. It rests upon the principle that, as long as the confidential relation lasts, the trustee or other fiduciary owes an undivided duty to his beneficiary, and cannot place himself in any other position which would subject

him to conflicting duties or expose him to the temptation of acting contrary to the best interests of his original *cestui que trust.* The rule applies alike to agents, partners, guardians, executors and administrators, directors and managing officers of corporations, as well as to technical trustees. The most important phase of this rule is that which forbids trustees and all other fiduciaries from dealing in their own behalf with respect to matters involved in the trust, and this prohibition operates irrespectively of the good faith or bad faith of such dealing. It is therefore a gross violation of his duty for any trustee or director, acting in his fiduciary capacity, to enter into any contract with himself connected with the trust or its management. Such a contract is voidable, and may be defeated or set aside at the suit of the beneficiary." 2 Pomeroy Eq. Jur. 2473, § 1077. We conclude therefore that, as between John S. Dashko and the appellant, the title to the property, in equity, was in the appellant, and not in Dashko, at the time Dashko entered into the escrow contract by which the property was to be conveyed, and was conveyed, from Novick to the purchasing company.

2. Such being the case, we come now to the issue of whether or not the appellee purchasing company was an innocent purchaser of the oil and gas lease in controversy. On the 13th of February, 1924, an action was instituted in the chancery court of Ouachita County by Frank W. Lowe, one of the beneficiaries of the common-law trust, against Dashko *et al.* and the appellant. The complaint charged, in substance, that the trustees of the common-law trust had fraudulently organized the appellant and fraudulently conveyed it all the properties of the four trusts. The prayer was for a receiver to take charge of the properties and that the same be sold to satisfy the claims of the beneficiaries. Summons was issued on the day the complaint was filed against all the defendants in that action. The appellant, in its answer of July 21, 1924, denied the allegations of the complaint, and set up, in substance, that it had been duly incorporated and was

authorized to do business in Arkansas, and that the common-law trusts and all their properties had been consolidated and merged into the appellant and all of their properties conveyed to the appellant; that, if any properties had not been conveyed by specific assignment, same should have been so conveyed, and the defendant corporation prayed that all the property belonging to the trusts be decreed as property belonging to the appellant.

On May 12, 1925, the appellant filed what is designated its "supplemental answer and cross petition," in which it set up, among other things, in substance, that, under the merger agreement, all the properties of the trust were to be conveyed to the appellant by specific assignments executed by the trustees; that the property in controversy was the property of the Business Men's Royalty Association, and that John S. Dashko, with the intent to defraud the appellant, omitted the same from the specific assignment, and that he did, on November 15, 1922, transfer the property in controversy to T. P. Novick without any consideration, and that T. P. Novick received the assignment with full knowledge that the property in controversy had belonged to the Business Men's Royalty Association. In short, the appellant charged that Dashko had conveyed the property in controversy to his brother-in-law, T. P. Novick, with the intent to defraud the appellant, and the appellant prayed that the court direct the receiver to take possession of the property in controversy and the oil and gas produced therefrom, and that, upon final hearing, the title thereto be declared in appellant. On the same day, at 3:30 P. M., the appellant filed in the office of recorder of deeds of Ouachita County a *lis pendens* notice that the property in controversy was being claimed by the appellant. On May 21, 1925, the appellee purchasing company filed its motion praying the court to permit it to intervene and setting up that it was the owner of the property in controversy by purchase thereof from T. P. Novick for a valuable consideration, without notice of any claim of the appellant, and that the appellant was in the hands of a receiver

and had no power to prosecute the action to determine the validity of the intervener's title in the receivership proceedings, and that the receiver had not done so; that T. P. Novick, from whom it purchased, had been in possession of the property since November 15, 1922, and had expended large sums of money in developing that property, without notice of any claim of appellant. The purchasing company moved the court to require the receiver to institute an action to determine the title of the land in controversy, and prayed the court to strike the supplemental answer and cross-petition of the appellant. A similar intervention and motion was filed by T. P. Novick on June 12, 1925, and, on the same day, the appellant filed its response to these motions, denying their allegations and reiterating its claim of ownership as set forth in its supplemental answer and cross-petition.

The court heard these motions on June 12, 1925, and entered an order directing that the supplemental answer and cross-petition of the appellant be severed and that same should be treated as a complaint in an independent action in which the receiver should join to determine the ownership of the property in controversy. The court thereupon directed that the purchasing company, T. P. Novick, J. S. Dashko and all the other defendants mentioned in the supplemental answer and cross-petition be required to file their answer thereto within twenty days. After this, further lengthy pleadings were filed by the purchasing company, Dashko, and Novick, and a reply thereto by the appellant, all of which raised the issues as set forth above, only in greater detail.

We have already determined the issue as between the appellant and Dashko—that appellant was, in equity, the owner of the property in question—and have set forth above so much of the pleadings as is necessary on that issue and also on the remaining issue of whether or not the purchasing company was an innocent purchaser of the property in controversy. It will be noted that, while the appellant and Dashko were parties defendant in the action by Lowe to have a receiver appointed for appel-

lant, appellant, in its answer to that action, filed July 21, 1924, does not make its answer a cross-bill against Dashko and ask that the deed conveying the title to him in his individual capacity to the property in controversy be canceled; nor did the appellant on that day ask that T. P. Novick be made a party defendant and that the deed of Dashko to Novick be canceled. Appellant did not on that day, in its answer, describe the property in controversy and pray for a cancellation of the record title in Dashko and Novick and that the appellant, as against them, be declared the owner of the property. Nor did the appellant, when it filed its answer on July 21, 1924, to Lowe's action against it and Dashko, file a *lis pendens* notice concerning the property in controversy. Our *lis pendens* statute provides, in substance, that, to render the filing of any suit at law or in equity, affecting the title of real estate or personal property, constructive notice to *bona fide* purchasers, it is necessary for the plaintiff, his attorney or agents, to file for record with the recorder of deeds of the county in which the property to be affected is situated a notice of pendency of such suit, setting forth the title of the cause and the general object thereof, together with a correct and full description of the property to be affected thereby and the names of the parties to the suit and the style of the court where the suit is pending. Section 6979, C. & M. Digest. The common-law and equity rule of *lis pendens* has been abrogated in this State by the above statute. Since then an action in this State affecting the title is not *lis pendens* until a notice has been filed in compliance with the statute. *Henry Wrape Co.* v. *Cox,* 122 Ark. 445, 183 S. W. 955; *Steel* v. *Robertson,* 75 Ark. 228, 87 S. W. 117; *Hudgins* v. *Shultice,* 118 Ark. 139, 175 S. W. 726; *Jones* v. *Ainell,* 123 Ark. 532-536, 186 S. W. 65.

Under the *lis pendens* statute and our cases construing it, the appellee purchasing company had no constructive notice that the record title of Dashko and Novick to the lands in controversy was being challenged or disputed by the appellant until the filing of the *lis pendens* with the

recorder of deeds at 3:30 P. M. o'clock on May 12, 1925. The effect of filing for record of the *lis pendens* notice, under the statute, is to protect the rights of the plaintiff in the action against those who may acquire title to or liens on the property from the defendant after the *lis pendens* notice has been filed for record. The filing for record of the *lis pendens* notice cannot have the effect to deprive *bona fide* purchasers of the property purchased before notice of *lis pendens* was filed for record. If one in good faith purchases real estate from a defendant in an action before the filing for record of the *lis pendens* notice, a failure to record the evidence of his title thus acquired until after the *lis pendens* notice has been filed for record will not have the effect to deprive him of his title or give the plaintiff in the action superior right or title. The plaintiff in the action, by recording the *lis pendens* notice, cannot acquire any greater right in the property than the defendant had therein at the time the *lis pendens* notice was filed. In other words, a *lis pendens* operates prospectively to preserve all the rights of the plaintiff as against the defendant in the litigation from the time the *lis pendens* notice is filed for record. But it cannot operate retroactively to divest the title of one to whom the defendant had conveyed the property prior to the filing of the *lis pendens* notice for record, even though such person has not recorded his muniment of title until after the filing for record of the *lis pendens* notice.

The above is necessarily the effect of *lis pendens* in the light of our decisions interpreting the meaning of the statute. In *Jones* v. *Ainell, supra,* we said: "A suit affecting the title or any lien on real estate is not *lis pendens* until notice of the pendency of the action is filed in accordance with the statute." The doctrine of *lis pendens* had its origin in the common law. It was a rule of the common law that, if the defendant in a suit affecting his real property, aliened the same during the pendency of a suit, the judgment at law or decree in chancery overturned the alienation. In 17 R. C. L., at page

1011, § 3, it is said: "The doctrine of *lis pendens* had its origin in the civil law, and was pungently stated in the legal maxim, *pendente lite nihil innovetur*. The doctrine, as it prevails at this time, seems to have had its origin in the common-law rule which obtained in real actions, where, if the defendant aliened during the pendency of the suit, the judgment in the real action overreached the alienation. The rule is thus older at law than in equity, and was adopted from the common-law courts by Lord Bacon as one of his ordinances for the better and more regular administration of justice in the court of chancery. This ordinance provides 'that no decree bindeth any that cometh in *bona fide* by conveyance from the defendant, before the bill is exhibited, and is made no party by bill or order; but, when he comes in *pendente lite*, and while the suit is in full prosecution, and without any color of allowance or privity of court, there regularly the decree bindeth.'" It is further said, at page 1036, § 32: "When a defendant in an action by a cross-complaint sets up affirmative rights and prays for affirmative relief against the plaintiff, the *lis pendens* begins from the filing of such cross action or cross-complaint, and not from the commencement of the plaintiff's action."

In *Cherry* v. *Dickerson*, 128 Ark. 572-578, 194 S. W. 690, we said: "The statute of this State on the subject of *lis pendens* is but declaratory of the common law, restricted to written notice of the pendency of the action which must be filed with the recorder of deeds." See also *Bailey* v. *Ford*, 132 Ark. 203, 200 S. W. 797.

It is further stated in 17 R. C. L., at page 1009, § 2: "If any of the parties, after the *lis pendens* has become operative, attempts any transfer of the subject-matter of the litigation, or to create any incumbrance or charge against it, or to enter into any contract affecting it, or to deliver possession of it to another, the action or suit may proceed without taking any notice whatever of such transfer, incumbrance or change in possession and the final judgment or decree, when entered, may be carried

into effect, notwithstanding the attempted dealing with the subject-matter thereof."

The undisputed testimony shows that negotiations for the purchase of the property in controversy by the purchasing company were begun by its attorney, J. K. Mahony, with Dashko on the night of May 8, 1925, and were concluded on the morning of May 12, 1925. A contract of sale and purchase of the property in controversy had been entered into between Dashko and Novick and the purchasing company. Novick had executed a conveyance or assignment of the property in controversy, and these papers were left in the hands of J. K. Mahony. On the morning of May 12, 1925, Mahony delivered to Hamp Smead, attorney for Dashko and Novick, the check of the purchasing company for $185,000 and placed the assignment in the hands of his partner, Saye, who carried the same to Camden, where it was filed for record at 3:45 P. M. of that day. The consideration specified for the assignment was the sum of $185,000 in cash and $65,000 payable out of seven-sixteenths of the oil produced from the lease. The testimony of Mahony shows that the check and the assignment were delivered and the agreement for the completed purchase was made at 11 o'clock A. M. on May 12, 1925. Upon the above facts, and under the above authorities, we conclude that the purchase of the property in controversy by the purchasing company of T. P. Novick, who held the record title, was consummated before the appellant filed its *lis pendens*.

In its pleadings the purchasing company alleged that it was a *bona fide* purchaser of the property in controversy without notice. The appellant denied this, and alleged that the purchasing company had notice, both constructive and actual, that the appellant was the owner of the property in controversy at the time of the purchasing company's pretended purchase. As we have seen, the purchasing company had no constructive notice of appellant's title, but, to constitute the purchasing company an innocent purchaser for value, it must also appear that, at the time it paid the consideration and completed

the purchase of the property, it had no actual notice of appellant's claim of title. In *Jennings* v. *Bouldin,* 98 Ark. 105, 109, 134 S. W. 948, we said:

"One who purchases, having actual notice of the pendency of the suit, cannot avail himself of the failure to give the *lis pendens* notice required by the statute."

In *Henry Wrape Co.* v. *Cox, supra,* we said, at page 448:

"If the plaintiff took the quitclaim deed from its immediate grantor without notice of an outstanding conveyance or obligation respecting the property, or notice of facts which, if followed up, would have led to knowledge of such outstanding conveyance or equity, it was entitled to protection as a *bona fide* purchaser, upon showing that the consideration stipulated had been paid and that such consideration was a fair price for the claim or interest designated."

In *Osceola Land Co.* v. *Chicago Mill & Lbr. Co.,* 84 Ark. 1-10, 103 S. W. 609, we said:

"But a further consideration of the case has convinced us that the statement that the burden is on the party claiming to be a *bona fide* purchaser to show want of notice is not correct as a general rule; for, when the party relies on the defense of being a *bona fide* purchaser, and shows that he has paid a valuable consideration, the burden of showing that he purchased with notice is on the party alleging it or who relies on the notice to defeat the claim of *bona fide* purchaser." (Citing cases).

In *Jones* v. *Ainell, supra,* we said, at page 537:

"The plaintiff in his complaint alleged that he was a *bona fide* purchaser of the land, and it is shown that he paid a valuable consideration for it. The burden of showing that he purchased with notice was on the party alleging it or who relies on the notice to defeat the claim of *bona fide* purchaser."

Since the purchasing company proved that it purchased the property and paid a valuable consideration therefor, and since the appellant relies on notice to defeat such claim of *bona fide* purchaser, it devolved upon the

appellant to show that the purchasing company had notice. As already seen, appellant has failed to prove constructive notice, and we are now to determine whether it has proved that the appellee purchasing company had actual notice.

In *Richards* v. *Billingslea,* 170 Ark. 1100, 1104, 282 S. W. 985, we said: "This court has held that whatever puts a party on inquiry amounts to notice where the inquiry becomes a duty and would lead to knowledge of the requisite facts by the exercise of ordinary diligence and understanding." Citing *Jordan* v. *Bank of Morrilton,* 168 Ark. 117, 269 S. W. 53; *Walker-Lucas-Hudson Oil Co.* v. *Hudson,* 168 Ark. 1098, 272 S. W. 836.

Now there is no testimony in the record tending to prove that the appellant gave any actual notice to the appellee that the property in controversy was claimed by the appellant. The only inquiry, then, is whether or not the appellee, prior to its purchase, had notice of sufficient facts to put it upon inquiry, which, if pursued with due diligence, would have advised the appellee of appellant's claim. What course would a prudent person take before he purchased the property in controversy? The first step would be to have an abstract made of the record title. This was done. The appellee employed the law firm of Mahony, Yocum & Saye to procure and pass upon the abstract of title, and they approved the same. The undisputed testimony shows that they were justified in such approval, for the record of deeds showed a complete record title in Novick. If it could be said that prudent attorneys, under the circumstances, should have looked to the court records to determine whether the property in controversy was involved in any litigation in which appellant was claiming the same, what would these records have shown? They would have disclosed that an action was pending in which Dashko and the appellant were parties defendant, the purpose of which was to place all of the gas and oil leases and the products thereof belonging to the appellant in the hands of a receiver, and that appellant, in answering the complaint in that case,

had not made its answer a cross-action against Dashko, claiming, as against him, to be the owner of the property in controversy and asking affirmative relief against Dashko. Prudent attorneys, upon examination of the pleadings in that action, might have well concluded that, if the appellant had intended to challenge the title of Dashko and of Novick, it would have set up and declared its rights as against Dashko and Novick, and that, since it had not done so, the record title of Dashko and Novick was not questioned in that litigation by appellant. If it could be said that prudent attorneys would and should have gone further and inquired of those in possession of the property in controversy as to the title, such inquiry would have discovered, so far as Dashko was concerned, that he had claimed to own the property in his own right from the time that he had purchased the same in August, 1922; that he had assigned the lease to Novick as early as November 15, 1923; that Novick had been in possession of the property and began drilling operations thereon as early as May 4, 1924; that a producing well had been brought in on the property on July 4, 1924; that Novick and Dashko were still in possession of the property, which was producing large quantities of oil; in short, that they were claiming the ownership, and had complete possession and control of the property and the production thereof. Inquiry of them would only have elicited the information that their rights to own and control the property in controversy and the production thereof had not been called in question by the appellant through its local director and attorney, nor by the receiver who had been appointed to take charge of its property. It occurs to us that prudent attorneys, under these circumstances, had the right to conclude and to advise their client, the appellee purchasing company, that the title in Novick, as evidenced by the record, was perfect. Our conclusion therefore is that the appellee purchasing company, at the time of its purchase of the property in controversy, had neither actual nor constructive notice of the claim of the appellant thereto.

The appellant contends that the appellee was not an innocent purchaser because the $65,000 payable out of seven-sixteenths of the oil to be produced had not been paid and that the $185,000 was by check, payment on which could have been stopped after *lis pendens* notice was filed for record. These contentions are untenable, for the reason that the undisputed evidence shows that the check was cashed before the *lis pendens* was filed for record, and this payment of $185,000 in cash was by far the greater part of the consideration. That part of the consideration payable only out of oil to be produced could not have been paid before the purchase was completed and might never be paid at all. It was not contemplated and not essential that it should be paid before the purchase could be consummated. To be sure, there must not only be a valuable consideration in fact, but there must be an actual payment of valuable consideration before the filing of the *lis pendens*. 2 Pomeroy, Eq. Jur. 750-751. The payment of $185,000 in cash before *lis pendens* notice was filed for record constituted a valuable consideration. The case of *Marchbanks* v. *Banks,* 44 Ark. 48, has no application, because in that case the purchaser had not paid the greater part of the consideration.

It is contended that, because Dashko was the trustee of the Business Men's Royalty Association in conformity with the declaration of trust, he had no title which he could convey. But the undisputed evidence shows that, when Dashko purchased the land in controversy, he took title thereto in his individual name and that record title at the time he sold the same to Novick was in Dashko as an individual and not as a trustee. The record title to the land in controversy therefore was in Novick at the time appellee purchased the same. The case of *Murphy* v. *Steele,* 169 Ark. 299, 274 S. W. 6, upon which counsel for appellant relies to sustain this contention, has no application here, for the reason that, in that case, we held that "the beneficiaries under a deed conveying the legal title to a trustee can have no greater rights or

equities against the grantor than their trustee who holds the legal title." That case is wholly unlike the case at bar. There the legal title was conveyed to the trustee as such.

We pretermit any discussion or decision of the issue as to whether or not appellant would be barred by laches from obtaining a personal judgment against Dashko and Novick, or both of them, for the amount of the consideration received by either or both of them as the purchase price of the property in controversy. Appellant did not, in its pleadings, ask for such specific relief against Dashko and Novick in the event that this court should uphold the purchase by the appellee purchasing company, and the trial court was not asked to award to the appellant any such alternative relief, and such relief has not been asked here.

We have not overlooked the other contentions so elaborately and ably argued by learned counsel for the appellant. We have carefully considered all of them, and do not concur in the views of counsel that appellee purchasing company is a monopoly and for that reason could not maintain this action; nor do we agree with counsel in the contention that the appellee, at the time of the purchase of the property in controversy, had not complied with the laws of this State permitting foreign corporations to transact business in this State, and therefore could not maintain this action. Because of the already too great length consumed in the consideration of what we deem to be the vital issues of this lawsuit, we refrain from discussing those issues raised and urged which we have found unimportant and unnecessary to a decision of the cause.

Our conclusion upon the whole record is that the appellee is an innocent purchaser for value of the property in controversy. Therefore the decree of the trial court dismissing the appellant's complaint against the purchasing company for want of equity is affirmed.

NORTH LITTLE ROCK v. KIRK.

Opinion delivered April 11, 1927.

1. MUNICIPAL CORPORATIONS—PUBLICATION OF ORDINANCE—BURDEN OF PROOF.—In a prosecution under a city ordinance, the burden of showing that there was no publication of the ordinance, as required by Crawford & Moses' Dig., §§ 7494, 7499, is on the person accused who interposes that defense.
2. MUNICIPAL CORPORATIONS—PUBLICATION OF ORDINANCE—PROOF.—The fact that the records of the city as to publication of its ordinances failed to show publication of a particular ordinance *held* insufficient to show that it was not published.
3. LICENSES—VALIDITY OF REVENUE ACT.—A city ordinance requiring an annual license of $50 from persons dealing in real estate or collecting rents thereon, without provisions as to regulation, inspection or supervision of real estate agents, passed before the enactment of a statute authorizing cities of the first and second class to impose occupation taxes, *held* void as a revenue ordinance.

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

Tom F. Digby, for appellant.

W. R. F. Payne and *Frank Strangways*, for appellee.

SMITH, J. Appellee was convicted in the municipal court of North Little Rock for violating ordinance No. 124 of that city, and duly prosecuted an appeal to the circuit court, where he was tried upon an agreed statement of facts. The court found that the ordinance had not been properly published and was void for that reason, and dismissed the prosecution, and the city has appealed.

Sections 1 and 2 of the ordinance read as follows:

"Section 1. That it shall be unlawful for any person, firm or corporation to engage in selling or buying real estate or to collect rent or rents on property located within the city limits of the city of North Little Rock, unless he or they be the owner or owners thereof, without first having obtained and paid for a license therefor from the proper city authorities.

"Section 2. That said license shall be issued annually, and the cost thereof shall be $50 per annum, in

advance, and all such licenses shall expire on the 31st of December in the year in which they were issued."

Section 3 makes the failure to comply with §§ 1 and 2 an offense punishable by a fine.

In the agreed statement of facts it was stipulated "that the city ordinance record book introduced in evidence contained statements on the margin of some of the ordinances recorded therein to the effect that such ordinances had been published on certain dates, but was wholly silent and contained no entry as to whether ordinance No. 124 had been published, and that the records mentioned above, to-wit: the minute-book of the city council and the ordinance record book, were the only records of the city pertaining in any way to the passage, recording or publication of said ordinance." Publication was not affirmatively shown in either of these records.

We think this stipulation insufficient to support the finding that the ordinance in question had not been published. By § 7494, C. & M. Digest, it is made the duty of a municipal corporation to publish its ordinances, and by § 7499 it is provided that it shall be deemed a sufficient defense in a prosecution for the violation of an ordinance to show that no publication was made. But the burden of showing that there was no publication devolves upon the accused who interposes that defense. There was no testimony upon that question, except the stipulation quoted above, and we think this alone was not sufficient to show there had been no publication.

However, we are of the opinion that the judgment of the court was correct upon another ground and must, for that reason, be affirmed.

The ordinance in question is dated January 1, 1905, which is prior to the statute authorizing cities of the first and second class to impose occupation taxes. The ordinance contains no provisions for the regulation, inspection or supervision of real estate agents, and it was obviously passed, not for the purpose of regulating that business, but to raise revenue.

In the case of *Stamps* v. *Burke,* 83 Ark. 351, 104 S. W. 153, the court commented upon the decision in the case of *Arkadelphia Lumber Co.* v. *Arkadelphia,* 56 Ark. 370, 19 S. W. 1053, in which a license fee of $25 per annum for the privilege of keeping a ferry within the corporate limits of the city was held reasonable and valid, and it was pointed out that the license required was for the operation of a ferry within the town limits and that the operation of a ferry might require a considerable amount of inspection and supervision to see that the ferry was kept in good condition, and not allowed at times to be overcrowded, and to see that prompt service was rendered, and that navigation was not disturbed.

But, after thus approving an ordinance where the license fee charged bore some fair proportion to the cost of the regulation which might be required, the court held invalid an ordinance which required persons selling fresh meats in the town to take out a license and pay $12.50 therefor quarterly. In holding the last-mentioned ordinance void the court said: "That the purpose of the license fee in this case was to raise revenue is plain when the amount of the fee is considered in connection with the fact that the ordinance does not attempt in any way to regulate the business beyond requiring a license fee. There is no provision against the sale of unwholesome meats, or any other provision tending to regulate the business or which would require some inspection and supervision on the part of the town authorities. There is nothing but a bald provision that butchers and other dealers in meat shall take out a license and pay $12.50 therefor quarterly."

The case of *Texarkana* v. *Hudgins Produce Co.,* 112 Ark. 17, 164 S. W. 736, reviews the authorities dealing with the right of a city to impose a license fee for the purpose of regulating the business licensed. It was there said:

"Upon consideration of the decisions in various cases of our own, as well of other courts, we think the test of the reasonableness of an ordinance imposing a

license for the purpose of regulation may be said to be that, if it is such a sum as is so manifestly excessive and out of proportion to the regulation which will probably be required to make the ordinance effective, so that it is certain the city will derive a profit from the enactment of the ordinance, then in all such cases it may be said that the purpose of the ordinance is to raise revenue, and such ordinances are void when no statute authorizes their enactment for the purpose of raising revenue.

"On the other hand, if the amount of the regulation is uncertain, and its cost is indeterminate, depending upon circumstances, which may vary, and it does not appear that the license imposed is so out of proportion to the probable cost of its enforcement as that the ordinance will necessarily be the source of income to the municipality, such ordinances should not be declared invalid, as having been passed for the purpose of raising revenue, rather than the purpose of regulation, although they may in fact prove to be the source of profit to the municipality."

Applying this test to the ordinance in question, it may be said that it obviously appears that its purpose is to raise revenue, and not to regulate, and, not having been passed pursuant to a statute authorizing its enactment for the purpose of raising revenue, it is void.

The court therefore properly dismissed the cause, and that judgment is affirmed.

SCHICHTEL v. UDA.

Opinion delivered April 11, 1927.

1. CONSTITUTIONAL LAW—PROPER DESIGNATION OF AMENDMENT.—The constitutional amendment providing for referendum elections in the State, counties and municipalities, *held* to be properly designated as No. 7.
2. MUNICIPAL CORPORATIONS—REFERENDUM OF ORDINANCE.—A petition for a referendum election on a town ordinance, under Amendment No. 7, was properly filed with the recorder of the town.

3. MUNICIPAL CORPORATIONS—EFFECT OF REFERENDUM OF ORDINANCE. —Under Const. Amendment No. 7, providing that any measure referred to the people by referendum petition shall remain in abeyance until a vote is taken, and that the word "measure" includes ordinances, *held* that, where electors have filed a proper petition for a referendum, the operation of the ordinance is suspended until the election is ordered and held.

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

John D. Shackleford, for appellant.

Mehaffy & Miller, for appellee.

SMITH, J. Appellant brought suit in replevin to recover possession of a cow which had been taken up by the marshal of the incorporated town of Alexander, while at large upon the streets of the town, in violation of an ordinance requiring stock to be inclosed and kept off the streets. The question presented is whether the ordinance was in effect as such at the time appellant's cow was taken up. The court below held that it was, and, upon this theory, directed the jury to return a verdict against appellant.

Certain citizens of the town who opposed the ordinance undertook to have a referendum ordered upon it, and, as a means to that end, filed with the recorder of the town a petition, the form and sufficiency of which is not questioned, praying that an election be held as is provided for in Amendment to the Constitution No. 7.

The case of *Wright* v. *Ward,* 170 Ark. 464, 280 S. W. 369, involved the identical ordinance here under consideration. There was a petition for mandamus to require the mayor, recorder and aldermen of the town of Alexander to hold an election on the referendum of the ordinance, and we there held that the amendment was self-executing and supplied a sufficient rule by means of which the right of the electors of the town to have a referendum ordered against the ordinance might be enjoyed and protected, and the duty to hold an election be enforced, and it was there ordered that the writ of mandamus be issued as prayed. It appears that, at the time appellant's cow was taken up, an election had not been ordered, although

the petition therefor had been duly filed with the recorder of the town. The question now for decision is therefore whether the ordinance was suspended upon the filing of the petition, although the election had not been ordered.

The amendment in question is commonly referred to as Amendment No. 13, and was so designated in the opinion the case of *Wright* v. *Ward, supra.* The confusion as to its number arises from the fact that it was voted on at the general election in 1918 as Amendment No. 13, and, although declared lost by the Speaker, January 15, 1919 (House Journal, page 45), it was later declared adopted in the case of *Brickhouse* v. *Hill,* 167 Ark. 513, 268 S. W. 865. This amendment superseded original Amendment No. 7, and should therefore be designated by the same number, although, as republished at page 1076 of the Acts of 1925, it is there designated as Amendment No. 9.

By the Amendment No. 7 the power of referendum is reserved to the people of the municipalities of the State, and the requisite number of electors to exercise the power is there designated. It is unnecessary here to discuss the extent of this power. The amendment is in one section, divided into numerous paragraphs, treating of various subjects under different titles. Under the subtitle of the sufficiency of the petition it is provided that:

"Sufficiency. The sufficiency of all statewide petitions shall be decided in the first instance by the Secretary of State, subject to review by the Supreme Court of the State, which shall have original and exclusive jurisdiction over all such causes. The sufficiency of all local petitions shall be decided, in the first instance, by the county clerk or the city clerk, as the case may be, subject to review by the chancery court."

The amendment does not expressly state where the petition for the referendum of ordinances shall be filed, but, inasmuch as it is provided that the sufficiency of the petition shall be decided in the first instance by the

city clerk, who is the recorder of the town, we conclude that the petition should be filed with that official.

The petition to refer the ordinance here in question was filed with the recorder of the town of Alexander, and, when this was done—the form and sufficiency of the petition not being questioned—the duty to call the election arose, and in *Wright* v. *Ward, supra,* we held that the performance of this duty could be compelled by mandamus.

In the paragraph of the amendment entitled "Referendum," it is provided that:

"Any measure referred to the people by referendum petition shall remain in abeyance until such vote is taken."

In the paragraph entitled "Local for Municipalities and Counties," it is provided that:

"The initiative and referendum powers of the people are hereby further reserved to the legal voters of each municipality and county as to all local, special and municipal legislation of every character in and for their respective municipalities and counties, but no local legislation shall be enacted contrary to the Constitution or any general law of the State, and any general law shall have the effect of repealing any local legislation which is in conflict therewith."

Other provisions of the amendment touch certain emergency legislation, which need not be here considered further than to say that the ordinance in question did not have the emergency clause.

Another paragraph of the amendment reads as follows.

"Definition. The word 'measure' as used herein includes any bill, law, resolution, ordinance, charter, constitutional amendment or legislative proposal or enactment of any character."

By the express language quoted an ordinance is a "measure" within the meaning of the amendment.

We conclude therefore that, when electors have sufficiently petitioned for the referendum of an ordinance,

and have so far complied with the provisions of Amendment No. 7 that nothing remains but the ministerial act of calling the election (a duty the performance of which may be coerced by mandamus), the operation of the ordinance is suspended, and remains suspended until the election is ordered and held. It is immaterial therefore that the ministerial duty of ordering the election was not performed. The operative effect of the ordinance was suspended, and will remain suspended until the election is held and the ordinance adopted by the electors of the town.

It follows therefore that the ordinance under which appellant's cow was taken up was not in force at that time, and the marshal's action was therefore unauthorized. The judgment of the court below will therefore be reversed, and the cause remanded for further proceedings in accordance with this opinion.

MEHAFFY, J., disqualified and not participating.

TRIBBLE v. TRIBBLE.

Opinion delivered April 11, 1927.

1. WILLS—FORM OF INSTRUMENT.—An instrument by which a grantor conveys his undivided half interest to his wife and children, reserving to himself the use of the land for life, *held* a deed as to form, and not a will.
2. MORTGAGES—PAROL PROOF.—Parol evidence is admissible to establish that an instrument in form a deed was intended to be a mortgage.
3. MORTGAGES—INSTRUMENT IN FORM OF DEED.—Where evidence is clear and convincing to the effect that an instrument in form a deed was intended to secure payment of an indebtedness due by the grantor, a court of equity will declare the real intent and effect of the instrument as a mortgage.
4. MORTGAGES—PURPOSE OF EXECUTION OF DEED.—In an action to cancel a deed to the grantor's wife and children, reciting a consideration of love and affection, it was admissible to show that he had no love and affection for them, and that the real purpose of the instrument was to secure a loan from his wife's father.

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

A. B. Belding, James E. Hogue and *Gibson Witt* for appellant.

Martin, Wootton & Martin, for appellee.

SMITH, J. This suit was brought to cancel a deed and a deed of trust, and, in support of the complaint praying that relief, the following testimony was offered: W. O. Tribble, the plaintiff, was forty-nine years old at the time his deposition was taken, and had been a chronic sufferer and unable to work for many years. He described his ailment as ossification, and his condition is pitiful. He is dying constantly, and yet lives in helpless misery. He is unable to perform the smallest service for himself, and one of his sisters testified that he required the almost constant care of one person, and has been in a rolling-chair for about six years. Plaintiff married a daughter of Y. A. Pearson, and two children were born to this union, one a married daughter named Ollie May Aldridge and the other a daughter named Annie.

The testimony of the wife and married daughter leaves the distinct impression that neither had any affection and but little sympathy for the husband and father. Tribble testified that he was compelled to leave his home and to go to the home of his sisters to receive the attention his condition required, and that neither his wife nor his daughter, Mrs. Aldridge, would have anything to do with him or come to see him, and that Mrs. Aldridge refused to answer his letters. His little girl came to see him occasionally. Mrs. Aldridge admitted that she had never done anything for her father, but stated that her physical and financial condition did not permit her to do so.

On July 27, 1918, Tribble brought suit for divorce against his wife in Clay County, Mississippi, where they both resided, and alleged cruelty and neglect and physical violence as grounds therefor. His wife answered, and denied these charges, and filed a cross-complaint in which she prayed a divorce on grounds similar to those alleged

in the complaint of her husband. This suit was compromised and settled through the intervention of Mr. Pearson, plaintiff's father-in-law. Mr. Pearson appears to have been a man of wealth and of dominating personality, and to have had considerable influence over Mr. Tribble. Under the settlement effected, Mrs. Tribble executed to her husband a contract releasing all claim to his Hot Springs property, and received from him a deed to other property in Mississippi and Texas. Tribble referred to this settlement as an equal division of his property with his wife. The divorce suit was dismissed.

Mrs. Tribble brought suit for divorce, and Tribble wrote a letter to the presiding judge, in which he stated that, if his wife was asking only a divorce, he would not file an answer, but, if she prayed alimony, he asked a postponement until he could employ an attorney. A divorce only was prayed, and no answer was filed, and a divorce was granted. This decree was rendered November 15, 1921.

Tribble and Pearson owned a lot as tenants in common of equal interests in the city of Hot Springs, and, on February 2, 1921, Tribble borrowed from Pearson $300, and gave as security therefor a deed of trust on his undivided one-half interest.

Tribble had heard of a doctor in Ohio who, he thought, might give him some relief, and he borrowed the money to get this treatment. His proposition was to pay the money back at the rate of $100 a year, and, to secure this money, he first proposed to assign to Pearson his half of the rent until the debt was paid. Pearson stated that he did not regard this as sufficient security, and the deed of trust here sought to be canceled was executed, and, at the same time and for the same consideration, and as further and additional security, Tribble executed a deed to his wife and two children to his undivided half interest in the Hot Springs property. The deed and the deed of trust described the same property. By this deed Tribble conveyed his undivided half interest to his wife and children, reserving to himself the control, use,

profit and right of occupancy for his life. This is the deed which Tribble seeks to cancel.

Tribble testified that he did not read this deed, and that he understood it was in effect a will, and that it was agreed between himself and Pearson that neither the deed of trust nor the deed should be recorded, and that both instruments would be canceled and surrendered to him when the $300 loan, with the interest thereon, was repaid, and that, in violation of his agreement, Pearson caused both instruments to be recorded a few days after their execution. This deed was defectively acknowledged, and it appears to be conceded that it was not entitled to be recorded on account of this defect.

Pearson died October 11, 1923, and this suit was not brought until after his death. Tribble explained this delay by saying that he did not commence the suit earlier because the indebtedness secured by the deed and the deed of trust had not been fully paid in the lifetime of Pearson.

Tribble also testified that he executed the instruments which he here seeks to cancel because he had confidence in Pearson and believed that he would do as he agreed, and, as he expected to repay the money, he did not hestitate to give any security required, and that both instruments were executed to secure the $300 loan. His necessities were pressing, and he hoped for surcease from further suffering, if not complete relief. Since the execution of these instruments Tribble has paid the taxes each year in his own name on his own undivided half interest.

When Pearson died, both the deed and the deed of trust were found with his papers, and the administrator of his estate testified that he mailed the deed to Mrs. Aldridge. Tribble testified that Mrs. Aldridge admitted to him that she and her mother knew nothing about this deed until after Pearson's death. Both Mrs. Tribble and Mrs. Aldridge denied that they were not advised of the existence of the deed. They testified that they knew it was to be executed, and had been executed and was in the possession of Pearson. Mrs. Tribble admitted that she

kept other valuable papers of her own in a safety deposit box in Clarksdale, Mississippi.

Tribble removed to the home of his sisters in 1918, and has since resided with them. He and they both testified that he desired to give them some compensation for their attention to him, and that, having agreed that services already rendered were worth $2,500, he executed to them a deed to his own undivided half interest in the Hot Springs property. The consideration for this deed was service already rendered and the continued care of appellant, and, in addition, these sisters deeded to their brother an undivided third interest in their home in Mississippi, where they lived.

These sisters filed an intervention in this suit, in which they claimed title to the lot in question, and they testified that, when the deed to them from their brother was executed and delivered, they were unaware of the prior deed from their brother to his wife and children.

There was offered in evidence an affidavit which Tribble made, which reads as follows:

"State of Mississippi, Clay county. This is to certify that I signed and delivered a deed to my Hot Springs property to my former wife and children, which deed was recorded in book 112, page 378, of the land records in Hot Springs, Arkansas, and later I executed a conveyance to my two sisters covering the same property, which deed was signed under compulsion when I was very ill.

"It is my desire that the deed recorded in book Vol. 112, page 378, remain on record, and the one to my sisters canceled, same having been obtained against my will, the consideration claimed in it being already paid.

"W. O. Tribble.

"Sworn to and subscribed before me this the 7th day of January, A. D. 1922. T. J. Watson, J. P. Dist. 4."

Much testimony was offered concerning this affidavit. Tribble and his sisters testified that Mr. Aldridge came to their house one day and stated that his wife wanted Tribble to spend the day with them. It was raining, and the sisters protested against Tribble being carried to

Aldridge's home that day, but Aldridge persisted and prevailed, and Tribble was carried to Aldridge's home. Tribble testified that, when he arrived at Aldridge's home, his daughter proposed that she would take him and take care of him for the remainder of his life if he would sign an agreement that, in consideration therefor, she might have his property after his death, and that he signed what he supposed was a contract to that effect. What he supposed was a contract proved to be the affidavit set out above. Tribble was carried home that afternoon after signing the affidavit, and the sisters testified that he was in high spirits on his return, and stated that he had made a contract with his daughter whereby she had agreed to take care of him for the remainder of his life. Tribble and his sisters all testified that the sisters agreed to this arrangement, but Mr. Aldridge refused to take appellant into his home. The execution of this affidavit was the last transaction between Tribble and Mrs. Aldridge, and she did not at any time offer to take him into her home.

Mr. and Mrs. Aldridge denied that any deception had been practiced upon Tribble to induce him to sign the affidavit, and that he had signed it with full knowledge of its purport.

The clerk of the chancery court of Clay County, Mississippi, who certified to the authority of the justice of the peace who took the acknowledgments to the deed and the deed of trust, testified that, when he made the certificate, Mr. Pearson, for whom he made it, remarked that he had gotten Tribble to do what he wanted him to do for some time, and that Tribble had executed these instruments only because he was very anxious to get some money.

The justice of the peace who took the acknowledgments testified that they were taken at the home of Pearson, and that Pearson stated at the time that he was loaning Tribble $300 to go off and get cured. The witness further testified that Pearson remarked to him, in Tribble's presence, that Tribble wanted to provide fur-

ther for his children after his death, and that Tribble made no objection to this statement. Mrs. Tribble had not obtained her divorce at that time. Witness did not know whether Tribble read the deed before signing it or not. Pearson made the remark that he was letting Tribble have $300 to go off and take treatment. Witness understood from the conversation at the time that Tribble was executing an instrument intended as a will to provide for his children in case of his death. Tribble and his wife were separated at the time, and the divorce suit was commenced a few months later. The papers had already been prepared before witness arrived at Pearson's home, and the only thing that Tribble spoke about was his trip.

Mrs. Tribble admitted she had made a settlement with her husband concerning a division of his property with him, and that this was done when the first divorce case was dismissed. She testified that she knew about the loan, and that the deed had no connection with it and was not given as security for it, and that her father kept the deed in his possession with her knowledge and consent and for her.

After this suit had been commenced, Tribble and his sisters, without consulting the attorney who represented them, and who resided in Hot Springs, conceived the idea that it might be advantageous for the sisters to execute a deed to Tribble reconveying the property to him, and they executed a deed to Tribble, which they sent to the attorney with directions to file it for record if the attorney thought the deed would improve Tribble's chance to recover the land. The attorney was of the opinion that the deed would not have this effect, and destroyed it, as he was authorized to do by the letter transmitting the deed to him.

As has been said, Tribble's sisters filed an intervention, and it is contended by them that their deed is superior to the deed from Tribble to his wife and children, for two reasons. First, that, as the deed from Tribble to his wife and children was defectively acknowledged, the record thereof did not constitute constructive notice

to them of its existence, and they had no actual notice thereof. Second, the deed from Tribble to his wife and children was executed without consideration, and its effect was to render him practically insolvent, and it operated therefore as a fraud upon them as existing creditors.

The court found the fact to be that the deed from Tribble to his wife and children was not executed as a result of fraud or collusion on the part of Pearson, and was in all respects a valid conveyance and passed the title to the parties named, and, although defectively acknowledged, was valid and binding between the parties thereto. The court also found that any right, title or interest which the interveners acquired by the deed from Tribble passed back to him by the deed from them to him, and that this after-acquired title inured to the benefit of Mrs. Tribble and her children. The court found that Tribble had paid the debt secured by the deed of trust, and that Tribble was not indebted to the estate of Pearson.

Upon these findings the court canceled the deed of trust and divested the title out of appellant and the interveners and vested it in Mrs. Tribble and her children, and confirmed their title thereto, subject to the reservation in the deed of the use of the land by Tribble for his life. Plaintiff and interveners have appealed.

It may first be said that the instrument executed by Tribble to his wife and children was in form a deed, and not a will. It is true it reserved to the grantor the use thereof during his life. But it was a conveyance of the fee to take effect upon his death.

In the case of *Bunch* v. *Nicks*, 50 Ark. 367, 7 S. W. 563, Mr. Justice BATTLE, speaking for the court, said: "To determine the character of an instrument, as to its being a will or deed, it is necessary to ascertain the intention of the maker from the *whole* instrument, 'read in the light of surrounding circumstances.' If the intention, at the time of the execution of the instrument, was to convey a present estate, though the possession be postponed until after his death, it is a deed; but, if the intention was it

should not convey any vested right of interest, but should be revocable during his life, it is a will. *Jordan* v. *Jordan,* 65 Ala. 301; *Williamson* v. *Tolbert,* 66 Ga. 127." See also *Field* v. *Tyner,* 163 Ark. 373, 261 S. W. 35; *King* v. *Slater,* 96 Ark. 589, 133 S. W. 173; *Lewis* v. *Tisdale,* 75 Ark. 321, 88 S. W. 579; *Cribbs* v. *Walker,* 74 Ark. 104, 85 S. W. 244; *Galloway* v. *Devaney,* 21 Ark. 526; *Hershey* v. *Clark,* 35 Ark. 17, 37 Am. Rep. 1.

But, while the instrument is in form a deed, it is well settled that parol evidence is admissible to show that it was in fact a mortgage. To accomplish that result the evidence must be clear and convincing, but, if the evidence measures up to that standard and it is clearly shown that it was intended for the instrument only to secure the payment of an indebtedness due from the grantor, a court of equity will not hesitate to declare the real intent and effect of the instrument. *Wimberly* v. *Scoggin,* 128 Ark. 67, 193 S. W. 264; *Hays* v. *Emerson,* 75 Ark. 551, 87 S. W. 1027; *Snell* v. *White,* 132 Ark. 349, 200 S. W. 1023; *Brewer* v. *Yancey,* 159 Ark. 257, 251 S. W. 677.

Appellees argue that, inasmuch as the deed of trust had been taken to secure the loan, an additional conveyance by way of security would have been fruitless. This would, ordinarily, be true, but this case has some unusual features. Pearson knew the strained relations between Tribble and his wife, and he knew that Tribble's sisters were giving him attention, and he may have contemplated the possibility of a conveyance from Tribble to these sisters. He knew also the physical condition of Tribble, and may have contemplated Tribble's death, in which event a foreclosure would be unnecessary if Pearson determined to allow the title to pass to his daughter.

The deed and the deed of trust were executed simultaneously, and the consideration for both appears to have been the loan of $300. It is true, as appellees contend, that the deed recites that it was executed in consideration of the love and affection of the grantor for the grantees, his wife and children, and that this is a

sufficient consideration. It is true also, as contended by appellees, that, while one may show the actual consideration of a deed, this cannot be done for the purpose of invalidating the conveyance. Tribble cannot show that he had no love or affection for his wife and children for the purpose of defeating the conveyance as being void for the want of consideration, but he had the right to show that the instrument, though a deed in form, was in fact a mortgage, and, as tending to establish that fact, he had the right to show the circumstances under which and the purpose for which the instrument was executed, not to defeat or invalidate it, but to establish its true character.

In the case of *Mewes* v. *Mewes*, 116 Ark. 155, 172 S. W. 853, it was said that the well-settled rule of law is that the only effect of a consideration in a deed is to estop the grantor from alleging that the deed was executed without consideration. For every other purpose it is open to explanation and may be varied by parol proof. See also *Sutton* v. *Sutton*, 141 Ark. 99, 216 S. W. 1052; *Hampton* v. *Haneline*, 125 Ark. 441, 189 S. W. 40; *Armstrong* v. *Union Trust Co.*, 113 Ark. 509, 168 S. W. 1119.

The deed from Tribble to his wife and children cannot therefore be declared void as being without consideration, because Tribble had no love or affection for them, but we may inquire what the purpose and intent of the instrument was, and we are convinced, after doing so, that its sole purpose was to afford additional security for the loan which Pearson demanded, and, as it was intended only to secure the loan of money, it is in fact a mortgage.

When this instrument was executed, Tribble and his wife were openly hostile to each other. He had already made a settlement with her of her marital rights in his estate by conveying to her what was considered to be one-half of the value of the property. Mrs. Tribble admitted that, in addition to this, she had kept all the household furniture and fixtures when Tribble left home,

but she said most of the property was hers, as she and her husband had bought it together.

There is no reason to believe that Tribble intended to give his wife any additional portion of his estate, yet the effect of the deed in question is to divest him of all his property save only the income therefrom during the remainder of his life. The rent was only about $55 per month, and this deed, if permitted to stand as such, denudes him of all other property and deprives him of the means of compensating his sisters or other persons for the attention he so urgently needs and which his wife and children had refused to give.

Having reached the conclusion that the deed was in fact a mortgage, it becomes unnecessary to determine whether, if a deed, it would have been in fraud of the rights of his sisters as existing creditors; and it is also unnecessary to consider whether there was such a delivery of the deed to Tribble from his sisters as operated to reconvey to him the title which he had previously conveyed to them and which, as the court found, passed, as an after-acquired title, to Mrs. Tribble and her children.

The decree of the court below appears to have been based upon the application of this principle. But, as we have said, we do not find it necessary to determine whether that principle is applicable here or not, because, in our opinion, the instrument, in form a deed, was executed to secure the payment of money, and was therefore a mortgage.

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

SECURITY BENEFIT ASSOCIATION v. PUNCH.

Opinion delivered April 11, 1927.

1. APPEAL AND ERROR—CONCLUSIVENESS OF VERDICT.—In an action on a beneficiary certificate of insurance, where the issue was whether insured paid the annual premium when the policy was delivered to him, was submitted to the jury with proper instructions, an adverse verdict is conclusive on appeal if supported by substantial evidence.
2. INSURANCE—PAYMENT OF PREMIUM—EVIDENCE.—In an action on a policy of insurance, evidence *held* to warrant a finding that the annual premium was paid by the insured when the policy was delivered.
3. PAYMENT—RECEIPTS AS EVIDENCE.—Receipts for payment of money are *prima facie* evidence of payment thereof, though open to contradiction, and the burden of overcoming the presumption devolves upon the party giving the receipt.

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

T. N. Robertson, A. J. DeMers, James E. Hogue, A. W. Fulton and *George R. Allen,* for appellant.

J. A. Sherrill, for appellee.

HUMPHREYS, J. This appeal is from a judgment in the sum of $5,208.30, including interest to the date thereof, rendered by the circuit court of Pulaski County, Third Division, in favor of appellee against appellant, upon a beneficiary certificate of insurance issued on the 25th day of October, 1923, by appellant, a fraternal beneficiary association, in consideration of an annual premium of $113.75, to Samuel A. Punch, who died on the 25th day of September, 1924. Appellee was the beneficiary named in the policy.

Many issues were joined in the pleadings, and a very lucid, edifying brief has been filed by learned counsel for appellant in presentation of the points of law growing out of the several issues joined, but, for the purposes of this appeal, we deem it necessary to discuss one issue only, as that issue is determinative of the case. The issue referred to is whether the insured paid an annual premium of $113.75 when the policy was delivered

to him. This issue was submitted to the jury on proper instructions, and, under the well-established rule governing appeals to this court, appellant is bound by the adverse verdict and judgment, if supported by any substantial evidence. The policy sued upon was not found for some time after the death of the insured. When found, a receipt was attached thereto, signed by the district manager of appellant, for $113.75, dated November 9, 1923, the date the policy was delivered to and accepted by the insured. This was the correct amount of the annual premium.

The district manager testified that, on October 25, 1923, pursuant to agreement, he presented the $5,000 policy with receipt attached for the annual premium of the insured, and left them for his inspection; that the insured discovered that the policy contained an error concerning the lodge to which he belonged; that he procured the policy, left the receipt with the insured, and returned it to the home office for correction; that, after being corrected and returned, he took the policy back to the insured; that the insured had obtained other insurance in the mean time, and did not feel able to carry the $5,000 policy, but that he finally prevailed upon him to keep it; that the insured paid him $68 at the time, for which he issued a receipt; that he failed to take up the first receipt which he had left with him for $113.75; that he explained to the insured that, as the $68 did not cover the premium for six months, he would have to retain it and pay the premium monthly out of same; that he delivered the policy the second time with the $68 receipt on November 9, 1923; that he paid the monthly premium out of the $68 payment until exhausted; that he was away on a vacation in June, and did not pay the premium, which resulted in the automatic suspension of the insured, under the by-laws of the appellant; that on July 1, 1923, he paid the insured's premium out of his own money for June and July, which had the effect of automatically reinstating him; that the August dues were not paid, and insured was again suspended; that in September the

local financier notified witness that she was ready to send in her report, and asked about the premiums on insured's policy; that he told her to report him suspended and to reinstate him, and that, as soon as he came down town, he would give her the money; that, later, he called and gave her a check for $20.50, and was informed that the insured had been reinstated on the books on September 18, 1924, but that she had not entered the payment on the cashbook; that, four or five days later, he was in the office, and the financier said that, to make the entries in the cashbook come in proper order, she had changed insured's reinstatement date to September 23; that she had not cashed the check, so the witness took it up and gave her the money instead; that, under his contract, he received the first eleven months premiums on policies as commissions, and that, after insured was reinstated the last time, and the head office had received the report from the local financier to that effect, he received a letter from the head office showing payment of his commissions on the insured's certificate; that, after the death of the insured, his wife, the appellee herein, refunded the premiums he had advanced for the insured, amounting to $40.25; that he did not believe the home office would have paid him the commission if it had known the last $20.50 was paid after the insured's death.

The financier of the local council testified that the insured was suspended in June, 1924, and reinstated the following month; that the former district manager paid the June and July assessments out of his own money; that, on the 18th day of September, the former district manager told her, over the telephone, to reinstate the insured, who had failed to pay the August dues, and that he would bring the money in; that, acting on the former manager's promise, she reinstated insured upon the book without receiving the money, and afterwards changed the date from the 18th to the 23d of September; that the insured died on September 25, and that the manager brought the money to her on the 26th day of September, after insured's death.

The by-laws of appellant were introduced by Mr. Abrahams, which provided that assessments of members are due on the first day of the month, and must be paid on or before the last day of the month, and, if not paid, the insured shall stand suspended without notice; also, that the insured may be reinstated within sixty days by paying up all arrearages, provided the insured is in good health at the time of making payment for reinstatement; also, that the association shall not be bound by any irregularity, neglect or illegal actions of any of its subordinate council or any of its officers.

The original certificate or policy and the receipt for $113.75 were introduced in evidence, and have been brought to this court for inspection. The certificate or policy bears date of October 25, 1923, but was apparently signed by the district manager and the insured on the same date said receipt was signed. The receipt was signed on November 9, 1923, being the date on which the policy was delivered. This is inferable from the fact that the same color of ink was used by the manager and the insured in signing the policy which the manager used in signing the receipt. The insured did not leave Little Rock for California, where he was injured and died, until the 14th day of August, 1924. He was not notified by the manager or financier that he was or had been in default in the payment of his assessments or premiums.

We think the conflict in the book entries, with the testimony of the manager and financier as to when the payments or assessments or premiums were actually made, the change of entries in the books, the failure of the manager to call upon the insured for his assessments or premiums after the $68 was exhausted, and the date of the receipt on November 9, 1923, instead of October 25, 1923, so as to correspond in date with the policy, furnish warrant to the jury in drawing the inference that the full annual premium of $113.75 was paid when the policy was delivered on November 9, 1923, as indicated by the receipt. The receipt is a very strong piece of evidence itself to the effect that the amount specified

therein was paid when same was executed and delivered to the insured.

In speaking of receipts for the payment of money and their effect, this court said, in the case of *Continental Gin Co.* v. *Benton,* 104 Ark. 367, 149 S. W. 528, that:

"Receipts of payment are *prima facie* evidence thereof; they are open to explanation and contradiction, but the burden of overcoming the presumption and *prima facie* case and making the explanation devolves upon the party giving the receipt."

And in the case of *Fidelity Mutual Life Ins. Co.* v. *Click,* 93 Ark. 162, 124 S. W. 764, said:

"The introduction of the receipt, properly signed, raised a presumption of payment within the terms of the receipt and cast the burden of overcoming the presumption by affirmative proof of nonpayment. Appellee introduced no other proof of payment, and perhaps had none, as the person shown by the face of the receipt to have made the payment was then dead. This presumption reached to every available mode of payment, and, in order to overcome it, the burden was on appellant to close up by affirmative proof every avenue through which the payment could have been made."

In view of what has been said with reference to the testimony and the rules just quoted, we think the evidence amply sufficient to sustain the verdict and judgment.

No error appearing, the judgment is affirmed.

MISSOURI & NORTH ARKANSAS RAILROAD COMPANY v. UNITED FARMERS OF AMERICA.

Opinion delivered April 11, 1927.

1. APPEAL AND ERROR—CONCLUSIVENESS OF JURY'S FINDING.—The verdict of a jury, being based upon substantial evidence, is conclusive upon appeal.
2. CARRIERS—NOTICE OF ARRIVAL OF SHIPMENT.—A requirement in bill of lading that notice of arrival of a shipment should be given to the consignee is not complied with by giving such notice to the consignor.
3. CARRIERS—LOSS OF GOODS—ACT OF GOD.—To exempt a carrier from liability as insurer for the safe transportation and delivery of goods on account of their destruction by act of God, the act of God must be the sole cause of the loss.
4. CARRIERS—LOSS OF GOODS BY LIGHTNING.—A railroad company is not relieved from liability for loss of freight in a warehouse at destination, caused by fire originating from lightning, where, if the railroad company had given proper notice to the consignee, the freight would have been removed before the fire.
5. CARRIERS—LIABILITY FOR LOSS OF FREIGHT IN WAREHOUSE.—A railroad company is not relieved from liability for the loss of cotton consigned to shipper's order and destroyed by fire in a warehouse at destination, on the theory that the warehouse company was the shipper's agent, where the railroad company's control over the freight had not ceased.

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

Shouse & Rowland and *R. E. Wiley*, for appellant.

John E. Miller and *J. Mitchell Cockrill*, for appellee.

HUMPHREYS, J. Appellees instituted suit against appellant in the circuit court of White County to recover $343.91, the value of two bales of cotton which appellee, United Farmers of America, shipped from Heber Springs to Searcy, to be sold by its agent, W. B. Cook, said cotton having been destroyed by fire in the warehouse of the Searcy Compress Company, to whom appellees delivered same.

It was alleged, in substance, in the complaint, that, on January 19, 1924, the United Farmers of America delivered two bales of cotton to appellant, a common carrier, at Heber Springs, to be transported to Searcy, for

which a bill of lading was issued; that, on January 25, 1924, the cotton arrived at Searcy and was delivered to the Searcy Compress Company, without giving notice to W. B. Cook of the arrival of the cotton; that, on February 3, the compress burned and the cotton was destroyed; that the shipment was consigned to shipper's order, with directions to notify W. B. Cook, agent of said appellees at Searcy, who received no notice or information that the cotton had been placed in the compress until February 4, after its destruction; that said appellee, for a valuable consideration, prior to the institution of the suit, assigned all its rights, interests and title in and to said cotton to its coappellee, Hartford Insurance Company.

Appellant filed an answer, denying that it failed to give notice of the arrival of the cotton to W. B. Cook, or that W. B. Cook had no notice or knowledge of the arrival of the cotton at Searcy until February 4.

By way of further defense, appellant alleged that the cotton was stored with the Searcy Compress Company in accordance with the custom between appellant and appellee, United Farmers of America, without the surrender of the bill of lading, which custom constituted the Searcy Compress Company appellant's agent to receive the cotton; that appellant transported the cotton to Searcy and gave notice to W. B. Cook, who failed to move the cotton, and, after a reasonable time, appellant delivered the cotton for storage to the Searcy Compress Company, which was a public and licensed warehouse, on January 25, 1924, and afterwards the compress was struck by lightning and the cotton burned in the resulting fire.

The following provisions of said bill of lading were pleaded as a further defense:

"Section 1 (b). No carrier shall be liable for loss or damage caused by the act of God. Carrier's liability to be that of warehouseman only for loss by fire occurring after the expiration of the free time allowed by tariffs after notice of arrival at destination and placement of property for delivery.

"Section 4 (a). Property not removed by the party entitled to receive it within the free time allowed by tariffs after notice of arrival at destination and placement of property for delivery may be kept in vessel, cars, or depot or warehouse, subject to charges for storage and to carrier's responsibility as warehouseman only, or, at the option of carrier, may be stored in public or licensed warehouse at the place of delivery, at the cost and without liability on the part of the carrier, and subject to a lien for all freight charges."

The cause was submitted to the court for trial, sitting as a jury, upon the pleadings, testimony adduced by the respective parties and a stipulation to the effect that the Searcy compress, where the cotton was burned on February 3, 1924, was destroyed by a stroke of lightning; and that the free time allowed by the tariffs for removal of the cotton after notice of arrival at destination and placement for delivery was 48 hours, which trial resulted in a judgment against appellant for $384.60, from which is this appeal.

The record reflects, according to the undisputed testimony, that, on January 19, 1924, United Farmers of America, of Heber, Arkansas, shipped two bales of cotton to Searcy, Arkansas, over appellant's railway, consigning same to shipper's order, with directions in the bill of lading to notify appellant's agent, W. B. Cook, when the cotton arrived in Searcy; that the cotton arrived at its destination on January 25, 1924, and was delivered to the Searcy Compress Company without the production of the bill of lading by W. B. Cook; that the bill of lading for the two bales of cotton had been mailed to and received by W. B. Cook; that the cotton remained in the compress until February 3, 1924, at which time it was destroyed by fire resulting from a flash of lightning that struck the warehouse; that, had W. B. Cook been notified of the arrival of the cotton when it reached its destination or when placed in the warehouse, he would have immediately obtained warehouse receipts for same and samples of the cotton, which would have enabled him

to place it on the market; that, without warehouse receipts and samples, he could not offer the cotton for sale; that, had he been notified of the arrival of the cotton or that same had been placed in the compress, he could have included it in the blanket insurance policy by proper designation; that the manner of handling cotton theretofore shipped by United Farmers of America to W. B. Cook for sale was for Cook, after receiving notice or weight sheets from the Searcy Compress Company of the arrival and storage of the cotton, to present the bill of lading to appellant, paying the freight, and immediately obtain warehouse receipts from the Searcy Compress Company for same; that W. B. Cook failed to receive any notice of the arrival of the cotton at its destination from appellant; that the bill of lading contained the provisions heretofore set out as § 1 (b) and § 4 (a).

The record reflects a conflict in the testimony as to whether W. B. Cook received notice or weight sheets of the arrival of the cotton from the Searcy Compress Company immediately after the arrival and storage of same, but this conflict has been resolved against appellant and it is bound by the finding of the court, as there is substantial evidence to sustain the finding. In other words, in reviewing the case on appeal to ascertain whether the trial court committed error, the finding of the trial court to the effect that appellant failed to give notice of the arrival of the cotton to W. B. Cook, or that W. B. Cook received notice or information from the Searcy Compress Company of the arrival of the cotton or other source, must be treated as true.

Appellant's main contention for a reversal of the judgment is that it was exempted from liability as an insurer of the cotton under the provisions of § 1 (b) of the bill of lading set out above, because the undisputed testimony reveals that the cotton was destroyed by an act of God. Appellant cites the case of *Mays* v. *Mo. & North Ark. Rd. Co.*, 168 Ark. 908, 271 S. W. 977, as conclusive of its contention. In the case cited liability was not claimed on account of a failure to comply with the con-

tract. On the contrary, it affirmatively appeared that the carrier complied with the contract in that case. In the case at bar liability was predicated upon the failure of appellant to comply with the requirements of the bill of lading and §§ 910 and 913 of Crawford & Moses' Digest, by giving notice of the arrival of the cotton to the party designated in the bill of lading. There is substantial evidence in the record in support of the finding of the court that the notice was not given. It is true that the undisputed evidence disclosed that the Searcy Compress Company mailed the weight sheets or notices to United Farmers of America at Heber Springs as soon as the cotton was placed in the compress, but that did not meet the requirements in the bill of lading to give notice to W. B. Cook, who resided in Searcy and was engaged to sell the cotton. The United Farmers of America had a right to presume that notice of the arrival of cotton had been given to Cook, notwithstanding the notice which had been sent to it. On account of the distinction pointed out between the cases, the instant case is not ruled by the case cited. In order to exempt a common carrier from its liability as an insurer for the safe transportation and delivery of goods on account of destruction of same by an act of God, the act of God must be both the sole and proximate cause of the injury. *St. L. S. W. Ry. Co.* v. *Mackey*, 95 Ark. 301, 129 S. W. 28. In the instant case the direct cause of the destruction of the cotton by fire was a stroke of lightning that set fire to the warehouse. It cannot be said, however, that the cotton would have been destroyed by this act of God if appellant had given the required notice to Cook. Had Cook received notice of the arrival and storage of the cotton he could have placed it upon the market and sold it before same was destroyed. In any event, he would have insured it against loss by fire. The negligent act of appellant, then, in failing to notify Cook, was an efficient and cooperative cause in the destruction of the cotton. The lightning directly destroyed it, but it was not the sole and proximate cause of its destruction.

Appellant makes the further contention for a reversal of the judgment that delivery of the cotton to the Searcy Compress Company constituted delivery to the consignee. This contention is made upon the theory that the Searcy Compress Company was the agent of United Farmers of America, because it was customary, in handling the shipments of cotton theretofore, for appellant to turn the cotton over to the Searcy Compress Company before the freight was paid and before the redemption of the bill of lading. We do not understand from the record that, when appellant turned the cotton over to the Searcy Compress Company, it ceased to control the same. According to the undisputed evidence, the compress company did not issue receipts for the cotton to the consignee until the consignee paid the freight and surrendered the bill of lading which appellant had issued to it. In other words, it was not within the power of Cook, the consignee designated in the bill of lading, to secure any control over the cotton until he paid the freight thereon and surrendered the bill of lading. We think the fact that the Searcy Compress Company was in the habit of notifying the consignee of the arrival and storage of the cotton is very strong evidence that it was acting in the capacity of agent for appellant. The cotton was not delivered to the designated consignee prior to its destruction, hence appellant was a carrier in the control of the cotton when same was destroyed.

No error appearing, the judgment is affirmed.

LANGE v. MAYO.

Opinion delivered April 11, 1927.

1. EXCHANGE OF PROPERTY—DISCREPANCY IN CULTIVATED ACREAGE.—Under a contract for exchange of a farm for city property, a discrepancy of 125 acres in the cultivated load from that represented was a material one.
2. EXCHANGE OF PROPERTY—FALSE REPRESENTATIONS.—False representations as to acreage of cultivated land, though material in a contract for exchange of lands, are not sufficient grounds for avoiding the exchange, or to prevent specific performance of the contract.
3. SPECIFIC PERFORMANCE—FALSE REPRESENTATIONS.—Though, in a suit to enforce specific performance of a contract for exchange of lands, plaintiff made false representations as to the acreage of cultivated land, specific performance will not be denied, where defendant examined the property carefully and was aware of the discrepancy as to acreage before entering into the contract.

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

Will G. Akers, for appellant.

Coleman & Riddick, for appellee.

HUMPHREYS, J. This suit was instituted by appellees against appellants in the chancery court of Pulaski County, to enforce the specific performance of a contract for the exchange of their farm in Lonoke County, Arkansas, for an apartment house belonging to appellant in Capitol View Addition to the city of Little Rock, Arkansas.

Appellants interposed the defense that they were induced to enter into the contract through the false and fraudulent representation of appellees that 500 acres of the land were in a high state of cultivation, and, on account of the alleged misrepresentation, sought by crossbill to cancel the contract.

The cause was submitted to the court upon the pleadings and testimony adduced by the respective parties, which resulted in a finding that appellees were entitled to a specific performance of the contract, and decreed accordingly, from which is this appeal.

In October, 1925, appellees advertised the farm for sale or exchange, describing it, as to acreage, as comprising 594 acres of land, 500 acres of which were in cultivation. David C. Lange, one of the appellants, answered the advertisement by letter with a view to exchanging his apartment house for the land. Appellees replied by letter, particularly describing the farm and stating that there were 500 acres in a high state of cultivation. David C. Lange made no response to the letter. Later R. W. Mayo called upon him and offered to show him the farm. Lange accepted the invitation, and they visited it and went all over the farm on Sunday, November 1. While there, Lange asked Mayo as to the acreage in cultivation. According to the testimony of Lange, Mayo said 500 acres. According to the testimony of Mayo, he made the following reply to the question: "Mr. Lange, I do not know just how many acres of it are in cultivation, but we bought the place for 594 acres, 514 in cultivation. I think there is approximately 500 acres in cultivation." The parties were unable to agree upon a trade, so the deal was stopped. On November 4 Lange wrote to Mayo as follows: "I was sorry that we could not get together on a trading proposition, but thought you might be interested in the cash proposition I made of $15,000 for my equity." After receiving this letter, appellees concluded they could trade the apartment house for a rice farm, so negotiations were resumed. R. W. Mayo testified that, in the course of the negotiations, he said: "Mr. Lange, I told you about this trade. Now, I tell you what to do. I want you to be thoroughly satisfied in what you are doing. You go down to the farm—go down in Lonoke County, talk to the different tenants that are on the farm, the different neighbors, find out what cotton they are making, and about the value of different lands around there, and, when you are thoroughly satisfied, come back and make me a proposition, and I think I can handle it." This statement was not contradicted by Lange.

According to the testimony of A. C. Brummitt, Lange came with W. D. Mayo the first Sunday in November and looked over the farm; and came alone the three following Sundays, the 8th, the 15th, and the 22d, arriving each time at about 11 o'clock A. M. and leaving late in the afternoon, after looking over and inspecting the farm. The witness stated that the first two Sundays he met and became acquainted with Lange, but had no conversation with him concerning the farm; that, on the third Sunday, the 15th of November, he had a conversation with Lange relative to renting the farm if he purchased same; that he offered to pay him $6 per acre for the land he was cultivating; that Lange was not pleased with the offer, stating that he could not make 6 per cent. on the investment at that price, as he had been told by N. A. Marshall, another tenant on the place, that there weren't more than 375 acres in cultivation. Lange then proposed that, if he got the land, to let witness have it for one-fourth of the crop on the cotton land, $6 an acre on the corn land, and $8 an acre on the land planted to other crops. Witness refused this proposition, and they came to no agreement.

According to the testimony of N. A. Marshall, Lange asked him how many acres there were on the farm in cultivation, and that he told him about 375 acres inside the fence lines.

Lange admitted having the conversations with Brummitt and Marshall relative to the acreage of cultivated lands in the tract, but claimed they were subsequent to the execution of the contract, which was signed by the parties on the 18th day of November. He stated that he received his first information as to the shortage of cultivated lands in the tract from Marshall, and that, after making further investigation and ascertaining that Marshall's statement was about correct, he declined to proceed further with the contract. He also stated that he signed the contract in reliance upon Mayo's representation that the tract contained 500 acres of cultivated land, and would not have signed it unless he had believed

that there was that much land in cultivation. After the parties came to an understanding relative to the terms of the exchange of lands, they consulted their respective attorneys and had them prepare the contract. No reference was made in the contract to the amount of cultivated land in the tract.

Appellees employed ——— Smith to survey out the cultivated lands, and, according to his survey, there were 468 acres of cleared land in the tract, including 30 acres of buckshot land used as pasture.

Lange employed J. O. Jones to survey out the cultivated lands, and, according to his survey, excluding the pasture, the tract contained 385 acres of land actually in cultivation.

Other witnesses who were familiar with the lands testified as to the amount of lands actually in cultivation on the tract, who varied in their estimates from 350 to 450 acres.

We are convinced, after a careful reading of the record in the case, that appellees misrepresented the amount of lands in cultivation on the tract in the advertisement for the sale and exchange of the land, in the letter they wrote in response to Lange's letter of inquiry, and in their conversations and consultations with him prior to the time the deal was stopped. After negotiations were resumed, however, appellees requested Lange to make a thorough investigation of the farm by going upon it, talking to the tenants and neighbors around about, and, after satisfying himself, to make them a proposition. Lange made a rather thorough investigation of the farm, and, according to the testimony of two witnesses, became aware of the discrepancy in the acreage of cultivated lands on the tract three days before he entered into the contract for the exchange of the properties. The shortage in acreage in cultivated lands was about 125 acres, and a material discrepancy. False and fraudulent misrepresentations as to the acreage, which is material, in a land deal, unless relied upon, are not sufficient grounds to avoid a sale or trade or to prevent the

specific performance of the contract. In view of the inspection of the farm made by Lange, the request of appellees for him to make his own investigation, and the testimony of Brummitt and Marshall, it cannot be said that the finding of the chancellor, to the effect that the discrepancy in the acreage of cultivated lands did not induce the trade, is contrary to a clear preponderance of the evidence. With the opportunity afforded Lange to investigate and inspect the farm, it must be presumed that he exercised and relied upon his own judgment in making the contract. We think the rule announced by this court in the case of *Carwell* v. *Dennis,* 101 Ark. 608, 143 S. W. 137, is applicable to the facts in the instant case. The rule referred to is as follows:

"A misrepresentation, in order to affect the validity of a contract, must relate to some matter of inducement to the making of the contract, in which, from the relative position of the parties and their means of information, the one must necessarily be presumed to contract upon the faith and trust which he reposes in the representations of the subject of the contract. For, if the means of information are alike accessible to both, so that, with ordinary prudence or diligence, the parties might respectively rely upon their own judgment, they must be presumed to have done so. Or, if they have not so informed themselves, must abide by the consequences of their own inattention and carelessness."

No error appearing, the decree is affirmed.

NORVELL v. MCFADDEN.

Opinion delivered April 11, 1927.

1. GUARDIAN AND WARD—CONVERSION OF ASSETS—JURISDICTION.—A ward, in becoming of age, may bring suit in equity against a person receiving money from the guardian and wrongfully converting it, without first going to the probate court for settlement of the guardian's account.
2. PLEADING—INDEFINITENESS.—Indefiniteness or uncertainty in a pleading should be reached by motion to make more definite and certain, and not by demurrer.
3. TRIAL—WRONG FORUM—REMEDY.—Where a complaint in chancery states a cause of action triable only at law, the remedy is a motion to transfer to the proper forum, and not a demurrer.

Appeal from Arkansas Chancery Court, Northern District; *H. R. Lucas,* Chancellor; reversed.

STATEMENT BY THE COURT.

Appellant instituted this suit in the chancery court against H. F. McFadden and the Exchange Bank & Trust Company. Complaint alleges that Mrs. Fannie McFadden (formerly Norvell) was the duly appointed guardian of the person and estate of plaintiff by the probate court of Arkansas County, where she and the plaintiff lived, and came into the possession, as such guardian, of $1,250 of his estate on the 20th day of August, 1923, and on that day wrongfully delivered said money to defendant, H. F. McFadden, and said McFadden wrongfully converted said money to his own use, and has never accounted for same.

The defendant, McFadden, is indebted to the plaintiff in the additional sum of $352 for rents collected by him during the year 1925 from tenants of certain property of the plaintiff's, located in the city of Stuttgart, having collected from the said tenants therein the rent for eight and one-half months at $40 per month. The defendant collected said rents and converted same to his own use, but had delivered or caused to be delivered to plaintiff the sum of $115 and a ring of the value of $60, for which he was entitled to credit on amount of the rents collected.

Plaintiff was entitled to recover from the defendant the sum of $1,602, with interest thereon until paid, less the sum of $194.50. Plaintiff is entitled to recover interest at the rate of 10 per cent. per annum on the said $1,250 from the 20th day of August, 1923, and to recover interest from the day of filing of the suit on the sum of $352 rent collected, less the amount of the credit thereon.

The complaint further alleges that Mrs. Fannie McFadden is the wife of the defendant, H. F. McFadden, and both are nonresidents of the State of Arkansas and are citizens and residents of the State of Texas. Plaintiff has arrived at legal age, and has never received anything in payment of the aforesaid sums, and that defendant is entitled to have deducted $194.50 only from the amount received and converted by him.

It was further alleged that defendant might contend that he had granted or given to plaintiff an interest in certain property in his possession in the State of Texas, which should compensate for the money claimed by plaintiff and sued for, that it had been intimated to plaintiff that defendant desired to adjust or settle the controversy by handling said Texas property in partnership with plaintiff, but that he had not done so, and that he refused to make any adjustment thereof, and denies that the plaintiff was given any interest in said property.

It further alleges that the defendant and garnishee, the Exchange Bank & Trust Company, has in its hands various properties, effects, notes, accounts, assets and moneys belonging to the defendant, McFadden, and in which he owns an interest, and said defendant and garnishee, Exchange Bank & Trust Company, is indebted to defendant, McFadden; that the said properties, effects, notes, accounts, assets and moneys may be carried in the name of Mrs. Fannie McFadden, and the indebtedness for moneys on deposit may be carried in her name, but the defendant, H. F. McFadden, owns and has an interest in said property; and that, even if Mrs. Fannie Webb McFadden claims an interest in said property, effects, notes, accounts, assets, moneys, debts and deposits, such

interest, if any, is subject to the rights of the plaintiff because of the acts of Mrs. Fannie McFadden, former guardian of plaintiff, in wrongfully delivering the aforesaid $1,250 to H. F. McFadden, and because of her acts in allowing and consenting to the said McFadden receiving the aforesaid rents, and because of her acts in allowing the said H. F. McFadden to convert the said money to his own use, and because of her acts in consenting to such conversion of such trust moneys.

That said moneys or properties may be carried in the name of McFadden Jewelry Company, defendant's trade name. Plaintiff is entitled to writ of garnishment to impound all the aforesaid effects, credits, notes, bills, accounts, choses in action, money or deposits in the hands of defendant and garnishee.

Propounded interrogatories to the defendant and garnishee relating to said property alleged to be in its hands, it alleges that the garnishee is a domestic corporation doing a general banking business in the city of Stuttgart, and plaintiff is entitled to an attachment and garnishment for seizure and impounding of all the property in possession of defendant and garnishee, and to have defendant and garnishee answer the allegations and interrogatories, and to subject all the said property and things to the payment and satisfaction of the aforesaid indebtedness and the decree of the court. Prayed judgment against defendant in the sum of $1,250, with interest thereon from the 20th day of August, 1923, until paid, at the rate of 10 per cent. per annum; and the further sum of $157.50, with legal interest from date, and an attachment and garnishment for impounding the property in the possession of the garnishee; that, upon final judgment, the attachment and garnishment be sustained and all the property of the defendant in the hands of the garnishee be subjected to the satisfaction of the decree rendered, and that any interest Mrs. Fannie McFadden may claim, if any, of said property be held and declared subject to the rights of the plaintiff to recover herein.

Affidavit for attachment and garnishment and warning order was made and bond filed and approved, and a writ of attachment and garnishment issued and served.

Defendant garnishee's answer admitted an indebtedness, and that it held certain other properties belonging to defendant, if he had not assigned or transferred them.

Defendant filed a general demurrer to the complaint, alleging it did not state facts sufficient to constitute a cause of action within the jurisdiction of the court nor facts sufficient to constitute a cause of action.

The court held the demurrer to the complaint well taken, saying the complaint herein does not allege facts sufficient to constitute a cause of action and should be dismissed for want of equity, and dismissed same for want of equity, and from the judgment this appeal is prosecuted.

A. G. Meehan and *John W. Moncrief,* for appellant.

KIRBY, J., (after stating the facts). The court erred in sustaining the demurrer. The complaint alleged that appellant had come of age, that defendant, McFadden, had received from his legally appointed guardian moneys, $1,250, belonging to him, and wrongfully converted same to his own use; that he had collected rents from tenants of plaintiff's property amounting to $352 and failed or refused to account for or pay over same to him, and that he was entitled to recover said amounts, less a small credit allowed. He was entitled to bring this suit without going first to the probate court for settlement of the accounts of the guardian. *Blanton* v. *First National Bank,* 136 Ark. 441, 206 S. W. 745; s. c. 142 Ark. 404, 219 S. W. 305; *American Assurance Co.* v. *Vann,* 135 Ark. 295, 205 S. W. 646.

If the complaint was regarded as too indefinite and uncertain in its allegations, the defect should have been corrected by a motion to make more definite and certain, and not by a demurrer.

The allegations of the complaint relating to the rents collected by the defendant, McFadden, from plaintiff's tenants, and not accounted for or paid over to him, con-

stituted, in any event, an action for moneys had and received, and, if the entire complaint could only be considered as stating a cause of action at law, the error should have been remedied by a motion to transfer to the proper forum, and could not be reached by demurrer. *Columbia Compress Co.* v. *Reid,* 160 Ark. 436, 254 S. W. 825.

It follows that the chancellor erred in sustaining the demurrer and dismissing the complaint for want of equity, and the decree is reversed, and the cause remanded for further proceedings according to law and not inconsistent with this opinion.

McCoy *v.* Holman.

Opinion delivered April 11, 1927.

1. Improvement district—several improvements.—Under Acts 1923, p. 538, § 1, amending Acts 1923, p. 87, § 1, providing for creation of improvement districts for building street car lines, waterworks, gas and electric lines, the county court is empowered to organize a district to construct several such improvements without regard to the connection or relation of the improvements to each other.
2. Improvement districts—single improvement.—Where the county court creates an improvement district for the purpose of constructing lines connecting with water, gas and electric light systems within an adjoining city, the three improvements, though distinct in character, are to be treated as one improvement for the purpose of including them in one district.
3. Improvement districts—several improvements with single assessment.—Where an improvement district is organized to connect an outlying district with the waterworks system and the gas and electric lines within an adjoining city, each improvement is part of an entire improvement, which can be provided without necessity for a separate assessment of benefits for each part of the improvement, though distinct parts confer benefits of different kinds on property.

Appeal from Pulaski Chancery Court; *Frank H. Dodge,* Chancellor; affirmed.

STATEMENT BY THE COURT.

This suit brought by appellant challenges the validity of an improvement district created by the Pulaski County Court out of territory adjacent to the city of Little Rock, under the provisions of act 126 of the Acts of 1923, as amended by act No. 645 of the 1923 session of the General Assembly.

Appellant, an owner of real property and a taxpayer within the district, instituted this action in the chancery court against the board of improvement to restrain and enjoin it from proceeding with the construction of the improvement authorized. The complaint alleges that the district was created by order of the Pulaski County Court September 7, 1926, for the purpose of "laying a complete system of main and lateral water-pipes connecting with the waterworks system serving the city of Little Rock, and for the purpose of laying a complete system of gas-pipes connecting with the gas system of the city of Little Rock, and for the purpose of building a system of electric lines for light and power connecting with the lines or systems serving the city of Little Rock. Said water, gas, electric light and power systems to be so located in said district, built in such manner and with such materials as the commissioners of the district may deem for the best interest of the property owners, and to extend beyond the borders of the district, if desirable or necessary." That this order creating said district combined three improvements, separate and distinct in type, and that the property owners cannot ascertain from the assessment of benefits the amount assessed for each separate improvement. That the county court was authorized to only create a district for making one improvement, was without authority to make the order complained of, and alleged it to be invalid on that account.

It alleged further that the board had made plans for the construction of said improvements, and that there had been made and filed by the assessors an assessment of benefits on the real property located within the bounds

of the district, which, it was alleged, was void because it makes but a single assessment upon the property for the construction of the three distinct improvements.

It alleged also that the assessment of benefits constituted a cloud upon appellant's title to the property in the district, and prayed that the district be declared invalid, the assessment of benefits against the property therein null and void, and that the board be perpetually enjoined from issuing bonds and proceeding with the construction of the improvement.

Appellees admitted the allegations in paragraphs 1 and 2 of the complaint, that the order of the county court combined three types of improvements, which are distinct, and that the property owners cannot ascertain from the assessment of benefits the amount of benefits assessed for each separate improvement, and denied that only one unit of improvement or separate improvement should have been included in the court order, that the county court was without authority to make the order, and that the district was invalid.

The answer alleged further that the three types of improvements set out in the order of the county court covered identically the same territory. That the district created by the said order is composed of lots and blocks joining one to the other, and is a complete unit, and that the three improvements provided for in the order can be made as fully and effectively in the same manner and without prejudice to any of the property owners of the one district as could have been done by the organization of three separate districts.

General demurrers were interposed to the complaint and answer, and the court sustained the demurrer to the complaint, overruled the demurrer to the answer, and plaintiff, electing to stand upon his complaint, declined to plead further, and the complaint was dismissed for want of equity, from which judgment this appeal is prosecuted.

S. L. White, for appellant.

L. P. Biggs, for appellee.

KIRBY, J., (after stating the facts). Appellant contends that a local improvement must consist of a single unit and that the county court was without power to organize a district for the construction of three separate and distinct improvements. The statute under which the district was organized provides: "Upon the petition of a majority in value of the owners of real property in any territory adjacent to a city having a population of more than ten thousand inhabitants, as shown by the last Federal census, it shall be the duty of the county court to lay off into an improvement district the territory described in the petition, for the purpose of building street-car lines, waterworks or water pipes, systems of gas-pipe lines, electric lines for light and power, or sewers, * * * or for more than one of said purposes," etc. Section 1, act 645, Acts of 1923.

The court's order establishing the district reads:

"Laying a complete system of main and lateral water-pipes connecting with the waterworks system serving the city of Little Rock; and for the purpose of laying a complete system of gas-pipes connecting with the gas system of the city of Little Rock; and for the purpose of building a system of electric lines for light and power connecting with the lines or systems serving the city of Little Rock. Said water, gas, electric light and power systems to be so located in said district," etc.

It was the evident purpose, as plainly expressed in the statute, to empower the county court to lay off and organize such improvement districts for the purpose of constructing any one or more of the improvements designated. This might include the construction of several of said improvements, any three or more of them, and without regard to the connection or relation of either improvement to the other, so far as the power of the county court to establish the district is concerned.

In *Wilson* v. *Blanks,* 95 Ark. 496, 130 S. W. 517, the court held, under statutes authorizing the creation of districts for construction of improvements in cities and towns, that one district could be created for the purpose

of making two local improvements, waterworks and electric light systems. Answering the question, Can one district be created for both purposes? the court said: "The statutes do not expressly prohibit the creation of one district for the purpose of making two local improvements. Their object is to secure the improvements upon the terms and conditions prescribed by the statutes. If the two improvements cover the same territory, and can be made as fully and effectually and in the same manner, and without prejudice to the rights of any of the property owners under the statutes by one as they can be by two districts, we see no valid reason why they should not be combined and made in such manner."

The two improvements must be treated as one, of course, for the purpose of including them in one district, a single improvement or construction, and made in the manner indicated and under the requirements of the statute as to the limiting of cost. *Bateman* v. *Bd. of Commissioners,* 102 Ark. 307, 143 S. W. 1062.

In *Bank of Commerce* v. *Huddleston,* 172 Ark. 999, 291 S. W. 422, the court held that improvement districts embracing the entire area of the city or town may be created for the purpose of constructing waterworks and electric lights, and could accept contributions from the city in order to enable it to construct the improvements within the limit of cost provided for by statute.

In the instant case each of these separate improvements are but a combination and parts of an entire improvement which can be provided in the organization of one district and without necessity for or regard to a separate assessment of benefits for each one of the parts of said improvements, even though the distinct parts of the improvement confer benefits of different kinds upon the property of the district. They each alike confer similar and identical benefits on the property in the district, and there is no good reason why they might not be constructed more economically and to the advantage of the property owners of the district by one board as a combined and single improvement, than by three boards of

commissioners constructing one such improvement for the same territory under three separate improvement districts.

There are no other contentions made as to the invalidity of the district, which is presumed to be lawfully created. No error was committed by the chancery court, and its decree is affirmed.

ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY v. MILLER.

Opinion delivered April 11, 1927.

1. MASTER AND SERVANT—JURY QUESTION.—In an action under the Federal Employers' Liability Act (U. S. Comp. St., §§ 8657-8665) by a section foreman against a railroad to recover for injuries alleged to have resulted from negligence of helpers while replacing a tie in defendant's track, the question of the negligence of fellow servants was for the jury.
2. TRIAL—INSTRUCTION DIRECTING VERDICT.—In an action by a section foreman against a railroad for injuries alleged to have resulted from negligence of helpers while replacing a tie in defendant's track, an instruction authorizing a recovery if it was the duty of fellow servants to wait until plaintiff had put his pick into the tie, and they failed to do so, and thereby caused plaintiff's injuries, *held* not tantamount to directing a verdict.
3. APPEAL AND ERROR—INDEFINITENESS OF INSTRUCTION—OBJECTION.—If defendant regarded an instruction on negligence as insufficient in failing to define negligence, it should point it out with a specific objection, in order to have a valid ground for complaint on appeal.
4. MASTER AND SERVANT—CONTRIBUTORY NEGLIGENCE—INSTRUCTION.—Where a railroad, in an action under the Federal Employers' the railroad alleged that the injuries complained of were due to plaintiff's negligence, an instruction on contributory negligence did not constitute prejudicial error, although the plea was not one of contributory negligence.
5. MASTER AND SERVANT—EMPLOYERS' LIABILITY ACT—INSTRUCTIONS.—Where, a railroad, in an action under the Federal Employers' Liability Act by a section foreman for injuries, alleged that the injuries were due to his own negligence, instructions as to assumed risk and comparative negligence were properly given.
6. MASTER AND SERVANT—BURDEN OF PROOF OF NEGLIGENCE.—A railroad company is not liable for unavoidable accident, but only for

negligence, and the burden of proving such negligence and that the injury was caused thereby rests on the plaintiff suing for injury.

7. MASTER AND SERVANT—EFFECT OF CONTRIBUTORY NEGLIGENCE.—Under the Federal Employers' Liability Act, an employee may recover for the master's negligence, though his negligence contributed to the injury, since such negligence only causes a diminution of damages.

8. APPEAL AND ERROR—HARMLESS ERROR.—In an action, under the Federal Employers' Liability Act, by a section foreman for injuries alleged to have resulted from negligence of helpers in replacing ties, permitting plaintiff to testify that he would have given the signal to move the tie if the helpers had waited, *held* not prejudicial where the jury found that it was negligence to move the tie without a signal.

9. MASTER AND SERVANT—ASSUMED RISK.—A section foreman suing under the Federal Employers' Liability Act *held* not to have assumed the risk from the master's negligence or from the negligence of fellow servants.

Appeal from Lawrence Circuit Court, Eastern District; *Dene H. Coleman*, Judge; affirmed.

STATEMENT OF FACTS.

This suit was instituted by appellee to recover damages alleged to have been sustained by him on account of the negligence of the workmen engaged with him in replacing ties under the railroad track in the place of old ties taken out.

He was foreman, working with two helpers engaged in replacing switch-ties, when the injury occurred. The method employed was to first place one end of the tie on the railroad dump, which was about four feet high at this place, and one man lift the other end to a level, when plaintiff and the other helper stuck their picks into the tie and pulled while the end man shoved the tie towards the rails. They acted in concert, the foreman, if he was present, giving the signal to move it, otherwise the last man to stick his pick into the tie gave the signal. The particular tie by the moving of which the injury was caused was of green white oak timber, 7″ x 9″ x 10′ long, weighing about 400 pounds.

The complaint alleged that plaintiff stuck his pick in the tie, and the helpers, their backs to him, without waiting for the signal from plaintiff, pulled and shoved the tie, throwing the plaintiff backward, catching his foot between the end of the tie and the west rail of the track, bending his foot double, and breaking some of the bones thereof.

The complaint also alleges: "The said act of the two employees of the defendant, in pulling against said tie before plaintiff had time to take his position to pull on the pick and before waiting for signal from the plaintiff, was negligent and careless, and done without due regard to this plaintiff's safety, and plaintiff's sole injury was caused solely by the said negligent act of the two employees of the defendant."

The answer denies the material allegations of the complaint, alleged that plaintiff was foreman of the gang when injured, and the men working with him were under his control, and that any injuries he may have received were due to his own negligence and failure to take proper precautions for his own safety.

The evidence shows that plaintiff was section foreman with a four-man crew, and, when injured, was working with two of the men, putting new crossties under the rails and replacing old ties being taken out. The spikes were drawn from the old ties, the rails jacked up, the old ties taken out, and the new ones were being put in as above stated. Plaintiff, Hurst and Bonner, according to his statement, were handling the particular tie which had been brought up the dump from the east side until one end was almost at the east rail. Bonner was at the far end of the tie, raising it to the level of the end lying on the dump. Plaintiff and Hurst, standing at the east rail, stuck their picks in the tie and pulled, with Bonner shoving, until the end of the tie was within 18 inches of the west rail.

Plaintiff further states: "When we made that pull, I turned around and walked outside the west rail and turned around and stuck my pick in—just reached

over as far as I could, with my left foot on the rail and my heel against the bottom of the rail, on the outside of the west rail. The minute my pick hit the tie they gave a pull, and I, not being in balance, got my left foot caught between the end of the tie and the ball of the rail on the east side of the west rail, between the end of the tie and the rail."

The unexpected pull, without signal and before plaintiff was ready, unbalanced him, causing his foot to slip off the rail and be caught between it and the end of the tie, and be crushed.

A written statement made by plaintiff to the railroad company, descriptive of the occurrence, indicated that signals were not being given on this occasion before the pushing and pulling to move the tie after the picks were stuck into it. That the three men could work together by watching, without giving signals, and that Bonner and Hurst moved the tie before he was ready to pull. That nothing was the matter with the roadbed or the picks. That, previous to this time, this gang had been instructed that they should not pull the tie until they got their picks set, and he supposed that the others heard him set his pick, and moved the tie before he got set to pull.

The testimony tended to show that the injury was painful, and plaintiff had not recovered from it entirely at the time of the trial, and could not work long at any employment requiring him to stand or move about on his feet.

The court instructed the jury, giving for plaintiff, over defendant's objection, the requested instructions Nos. 1 and 2, relating to contributory negligence, and refused to give defendant's instruction No. 4, as requested. The jury returned a verdict for $1,200, and from the judgment thereon this appeal is prosecuted.

E. T. Miller, E. L. Westbrooke, Jr., and *E. L. Westbrooke,* for appellant.

Walter L. Pope and *T. W. Campbell,* for appellee.

KIRBY, J., (after stating the facts). It is earnestly insisted that the court erred in not directing a verdict for defendant, and that there is not sufficient testimony to sustain the judgment.

Plaintiff was foreman of the section gang, and helping and directing the men in the work of replacing the ties. The evidence is undisputed as to the manner in which the injury occurred. Appellee was a vice-principal, and the suit was brought under the Federal Employers' Liability Act, which is copied in our act 88 of 1911. Appellant relies upon our opinion in *St. L. I. M. & S. Ry. Co.* v. *Cobb*, 126 Ark. 225, 190 S. W. 107, and *Kansas City & Memphis Ry. Co.* v. *Huff*, 116 Ark. 461, 173 S. W. 419, in its insistence upon plaintiff's failure to show a right to recover.

In the first case it was said: "Under the statute it matters not whether the injured employee stands in the relation of vice-principal to the employee injuring him, provided the injury is caused through the negligence of such employee. But, if the relation of vice-principal and subordinate exists between the two servants at the time of the injury, and the injury is caused while the subordinate is acting, without negligence, under the orders and directions of his superior, then there would be no negligence for which the company would be liable, because, in such cases, the negligence would be that of the vice-principal himself."

There was some testimony tending to show that the helpers, fellow-servants of plaintiff, were not acting without negligence under the orders and directions of plaintiff, the vice-principal, when the injury occurred. That they were negligent in failing to give the signal for beginning to move the tie, or waiting for him to give it before doing so, while plaintiff was unprepared for this action, but for which, being unexpectedly made, the injury would not have resulted. The testimony is sufficient to sustain the verdict, and no error was committed in the court's refusing to direct a verdict for appellant.

We do not agree with appellant's contention that instruction No. 1 was tantamount to a directed verdict for plaintiff. The instruction told the jury to return a verdict for plaintiff only if it found from a preponderance of testimony "that it was the duty of the other employees to wait until plaintiff had put his pick into the tie that was to be put under the rails of said track and prepared himself to pull said tie," and only if the jury further found "that plaintiff's said helpers failed to wait until plaintiff had prepared himself for pulling said tie, but immediately pulled said tie after plaintiff had stuck his pick into it, and thereby caused plaintiff's foot to be injured;" and only on a further finding by the jury "that plaintiff's said helpers thereby failed to exercise ordinary care for plaintiff's safety, and that plaintiff had not assumed the risk."

If appellant regarded the instruction as so indefinite as not to furnish a guide to the jury as to what would be negligence on account of it not stating that the failure of plaintiff's helpers to wait for the signal to move the tie, and moving it without the giving of said signal, it should have pointed this out with a specific objection.

It is next contended that the court erred in giving instruction No. 2, contributory negligence not being pleaded as a defense. The answer "alleges the fact to be that the plaintiff was, at the time he was injured, foreman of the men working with him, and each of them was under his control, and whatever injuries he received were due to his own negligence and failure to take any precautions for his own safety."

It is true this is not a plea of contributory negligence, but the jury could have found that the railroad company was guilty of negligence and, under the allegations that plaintiff's injuries were due to his own negligence, the question arose necessarily whether his negligence contributed to the injury, and no prejudicial error was committed in giving the instruction a correct declaration of the law on the subject. *St. L. S. W. Ry. Co.* v. *Rogers,* 166 Ark. 389, 286 S. W. 281. Neither was error

committed in giving instructions on assumed risk and comparative negligence. *K. C. So. Ry. Co.* v. *Sparks,* 144 Ark. 227, 222 S. W. 724. Nor does the instruction complained of relative to recovery of damages appear to have been erroneous or prejudicial under the circumstances of this case. *K. C. So. Ry. Co.* v. *Sparks, supra.*

Appellant's next contention is that the court erred in amending its instruction No. 4 by striking out the last sentence and giving only the first one. The part given told the jury that the railroad company was not liable for unavoidable accidents, was only liable for negligence, and that the burden of proving that the company was negligent and that such negligence caused the injury to plaintiff, rests on the plaintiff, which is, of course, a correct declaration of the law. This precluded a recovery by the plaintiff unless the proof showed that the injury was caused by the company's negligence, and he would have been entitled to recover, even though his own negligence contributed to his injury, under the Federal Employers' Liability Act, such negligence only causing a diminution of damages.

Another instruction allowed the jury to hold the defendant liable only upon a finding that plaintiff's helpers were negligent and that the injury or damage was caused by or resulted from such negligence.

There was no testimony showing the accident or occurrence was caused on account of the failure of the plaintiff to have the work performed in a reasonably safe manner.

The last assignment, that the court erroneously permitted the plaintiff to testify that he would have given the signal to move the tie if they had waited a little bit, was not prejudicial, under the circumstances. The negligence alleged was in the helpers or the other employees suddenly moving the tie without giving warning or waiting for a signal from plaintiff to move it, and the jury found that it was negligence to move it without such signal being given, and a statement that the signal would have been given by plaintiff, had it not been so

suddenly done, could not have been prejudicial, under the circumstances.

Certainly appellee did not assume the risks of an injury arising from the master's negligence nor the risk of danger or peril arising from the negligence of a fellow-servant of this railroad corporation. *St. L. S. W. Ry Co.* v. *Smith,* 102 Ark. 565, 145 S. W. 218.

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

RURAL SPECIAL SCHOOL DISTRICT NO. 50 *v.* FIRST NATIONAL BANK.

Opinion delivered April 11, 1927.

1. SCHOOLS AND SCHOOL DISTRICTS—NOTES ISSUED WITHOUT AUTHORITY.—Holders of notes executed by a school board, not authorized to borrow money by a majority of the electors of the district, as required by Crawford & Moses' Dig., §§ 8837, 8840, acquired no rights.
2. SCHOOLS AND SCHOOL DISTRICTS—POWERS OF DIRECTORS.—One who deals with the board of directors of a rural special school district is bound to know what contracts the board is authorized to make.
3. SCHOOLS AND SCHOOL DISTRICTS—POWERS OF DIRECTORS.—A school district is a *quasi* public corporation and its directors can exercise no powers beyond those expressly conferred by statute or arising therefrom by necessary implication.
4. SCHOOLS AND SCHOOL DISTRICTS—POWERS OF DIRECTORS.—The powers and duties of school directors are derived only from legislative authority, and a contract entered into by them beyond the powers conferred on them by statute is null and void.
5. SCHOOLS AND SCHOOL DISTRICTS—UNAUTHORIZED CONTRACT OF DIRECTORS.—Notes executed by the board of directors of a rural special school district for money borrowed to erect a school building are void if not authorized by a majority of the electors at an annual school meeting, as required by Crawford & Moses' Dig., §§ 8837, 8840.
6. SCHOOLS AND SCHOOL DISTRICTS—VOID CONTRACT—RATIFICATION.—A rural special school district is not liable on notes executed by its board of directors for money borrowed without authority,

though the money was used to erect a school building, which was used by the district.

7. SCHOOLS AND SCHOOL DISTRICTS—MONEY LOANED TO BUILD SCHOOL HOUSE—LIEN.—Holders of notes executed by the directors of a school district without authority have no lien on the district's schoolhouse, in the construction of which the money was spent.

8. SCHOOLS AND SCHOOL DISTRICTS—VOID CONTRACT—RATIFICATION.—The board of directors of a rural special school district cannot ratify an unauthorized contract made by them.

9. SCHOOLS AND SCHOOL DISTRICTS—VOID CONTRACT—LIABILITY OF DIRECTORS.—Directors of a rural special school district *held* not personally liable on notes executed by them without authority from the electors of the district, since the payees had equal opportunity to know the law.

Appeal from Yell Chancery Court, Dardanelle District; *W. E. Atkinson,* Chancellor; reversed.

A. S. Hays and *J. B. Ward,* for school district.

Herbert C. Scott for bank, and *Clem P. Callans, J. W. Wilson* and *J. E. Chambers,* for H. M. Mitchell and other directors.

MEHAFFY, J. The appellant is a special school district in Yell County, formed by the consolidation of District No. 48 and District No. 50, common school districts. A petition was presented to the county court and the election ordered and the district created under the provisions of the statute. After its creation the directors who were elected qualified and acquired lands and erected a school building on the said lands.

The district entered into a contract with Clem P. Callans for the erection of the building for the price of $3,800. The directors sold the buildings belonging to the common school districts 48 and 50, using the funds derived therefrom. and also, during the course of the construction of the buildings, used all of the funds belonging to the two common school districts at the time of the consolidation.

The question of erecting a school building was not submitted to the legal voters at an annual school election, and, without any authority from the legal voters, the district borrowed from the First National Bank of

Dardanelle $2,500 and executed note for that amount in the name of Rural Special School District No. 50, and this note was indorsed by the directors for said special school district.

After the completion of the school building the district executed note to C. P. Callans for $1,000, money which it borrowed from him. There was no authority from the legal voters to make either of these contracts, that is, no election authorized the district to borrow money.

Suit was brought on the notes by the First National Bank and C. P. Callans in the circuit court of Yell County, but was afterwards transferred to the chancery court, where it was tried. Suit was also brought by the same parties against members of the board of directors, and the two suits were consolidated and tried together. The chancery court found as follows:

"The court further finds that the $2,500 represented by the note to the First National Bank of Dardanelle was used by the directors in paying the said Callans on the contract price for said building, and the $1,000 note to Clem P. Callans was the balance due to him on the cost of erecting said building. The court further finds that the directors, at the time of making the contract and executing the notes sued on, were under the belief that they were authorized to make such contracts and to borrow said money, and that the house was economically built, and was worth the amount to be paid, and further finds that, after the completion of said building, the said school district used said building upon the said lands. The premises considered, the court holds that the note executed by and on behalf of the school district to the First National Bank in the sum of $2,500, of date of January 17, 1921, is null and void both as to the school district and as to each of the individual defendants whose names are indorsed thereon; and further holds that the note for $1,000 given to the plaintiff, Clem P. Callans, on January 20, 1920, is null and void both as to Special School District No. 50 and the individuals who signed

their names to said note as indorsers. And the court further holds that the plaintiff, Clem P. Callans, having done the work on said building to the amount of $1,000 for which he had not been paid, and the plaintiff, First National Bank of Dardanelle, had furnished money to the amount of $2,500 to pay for material and labor in said building; that the plaintiff, Clem P. Callans, and the plaintiff, First National Bank of Dardanelle, have liens upon said building which are superior and paramount to the claims of the district to said building, and that they shall have judgment for said amounts, together with 10 per cent. interest thereon from the date of their notes. It is therefore by the court considered, ordered, adjudged and decreed that the plaintiff, Clem P. Callans, have a lien upon said building in the sum of $1,512.33, being the principal and interest on the note of $1,000, date of January 20, 1920; and that the First National Bank of Dardanelle have a lien on said building for the sum of $3,477.28, being the principal and interest of their note of January 17, 1921, and that, unless the said special school district shall pay and discharge said lien within 90 days from this day, then the plaintiff may sell the building so erected by the said Clem P. Callans, and erected upon the land deeded to the said Special School District No. 50, and, if said building does not bring sufficient to pay both debts in full, then the price for which said building is sold shall be divided between the two plaintiffs in proportion to their respective debts; and the clerk of this court is hereby appointed commissioner to execute the decree of this court, and he shall sell said building upon a credit of three months, after giving notice for the time, place and terms of said sale by publication in a newspaper published in the Danville District of Yell County, for at least four insertions, and that the purchaser may remove said building from said ground within thirty days after said purchase; it is further by the court considered, ordered and decreed that the plaintiffs take nothing by reason of their suit against the individual defendants, H. M. Mitchell, J. A. Meeks,

John F. Foster, A. J. Gray, Jr., and R. S. McConnell, and that the defendant, Rural Special School District No. 50, pay the cost in this suit. To which finding and decree of the court in declaring the plaintiffs, Clem P. Callans and the First National Bank of Dardanelle, to have a lien on the school building erected upon the lands belonging to said special school district superior and paramount to the interest of said school district in said building, the said Rural Special School District No. 50 at the time objected and prayed an appeal from said decree to the Supreme Court of the State of Arkansas, and which was by the court granted; thereupon the court ordered and directed the commissioner to make sale; that he shall take no action in carrying out the decree of the court during the pendency of said appeal, provided said school district shall have said building fully insured and preserve said building in a good state of repair, which the directors of said Rural Special School District No. 50 then and there agreed to do.

"To the finding and decree of the court in finding the defendants, H. M. Mitchell, J. A. Meeks, John F. Foster, A. J. Gray and R. S. McConnell, to be not liable upon said notes and discharging them thereon, each of the plaintiffs excepted and prayed an appeal to the Supreme Court of the State of Arkansas, which is by the court granted."

It is first contended by the school district that the notes executed by the school district are void. This is a rural special school district, and is composed of territory of two former common school districts, each of which seems to have had a schoolhouse. These school buildings were afterwards sold and this money, together with the funds of the district on hand at the time of the creation of appellant school district, was a part of the funds that went into the construction of the new building.

With reference to rural special school districts borrowing money, the law provides: "All school districts created under this act shall have the power to borrow money as any special or single district in cities or incorporated towns, when a majority of the legal electors

authorize it by a vote at any annual school election." C. & M. Digest, § 8837.

Section 8840 of C. & M. Digest, among other things, provides for borrowing money for building purposes if authorized by vote of a majority of electors of the district at any annual election. Every person dealing with a school board is bound to know what the law is and is bound by its provisions. When these notes were executed the parties to whom they were made were bound to know that the notes would be void unless the board of directors was authorized by a vote of the majority of the electors of the district at an annual election.

"A person contracting with a board of education is presumed to know the limitations of its powers, and can acquire no rights by a contract which such board is not clearly authorized to make." *State* v. *Free,* 3 Ohio Decisions, 314.

If there was no election held, or, rather, unless the board of directors was authorized by a majority of the electors of the district at an annual meeting, then the holders of the notes acquired no rights, because the board of directors was not authorized to make the contract. And a person contracting with a school district is bound to know what contract the board is authorized to make.

"The trustee of a school corporation is a special agent of limited powers, and it is incumbent upon those who deal with him to ascertain whether he is acting within his authority." *Union School District* v. *First National Bank,* 102 Ind. 464, 2 N. E. 194.

"A person contracting with a school trustee is bound to take notice of his official character, and that he can only bind his township on contracts authorized by law." *Bloomington School Township* v. *National Furnishing Co.,* 107 Ind. 4, 43 N. E. 760.

It seems that the courts universally hold that, when one deals with an agency like the board of directors of a rural special school district, he is bound to know the powers and limitations of such agency. Such is not only

the law as announced by courts generally, but this court has passed directly on this question.

"All parties dealing with public officials must take notice of limitations or restrictions upon their power. In this sense directors of a school district are public officials. * * * The reference appears in § 1 of said act 180, and is as follows: 'Provided further, that this act shall not be construed as authorizing any board of directors of any rural special or consolidated school district to issue bonds unless authorized to do so by the vote of the legal electors at the annual school election, as provided in act 321 of the Acts of 1909 of the General Assembly of the State of Arkansas.' * * * The court erroneously ruled that the bonds and mortgages were valid subsisting obligations in the hands of appellee against appellant district." *Rural Special School Dist.* v. *Pine Bluff*, 142 Ark. 279, 218 S. W. 661.

"The bonds were sold on the 15th day of October, 1916. This was before another annual school meeting could have been held. Therefore the record affirmatively shows that the school district was organized and the bonds sold during the year 1916, after the time provided by statute for holding the annual school meeting and before another annual election could have been held. This shows conclusively that no vote of the electors of the district was had to authorize the issuance of the bonds, and it follows that the bonds and deed of trust are void because they were issued by the board of directors of said school district without authority." *Robertson* v. *Rural Special School Dist. No. 9*, 155 Ark. 161, 244 S. W. 15.

This court again said: "Appellants cite the cases of *Robertson* v. *Rural Special School Dist. No. 9*, 155 Ark. 161, 244 S. W. 15, and *Rural Special School District No. 30* v. *Pine Bluff*, 142 Ark. 279, 218 S. W. 661, in which cases it was held that the school district bonds issued by the rural special school district, without the consent of the majority of the legal voters granted at the annual school meeting, and in accordance with § 8837, C. & M. Digest, are void, even in the hands

of an innocent purchaser. It was so held in those cases as to such districts, because, under the statute conferring this authority on rural special school districts, it was provided that the power to issue bonds might be exercised only upon the vote of the legal electors at an annual school meeting. But Mammoth Spring Special School Dist. No. 2 is not a rural special school district, and did not derive its authority to issue bonds from § 8837, C. & M. Digest. Section 8984, C. & M. Digest, is the section of the statute under which appellee school district proceeded, and this section does not require, as a condition precedent to the issuance of bonds, the consent of the electors. * * * In other words, the affirmative vote of the electors is not required to confer this authority on the urban special school districts of the State, which derive their authority to issue bonds under § 8984, C. & M. Digest." *Davis* v. *White,* 171 Ark. 385, 284 S. W. 764.

In construing the statute providing for transferring pupils to and from school, this court held that a contract made to transfer children of one district to the schools of another district was not only invalid but was not ratified by its performance. The court said: "But it is quite obvious that the legislative purpose was to provide means for the transportation of the children of any particular district to the schools of that district. The act says nothing about transporting the children of one district to the schools of another district, nor is any authority conferred to use the school funds to pay tuition in the schools of another district. No authority was conferred by the act of 1919 to make such a contract as was made with Free, nor does such authority otherwise exist, and, as the directors were without authority to make the contract, it has not been ratified by its performance." *Bd. Dir. Gould Spec. Sch. Dist.* v. *Holdtorff,* 171 Ark. 668, 285 S. W. 857.

"A school district is, by the statutes of this State, made a body corporate: but it is intended as an agency in the administration of public functions. It is a *quasi*

public corporation, and can exercise no powers beyond those expressly conferred by statute, or which arise therefrom by necessary implication. The powers and duties of the directors of a school district are derived only from legislative authority, and they can exercise no power that is not granted by statute. A contract entered into by the directors therefore, which is beyond the powers conferred on them by the statute to make, is null and void." *First Nat. Bank of Waldron* v. *Whisenhunt*, 94 Ark. 583, 127 S. W. 968.

The chancellor was therefore correct in holding that the notes were void.

The school district's next contention is that the school district cannot be held liable because of the fact that they have used the school building since the time of erection up to the present time. We think that the appellant is correct in this contention. As was said in the case of *First National Bank of Waldron* v. *Whisenhunt*, 94 Ark. 583, 127 S. W. 968, all persons who deal with school officials are presumed to have full knowledge of the extent of the powers of these officials to make the particular contract, and, in the case last mentioned, the court further said: "Neither the use of the maps in the school nor the failure to object would amount to ratification. * * * The payee of warrants and the appellant had all the means of knowledge as to the authority of the directors to make the contract that was possessed by the directors. Neither was deceived or misled into the making of the contract or the purchase of warrants."

It will therefore be seen that the parties contracting with the rural special school district in this case had all the means of knowledge as to the authority of the directors that the directors themselves had. Both of them were bound to take notice of the limitations of the authority of the board to contract. They were bound to take notice that a valid contract could not be made unless authorized by the legal voters at an annual election. They were bound to know that their contract was void.

It has been held by some courts that, where a contract is entered into by which a school district secures money and purchases property, the property, if of such character or nature as to be capable of removal without injuring the other property, they may remove the property. Especially is this held to be true in some courts, where the district purchased the property without authority and still has the property, and the property is such that it can be removed without injury to other property of the district.

It is not necessary, however, for us to decide that question in this case, because it is claimed here that the money went into the construction of the schoolhouse, and no lien is authorized by the Legislature under the facts in this case. It has also been held that, where bonds are issued by a school district in violation of law, or where the bonds were not authorized by law, the sureties on the bond are not liable, and no lien exists against the schoolhouse, since it belongs to the State. *Cooper v. H. H. Harder & Co.* (Tex. Civ. App.), 219 S. W. 550.

This court has said: "The directors have charge of the school affairs and educational interests in their district, and the care and custody of the schoolhouses, grounds and other personal property belonging to the district. But they have no power to purchase or lease in the corporate name a schoolhouse site, or to hire, purchase or build a schoolhouse with funds provided or to be provided by the district, unless thereunto authorized by a majority vote at the district meeting. * * * This want of power or authority cannot be supplied by the unauthorized acts of the directors or by any attempted ratification afterwards. It is apparent that, if the directors had no power to make the contract in the first instance, they could not subsequently pass a resolution ratifying their act. In other words, under the record in this case there could be no ratification by the directors, for they had no power to contract to build the schoolhouse by ratification or otherwise. It has been well said that the law never implies an obligation to do

that which it forbids the party to agree to do. * * * In the first place, it may be said that the land on which the schoolhouse was built belonged to the school district, and the use of the schoolhouse was inseparable from the enjoyment of the land.

"Again, it may be said that, if the taxpayers of the district could be made liable by the fact that the money was used in the building of a schoolhouse, the statutory prohibition, making it unlawful for a district to raise money for building a schoolhouse unless due notice had been previously given in the manner prescribed by the statute, would be useless. The limitation or restriction imposed by the statute would be practically of no avail if it could be brought to naught by the unauthorized act of the directors, acquiesced in by the electors of the district. The public, by such a doctrine, would be exposed to the very abuse which the Legislature intended to prevent. The statute in question was passed as an act of public policy by the Legislature, and it would be a very unsafe rule to establish to hold that school officers might borrow money without complying with the statute and bind the district because it was used in constructing a schoolhouse and the house was afterwards used for school purposes." *Ark. Nat. Bk.* v. *School Dist. No. 99*, 152 Ark. 507, 238 S. W. 630.

The above case, we think, settles the law on this particular question. As stated by the court in the last case cited, the limitations or restrictions would be of no avail if it could be brought to naught by the unauthorized acts of the directors acquiesced in by the electors of the district. The above case is stronger than the present, because there is no question here of ratification by the voters of the district, and they are the only ones who could ratify it if it could be ratified at all. To hold otherwise would be to make the statute of no effect, because a board of directors could make a contract without submitting the question to the legal voters, with the knowledge that it would not be authorized by the legal voters, and make the district liable to the same extent that it

would be if the directors complied with the law. It would certainly be a very unsafe rule to hold that the statute might be violated by the board of directors doing the very thing that the statute says that they shall not do, and then enforce the contract as if there had been no violation of the statute. If this could be done the statute would be perfectly useless.

"It is well settled that those who deal with municipalities are bound to take notice and be bound by these constitutional restrictions. Accordingly it must be recognized that, in applying equitable relief in the present form of action, equity must not accomplish by indirection what the law has prescribed must not be done directly.

"In accordance with the stipulated facts, it is impossible to restore to the plaintiff the building erected without destroying property of the municipality. It is likewise impractical to segregate or detach that portion of the building which represents the excess moneys therein owing to the plaintiff. It is likewise clear that the imposition of a judgment to pay such amount, or the requirement that a rental be paid for that portion of the building represented by plaintiff's moneys unpaid, would impose a burden upon the school district in excess of the constitutional restrictions. * * * Although, in equity, recovery may be permitted in such cases, where no additional burden is thereby placed upon the municipality in excess of the constitutional debt limit, or where the property itself can be identified, segregated, and restored to the parties without injuring the municipality or its property by so doing, nevertheless, in upholding the constitutional restrictions absolutely imposed, relief upon equitable principles cannot be granted where this cannot be accomplished." *Bartelson* v. *International Sch. Dist.*, 43 N. D. 253, 174 N. W. 78.

"If the material furnished had been supplies which had been used, or had been property which had become so mingled with other property as to be not subject to identification, or have been so affixed as to be irremovable, that result might necessarily follow, because the plaintiff

would be without remedy. * * * The only question therefore is: To what extent shall plaintiff be permitted to remove his property? In our judgment, he should only be permitted to remove so much thereof in value as has not been paid for, and no more. Under the evidence as it now stands, however, we cannot say just what part of the property can be removed and what part cannot. Nor can we say what part of the property the plaintiff should be permitted to remove in order to prevent injustice. * * * In case, however, the parties cannot agree, as herein suggested, then to enter judgment permitting the plaintiff to remove so much of the property which can be removed without substantial injury to the building as may be necessary to compensate him for the unpaid purchase price, with legal interest, specifying the particular articles that may be so removed and fixing their value, as hereinbefore suggested." *Moe* v. *Millard County School Dist.*, 179 Pacific 980.

It will be observed, however, that our court, in construing the statute, has held that to permit parties to do indirectly what the law prohibits them from doing would make the statute wholly ineffective. We therefore conclude that there can be no lien had on the schoolhouse, and that it cannot be sold to pay the debt.

The only other question in the case, and that is in the case against the directors, is whether they are personally liable, since the contract they undertook to make for the district is void. Some of the authorities already referred to decide this question. We think this question has been settled by this court in *First Nat. Bank of Waldron* v. *Whisenhunt,* 94 Ark. 583, 127 S. W. 968, in which the court said: "The directors were only acting therefore as public agents, and, according to the intent of all the parties to the contract, with the purpose of expressly binding the district. They did not incur personal liability by signing their names thereto as directors. Nor are the directors personally liable because the contract was beyond their authority. * * * An officer who, in good faith and under misapprehension, makes a contract in behalf

of the municipality which is invalid for want of authority to make it, will not be held personally liable on the contract where the other contracting party has equal means of knowledge as to his authority."

We have already stated that the payees in the notes had equal opportunity to know the law with the directors, and it follows from what we have said in the case of Rural Special School Dist. No. 50 *v.* the First National Bank of Dardanelle and Clem P. Callans, the chancery court erred in holding that a lien could be enforced against the school building, and for this error the case must be reversed and remanded, with directions to dismiss the complaint. And the case of First National Bank of Dardanelle and Clem P. Callans *v.* H. M. Mitchell, J. A. Meeks, R. S. McConnell, John F. Foster and A. J. Gray, Jr., must be affirmed, and it is so ordered.

WALTHOUR *v.* PRATT.

Opinion delivered April 11, 1927.

1. BROKERS—AGENCY QUESTION OF FACT.—In an action to recover a secret profit made by a broker in purchasing a lot for plaintiff, the question whether defendant was the agent of plaintiff was one of fact for the jury.
2. APPEAL AND ERROR—CONCLUSIVENESS OF JURY'S FINDING.—The finding of the jury on a question of fact, where there is any substantial evidence to support it, cannot be disturbed by the Supreme Court.
3. BROKERS—PROOF OF AGENCY.—To establish a broker's agency, the evidence need not show an express agreement, but it may be implied from circumstances, such as the relation of the parties and their conduct with reference to the subject-matter of contract.
4. BROKERS—SECRET PROFIT.—A broker employed to buy land for his principal, who purchases it from the owner for $1,500, and procures a deed to a third person, who conveys it to his principal for $1,850, is liable to his principal for the difference as secret profit.
5. TRIAL—ASSUMPTION OF DISPUTED FACT.—In an action against a broker to recover secret profit made by the agent in purchasing

lots for the principal, an instruction stating to the jury that plaintiff would be entitled to recover whatever secret profits, if any they find, etc., was not erroneous as assuming that defendant made a secret profit.

6. PRINCIPAL AND AGENT—SECRET PROFIT—FRAUD.—In an action to recover secret profit made by an agent in purchasing lots for his principal, it was not necessary to prove fraud in order to entitle the principal to recover.

7. PRINCIPAL AND AGENT—DUTY OF AGENT.—An agent is under duty to represent his principal faithfully, and he cannot acquire any private interest of his own in opposition to his principal.

8. PRINCIPAL AND AGENT—DUTY OF GRATUITOUS AGENT.—The fact that an agent acts gratuitously does not relieve him of liability for wrongful acts or negligence, whether they amount to fraud or not.

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

George A. McConnell, for appellant.

Fred A. Isgrig, E. B. Dillon and *Philip McNemer*, for appellee.

MEHAFFY, J. The appellee, Elsie Pratt, and her husband, R. C. Pratt, filed suit in the Pulaski Circuit Court against J. D. Walthour, the appellant, alleging that R. C. Pratt had entered into a contract with appellant to purchase certain lots 1 and 2, block 2, Pinehurst Addition to the city of Little Rock, from the owner, who was unknown to the plaintiff; that said Walthour was instructed by plaintiff to purchase the property for the least sum possible; that, in pursuance of said agreement, the defendant located the owner, and reported to plaintiff that he could not get the owner to state the price, but requested the plaintiff to make an offer to the owner; that, relying upon the statements, plaintiff offered $1,850 and instructed defendant to convey the offer to the owner, and, if satisfactory, to have deed made to Elsie Pratt; that, instead of having deed made to plaintiff, defendant purchased the property for himself through one J. S. Bailey, who was in collusion and connivance with the defendant, purchased the property in his name for the sum of $1,500, and that Bailey con-

veyed the property to plaintiff for $1,850; that defendant paid only $1,500 of this to the owner, making a profit for himself of $350.

Defendant answered, denying all the material allegations of the complaint. Thereafter R. C. Pratt's name was stricken out, and the case proceeded to trial in the name of Elsie Pratt as the plaintiff.

Elsie Pratt testified, in substance, that she and her husband went out with Mr. Walthour to look at some lots; that was the first time she had ever met him, and they looked at lots which belonged to Mr. Walthour, but she did not care for them, and later they came to the lots involved in this suit; that she asked Mr. Walthour about them, and he said they belonged to Mr. Cox. Her husband asked if he had any idea what Mr. Cox wanted for them, and Mr. Walthour said he did not know, but he imagined about $2,100. They told Mr. Walthour to find out what he would take for them, and that thereafter her husband conducted the negotiations, and that she signed the notes, but did not notice the name of the payee and never noticed the name of the grantor when the deeds were delivered to her; that she did not inspect it more closely because she thought Walthour would do the right thing; that she signed the notes and made the payments; gave the money to her husband, and that it was her own money; that it was on a Saturday in July when they looked at the lots.

R. C. Pratt testified, in substance, that he went out with his wife and Walthour, and they did not like th lots first shown them, but they saw these lots, and Walthour told them there was not a chance to get price down below $2,100, and suggested that Pratt ma an offer, and he did make an offer of $1,850. He sign the contract, but did not remember seeing the name Bailey on it; he placed confidence in the bank to loo after his affairs, and just signed the contract and paid no attention to it. He said that Walthour later came to the house and said that Cox had accepted their offer. He gave him a check for $1,105, the balance to be paid $2

a month. They did not have the abstract examined. He carried the deeds home and put them in a trunk, and did not look at them; did not notice who the grantor was. Later he began to investigate, after he had a conversation with Mr. Cox, and looked over the papers, and saw Bailey's name on the notes, and that was the first thing he knew of Mr. Bailey. He never read the contract. He never let his eyes get above the bottom line; he just signed the papers.

Contract was introduced, showing the agreement to purchase the lots for $1,850, the payment of $1,100 in cash, and the balance at $25 a month. Cash payment of $100 was put up to bind the contract.

Tipton Cox testified, in substance, that he owned the lots, and that Mr. Walthour came to him, or called him over the 'phone, asking him what he would take for the lots, and he told him $1,500, and finally agreed to take $1,400 net. This was allowing a commission to Walthour of $75. He said Pratt was buying it, that is, he mentioned the name of Pratt. It seems, when the deed was made, he said the deed would be made to Mr. Bailey, as there was some financing to be done. At the time he signed the contract he did not notice to whom he was making the offer; he was paid $1,400, and never paid any attention to the contract. The conversation was that Pratt was buying the lots to put a brick veneer house on, that was one of the considerations. There was some talk about making the deeds to Bailey on account of some financing, but he never gave that any thought. The acceptance of the offer from Bailey was dated July 20. He had not, prior to this time, listed these lots with him for sale. Walthour merely called him up and asked what he would take for these lots. He had sold some lots to Walthour prior to this.

The defendant testified, in substance, that he was the manager of the real estate department of the W. B. Worthen Company, and works on a commission basis, part of which goes to the bank and part to him; that he met Mr. and Mrs. Pratt on Saturday morning, July 20,

took them out and showed them his lots. They did not like them, and, coming back, they came by lots 1 and 2, and Mr. and Mrs. Pratt said they were nice lots, but he told them that he did not own them, and the party who owns them wants $2,000 or $2,100, and he had just sold them for Cox the day before to J. S. Bailey. He bought them for an investment. Bailey is the brother-in-law of Walthour. He did not tell Pratt who owned the lots, but he thought that made no difference. He never at any time told them that Cox owned lots 1 and 2, or that he was negotiating for them to buy these lots from Cox. They never agreed at any time to pay him anything for finding the lots for them. He wrote this contract that Pratt signed; he told him if he would make an offer for $1,850 he could possibly get it through for him; that it was customary in real estate transactions to put up some earnest money. He did not say to buy the lots from Cox or Bailey, and did not ask who they belonged to. They never at any time agreed to pay any commission for his services. He was representing Bailey, and Bailey paid him a commission of $92.50, that is all the commission he made except the $75 commission on the sale from Cox to Bailey. There was no connivance or scheme between him and Bailey, as charged in the complaint, and the charge that they were in collusion, he says, is untrue. It was a straightout sale. There were two sales.

J. S. Bailey testified, in substance, the same as Walthour with reference to the purchase of the lots, and that there was no collusion.

The above statement of the evidence is sufficient to show the issues and the contentions of the parties. The jury rendered a verdict in favor of the plaintiff for $350. Defendant filed its motion for a new trial, which was overruled and exceptions saved, appeal to the Supreme Court prayed and granted.

The appellant earnestly contends that there is no evidence to show that he was the agent of appellee, and that, for that reason, the court should have directed a verdict in his favor. As to whether he was the agent

of Mrs. Pratt is a question of fact properly submitted to the jury, and, under the facts as developed in this case, the jury might have found either way. They might have found that there was no agency. They however found that the agency did exist, and there is some substantial evidence to support this finding, and their finding of this fact is binding on this court.

It has been held many times that the findings of a jury on questions of fact, where there was any substantial evidence to support it, could not be disturbed by this court. It is not necessary, in order to establish agency, that the evidence show any express agreement.

"It is not essential that any actual contract should subsist between the parties or that compensation should be expected by the agent; and while the relation, in its full sense, invariably arises out of a contract between the parties, yet the contract may be either express or implied. * * * Whatever evidence has a tendency to prove an agency is admissible, even though it be not full and satisfactory, and it is the province of the jury to pass upon it. Direct evidence is not indispensable—indeed, frequently is not available—but, instead, circumstances may be relied on, such as the relation of the parties to each other and their conduct with reference to the subject-matter of the contract." 21 R. C. L. 819-820.

"While the relation of agent and principal cannot be presumed and cannot be established by the acts or declarations of the agent in assuming authority, yet such relation and the authority of the agent, if the relation can be proved, can be shown by circumstances as well as by positive proof." *Moore* v. *Ziba Bennett & Co.*, 147 Ark. 216, 227 S. W. 753.

In the case at bar the evidence tends to show that the appellee requested appellant to see the owner of the lots, and appellees testify that the appellant told them it was Mr. Cox; that an offer of $1,850 was made; that afterwards appellant told appellee the offer had been accepted, a contract was signed, and afterwards deeds were executed and money paid. Tipton Cox testified

that, when Walthour came to him or talked to him, he understood that Pratt was purchasing the lots, or that Pratt was the one making the offer, and that he was to make the deed to Bailey because some financing was to be done. We think the evidence sufficient to support the verdict of the jury finding that there was in fact an agency.

It is also earnestly contended by the appellant that there was no evidence of fraud or collusion, but this was also a question of fact for the jury, and, if there is any substantial evidence upon which to base the verdict, it cannot be disturbed by this court, and we think there was substantial evidence from which the jury might have found that the appellant was the appellee's agent, and, while acting as her agent, purchased the property from Mr. Cox for $1,500, and had the deed made to Bailey and then conveyed to appellee for $1,850. The appellant contends that there is no fraud, and that the court committed error in its instructions, because the suit was based on fraud. We cannot agree with appellant in this contention. The complaint does not allege fraud in so many words, but it alleges that, instead of having the deed executed to plaintiff, the defendant purchased the property for himself through one Bailey, who, in collusion and connivance with the defendant, purchased the property in his name for the sum of $1,500, and thereafter Bailey conveyed the property to Elsie Pratt for the sum of $1,850.

These are the allegations of the complaint, and there was sufficient evidence upon which the jury based its verdict. Like the question of agency, it was a question of fact, and a finding by the jury either way would have been conclusive.

Appellant insists that the instructions requested by him and refused by the court should have been given, but we think the court properly instructed the jury, and that it is unnecessary to set out at length the instructions given by the court or those requested by the defendant. What we have said about the manner in which agency may be established answers the argument with refer-

ence to defendant's first objection to the first instruction given by the court.

Defendant also contends that the instruction assumed that defendant made a secret profit. We do not think the instruction assumes that he made a profit, but it states to the jury that, whatever secret profits, if any, they find, etc., thereby leaving it to the jury to determine the question not only of agency but also as to whether there was a secret profit.

He also objects to the instruction because he says that he was entitled to represent both Cox and Bailey and entitled to a commission from each. There is no doubt but that he was entitled to represent anybody he wished and charge a commission for representing them, but the question here is whether he was representing the appellee, and whether he made a secret profit, and these questions were both submitted to the jury, and its verdict settles these questions against the appellant. It was not necessary to prove fraud in order to entitle plaintiff to recover in this case. It is the duty of an agent representing a principal to faithfully represent that principal and to be loyal and faithful to his interest, and he cannot acquire any interest for himself in opposition to the interest of his principal. And the fact that an agent acts gratuitously and without commission does not relieve him of liability for wrongful acts or negligence, whether they amount to fraud or not.

"Everyone, whether designated agent, trustee, servant, or what not, who is under contract or other legal obligation to represent or act for another in any particular business or line of business, or for any valuable purpose, must be loyal and faithful to the interest of such other in respect to such business or purpose. He cannot lawfully serve or acquire any private interest of his own in opposition to it. This is a rule of common-sense and honesty, as well as of law. The agent is not entitled to avail himself of any advantage that his position may give him to profit beyond the agreed compensation for his services. He may not speculate for his gain in the sub-

ject-matter of the employment. He may not use any information that he may have acquired by reason of his employment, either for the purpose of acquiring property or doing any other act which is in opposition to his principal's interest." 21 R. C. L. 825.

We do not think the statement of the court, excluding from the consideration of the jury all elements of fraud except as the court instructed them, was prejudicial. As we have already said, it is not necessary to prove fraud, and the court so told the jury. The instructions of the court correctly submitted the questions in controversy to the jury, and the evidence was sufficient to support the verdict of the jury, and the case is therefore affirmed.

SCOTT v. STATE.

Opinion delivered April 11, 1927.

1. BASTARDS—NATURE OF BASTARDY PROCEEDING.—A prosecution for bastardy is a civil action, though properly brought in the name of the State and prosecuted by the prosecuting attorney, and a petition for change of venue must conform to the procedure in civil cases.
2. APPEAL AND ERROR—GENERAL EXCEPTIONS TO EVIDENCE.—Exceptions assigning error in admitting each and all the testimony admitted over appellant's objection, and excluding each and all of the testimony offered by defendant and excluded by the court, *held* too general.
3. BASTARDS—EVIDENCE.—In a bastardy prosecution, evidence that one doctor suggested to another that they get some person with money "to lay this child on" so they could get their fees, *held* properly excluded.
4. BASTARDS—EVIDENCE.—In a bastardy prosecution, evidence as to the position in which sexual intercourse was consummated, whether standing or lying down, was competent, and should have been admitted.
5. BASTARDY—EVIDENCE—NONACCESS OF HUSBAND.—In a bastardy prosecution, the prosecuting witness, being married, could not testify as to nonaccess of her husband.
6. BASTARDS—INSTRUCTION DISAPPROVED.—In a bastardy prosecution, where it appeared that the complaining witness was married at the time of conception, an instruction that the presumption of

legitimacy may be overcome by evidence, was erroneous in failing to require evidence of nonaccess of husband.

7. BASTARDS—NONACCESS OF HUSBAND—BURDEN OF PROOF.—Evidence to charge defendant with paternity of a married woman's illegitimate child must show the impossibility of her husband's access by a preponderance of the evidence.

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

U. C. May and *White & White,* for appellant.

H. W. Applegate, Attorney General, *Kincannon & Kincannon* and *Evans & Evans,* for appellee.

McHANEY, J. This is a bastardy prosecution against appellant, begun on the first day of July, 1925, at Paris, in the Northern District of Logan County, on a complaint of Mabel Freeman, charging that appellant is the father of a bastard child born to her on the 9th day of January, 1925, and praying that he be required to pay the lying-in expenses and a monthly sum for the support of said child. The case was tried before a jury in the county court, which resulted in a mistrial, and was tried again on the 21st day of September, resulting in a verdict and judgment against him. An appeal was duly prosecuted to the circuit court, where appellant filed a petition for change of venue, which was overruled, and he was again tried by a jury in the circuit court, which resulted in a verdict and judgment against him for the sum of $15 lying-in expenses, and $3 per month for the support of the child for a period of seven years. Appellant, in due time, filed his motion for a new trial, which was overruled by the court, from which he prayed and was granted an appeal to this court.

The first assignment of error urged for consideration here is that the court erred in overruling his petition for a change of venue. Appellant seems to have regarded this case as a criminal prosecution, as his petition and affidavits for change of venue appear to have been drawn with the requirements of the criminal statutes in view, rather than the procedure for a change of venue in civil cases. This court has several times held

that a bastardy proceeding is of a civil nature, although properly brought in the name of the State and prosecuted by the prosecuting attorney. *Wimberly* v. *State,* 90 Ark. 514, 119 S. W. 668; *Belford* v. *State,* 96 Ark. 274, 131 S. W. 953; *Chambers* v. *State,* 45 Ark. 56; *Pearce* v. *State,* 55 Ark. 387, 18 S. W. 380.

At common law the mother was required to support her bastard child, and not the father, but the statutes of this State (§ 772 *et seq.,* C. & M. Digest), give the mother of such a child the right to require the father to contribute to its support, and implies an obligation and a promise on his part to help support it, and this court has held that she can enforce such a promise based upon moral obligations and a legal liability. *Davis* v. *Herrington,* 53 Ark. 5, 13 S. W. 215. Therefore a bastardy proceeding is a civil action, and a petition for a change of venue in such a case would come under the provisions of law applicable to changes of venue in civil cases. Section 10341, C. & M. Digest. However, we have examined the evidence on the question of the change of venue, and find that there was no error in overruling the motion. It would unduly extend this opinion to set out such evidence, and no useful purpose could be served thereby.

It appears from the evidence that the prosecutrix, Mabel Freeman, has a living husband, from whom she was separated at the time, but not divorced, he living at Hon, in Scott County, and she residing at Magazine, in Logan County, but having visited at Hon in June or July, where she saw her husband several times.

Many proper exceptions were saved to the admission, over appellant's objections, of testimony offered by the State, and for the refusal of the court to admit certain evidence offered by appellant, and to cross-examine the prosecuting witness, Mabel Freeman, in certain respects, with particular reference to the testimony of Mabel Freeman of non-access to her husband.

These objections and exceptions were attempted to be preserved by appellant in his motion for a new trial, as follows:

"Nine. The court erred and committed separate and several errors in excluding each and all the testimony admitted by the court over the objection and exception of the defendant.

"Ten. The court committed separate and several errors in excluding each and all of the testimony offered by the defendant and excluded by the court."

In paragraph nine, the word "excluding" is used when we think counsel intended the word "admitting" instead, but, even though the assignment be changed by substituting that word, still both assignments would be too general to bring before the trial court any particular objection and exception relied on, either in the admission or exclusion of testimony. It does not point out any particular testimony which was admitted or excluded by the court over the objection and exception of the defendant, nor does it name any witness whose testimony is complained of, and the assignment is therefore too general to raise any question on the admission and exclusion of evidence for consideration by this court.

In *Lomax* v. *State*, 165 Ark. 386, 264 S. W. 823, the assignment was "because the court erred in admitting testimony which was incompetent, irrelevant and immaterial to the issues involved in said cause." This court held that such an assignment was too indefinite, and, in disposing of the matter, said:

"This court has frequently held that a motion for a new trial on the ground that the court erred in admitting evidence on the part of the defendant, without naming the witnesses or pointing out the evidence, is too general, and does not present any question for review on appeal" (Citing cases).

To the same effect see *Armstrong* v. *State*, 171 Ark. 1136, 287 S. W. 590.

While we cannot reverse the case on these assignments of error, and because it is reversed on another ground hereinafter set out, we deem it proper to state that many of the exceptions, both to the admission and exclusion of testimony, were proper. We do not, how-

ever, think there was any error in the exclusion of the testimony offered on the part of appellant by witness, Dr. Ewing, that Dr. Miller suggested that they get some person with money to lay this child on, so that they could get their fees. But we are of the opinion that the questions asked by appellant's counsel as to the position in which the sexual intercourse was consummated, whether standing up or lying down, was competent, and should have been admitted.

On the question of non-access, the prosecuting witness cannot testify to non-access to her husband, as has been held by this court several times. In *Kennedy* v. *State,* 117 Ark. 113, 173 S. W. 842, L. R. A. 1916B, 1052, Ann. Cas. 1917A 1029, this court said:

"Under our statute, the mother is a competent witness in all cases of bastardy, unless she be legally incompetent in any case. It is not necessary that her testimony be corroborated. She may testify to any facts tending to prove the illegitimacy of the child, except the single fact of non-access of her husband."

The reason for the rule, as stated by the court in this case, is as follows:

"But we are in full accord with the doctrine that, on the ground of decency and morality and as a matter of public policy, a husband and wife should not be permitted to testify to non-access in affiliation proceedings. For, when they so testify, they proclaim their own lechery and their infidelity to each other, and reveal secrets that are so purely delicate and personal as to make it grossly indecent to advertise them to the world. By so doing they not only scandalize the sacred marital relation, but they cast a cloud upon the life of the unoffending child, and subject it to handicaps and embarrassments that are always most hurtful and most difficult to overcome. In the interest of society and for the benefit of the innocent offspring, this should never be permitted."

Again, in this same case, the court used this language: "She may testify to facts which tend to prove that access on the part of her husband within the period of gestation

was impossible, and, if she testified to facts of that character, there would be a question for the court or jury trying the issue to determine as to whether or not the presumption of legitimacy had been overcome. But, in this case, there is no such testimony. She does not testify to any fact that would warrant the conclusion that her husband did not have access within the period of gestation."

This case was followed in the later case reported in the same volume, page 408, [174 S. W. 1196], *Liles* v. *State ex rel. Johnson.* In this case the court said:

"The witness was permitted to testify, over appellant's objection, that she had not cohabitated with Stevens, her husband, for more than four years, at the time the appellant had the sexual intercourse with her."

The court reversed that case for the admission of such incompetent testimony.

In the case of *Jacobs* v. *Jacobs,* 146 Ark. 48, 225 S. W. 23, the court again followed the above cases, and there said:

"Nothing is allowed to impugn the legitimacy of a child, short of proof by fact showing it to be impossible that the husband could have been its father. This is the general rule on the subject."

It was agreed that the husband of the prosecuting witness resided at or near Hon, which was about thirty miles from Magazine, where she lived at all times within the period in which the child could have been begotten. Therefore it is a matter of common knowledge that access of her husband was not impossible. We have made this statement in view of the complaint made against instruction No. 1, given on the court's own motion, to which a proper exception was made and a proper assignment preserved in the motion for a new trial. This instruction is as follows:

"Gentlemen of the jury, the only question for you to determine is whether or not Charles E. Scott is the father of the bastard child of Mrs. Freeman, the prosecutrix. If a married woman gives birth to a child, the presumption is that it is her husband's. This presump-

tion may be overcome by evidence, and that is a question for you to determine in this case."

This instruction did not correctly declare the law, and it was not cured by any other instruction given by the court. It did not go far enough in defining the kind of testimony required to overturn the presumption that the husband of a married woman is the father of her child. Some instruction similar to appellant's requested instruction No. 9 should have been given to cure the defect in instruction No. 1 on the court's own motion, with the words "clear and abiding" stricken out. The requested instruction is as follows:

"If you should find from the testimony that the said Mabel Freeman gave birth to a child, on or before the time alleged in the complaint, and that, at the time the said child was or might have been begotten, the said Mabel Freeman had a living husband residing within a radius of 20 or 25 miles from her, she at Magazine, Arkansas, and he at Hon, Arkansas, although living apart from her, before you can convict the defendant of being the father of said child you must find from a fair preponderance of the testimony, to your clear and abiding satisfaction, that the said husband of her, the said Freeman, did not have access to his said wife, and did not, during such period of conception, have any acts of sexual intercourse with his said wife."

In this view of the case it must be reversed, and remanded for a new trial; but we deem it proper to say that, on a retrial, the evidence of non-access of the husband must be such as to convince the jury, by a preponderance of the evidence, of the impossibility of access. The evidence in the record before us is not sufficient to establish this fact.

PRIMROSE *v.* BROWN.

Opinion delivered April 11, 1927.

1. FENCES—FAILURE TO MAINTAIN DIVISION FENCE.—On failure of an adjoining landowner to maintain his half of a division fence, as required by Crawford & Moses' Digest, §§ 2535-6, 4654, he became liable to the adjoining proprietor for damages sustained by the latter to his stock by reason thereof.
2. JUSTICES OF THE PEACE—JURISDICTION.—A suit between adjoining landowners for $90 damages to stock occasioned by defendant's failure to maintain his half of a division fence is not a suit involving damages to real property, but to recover a damage to personal property, and is within the jurisdiction of a justice of the peace.

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

Appellant *pro se.*

McHANEY, J. Appellant, Con Primrose, brought this action in the justice of the peace court of Benton County, alleging that he is in possession of an eighty-acre tract of land adjoining a tract of eighty acres owned by appellee in Benton County, between which property there is a division fence; that the cost of maintaining said division fence should be equally borne by appellant and appellee; appellant kept up his half of the fence, and that appellee has failed, neglected and refused to keep up the other half of said fence, and that his stock turned in on his premises would get through the unrepaired portion of the devision fence and be damaged thereby, and that he had been damaged by reason of her negligence in the sum of $90 "in caring for and looking up his stock, and in the actual damage done to the stock as aforesaid."

On the trial of this case in the justice of the peace court he recovered $20, from which an appeal was taken by appellee to the circuit court, where she filed a motion to dismiss for want of jurisdiction in the justice of the peace court, and the court sustained said motion, dismissed his cause, and he has appealed to this court.

There is an obligation in law resting on joint owners or users of a division fence to equally maintain same. Section 4654 of Crawford & Moses' Digest reads as follows:

"When any person shall inclose land adjoining another's land already inclosed with a fence, so that any part of the fence first made becomes the partition fence between them, in such case the charge of said division fence, as far as it is inclosed on both sides, should be equally borne and maintained by both parties." See also §§ 2535 and 2536 of C. & M. Digest.

By failure of appellee to maintain her half of the division fence she would be liable to appellant for whatever damage he sustained to his stock by reason thereof. This suit does not involve damages to real estate, which would not be within the jurisdiction of a justice of the peace, but is to recover a damage done to personal property.

The judgment of the circuit court in dismissing appellant's complaint was wrong, and it is therefore reversed, and the cause remanded for a new trial.

PRINCE v. ALFORD.

Opinion delivered April 4, 1927.

1. APPEAL AND ERROR—DIRECTED VERDICT—PRESUMPTION.—Where a verdict is directed against appellant, the Supreme Court will give the testimony and the inferences reasonably deducible therefrom the interpretation most favorable to him.
2. LANDLORD AND TENANT—CONSTRUCTION OF LEASE.—Where a lease was prepared by the landlord's attorney, any doubt as to its meaning should be resolved against the landlord.
3. LANDLORD AND TENANT—JURY QUESTION—BREACH OF LEASE.—In a suit for damages for breach of a lease, the question whether a deed from the landlord to a third person was not in fact a mere subterfuge adopted to defeat the lease *held* for the jury.
4. LANDLORD AND TENANT.—Where a landlord and his grantee collude to defeat the tenant's lease by a conveyance from the

landlord to such grantee, both are liable to the lessee for breach of the contract.

5. VENDOR AND PURCHASER—NOTICE OF TENANT'S RIGHTS.—Although a lease, recorded but not acknowledged, was not constructive notice to a purchaser, it could be considered in determining whether the purchaser had actual notice of the lease before purchasing.

6. VENDOR AND PURCHASER—POSSESSION OF TENANT AS NOTICE.—Possession of the premises by the tenant is notice to the purchaser of the reversion of the tenant's actual interest under the lease.

7. LANDLORD AND TENANT—NOTICE OF TENANT'S RIGHTS—JURY QUESTION.—In a suit by a tenant to recover damages for breach of a lease contract, the question whether one who purchased the leased premises did so with notice of the tenant's rights *held*, under the evidence, to be a question for the jury.

8. LANDLORD AND TENANT—COVENANT FOR RENEWAL OF LEASE.—An unconditional covenant for renewal of a lease is a covenant real which runs with the land, and is binding upon a subsequent purchaser with notice, as a covenant to renew a lease is a part of the lease and fixes the term thereof.

9. LANDLORD AND TENANT—BREACH OF CONTRACT OF LEASE—PERSONS LIABLE.—Where a purchaser of land took title with notice of the lease, he became liable with the lessor for a breach of the contract of lease.

10. LANDLORD AND TENANT—BREACH OF LEASE—DAMAGES.—The measure of damages for breach of a contract of lease by the lessor is the difference between the actual value of the leasehold estate and the agreed rental that was to have been paid therefor.

11. LANDLORD AND TENANT—BREACH OF LEASE—ACTION.—Where a landlord extinguishes the tenant's term by a wrongful conveyance, the tenant had a cause of action against him for damages to the value of the term, based upon the wrongful destruction of the term.

Appeal from Mississippi Circuit Court, Chickasawba District; *W. W. Bandy*, Judge; reversed.

Frank C. Douglas and *C. L. Summers*, for appellant.

Nelson & Crawford, for appellee.

SMITH, J. On December 3, 1923, J. T. Alford was the owner of lot 17, in block 33, of the original survey of the city of Blytheville, at which time he entered into a lease contract for a period of two years for the lot described with D. L. Downs. The lease began January 1, 1924, and provided that the lessee should pay a rental

of $6 per week. The lease contract contained the following provisions:

"It is further agreed that, when first party gets ready to build a new building upon said lots, he shall give second party ten days' notice thereof, and second party hereby agrees to vacate said premises at once and deliver the same to first party. It is further agreed that, if first party constructs a new house upon said lot, then second party shall have the refusal of renting the same for a period of two years from date of completion at the rental price of $50 per month, payable in advance.

"Signed in duplicate on this the 3rd of December, 1923.

"J. T. Alford, first party.
"D. L. Downs, second part.

"Lease transferred satisfactorily. When old building is torn out the rent stops until new building is completed.
"J. T. Alford to W. O. Prince."

W. O. Prince purchased the lease from Downs, with the consent of Alford, as is shown by the indorsement made on the lease itself, and the lease was assigned to him by Downs on April 19, 1924. Alford did not erect the building mentioned in the lease, but sold the lot to T. E. Reeves, who did erect a building consisting of two rooms. Reeves tendered one of these rooms to Prince at a monthly rental of $50, but Prince declined the offer, and demanded possession of both rooms, or the entire building, at that rental. This demand was refused by Reeves, who thereupon rented the rooms to separate tenants for $50 per month each. Prince then brought this suit against Alford and Reeves to recover damages for the breach of the contract, and alleged as the measure of his damages the difference between the agreed rental and the rent reserved, and judgment therefor was prayed.

Prince testified that he bought the lease with Alford's consent, and paid rent to Alford, and, after doing so, Alford stated that he had never read the lease after it had been executed until the night before the conversation between them. While it is shown that Prince paid the

rent on the lease, it is not clear whether he took actual possession and occupied the house thereon. Alford proposed that a new contract be written, but Prince declined to change the old one. Alford then asked if Prince construed the contract as giving him all of the new building which Alford contemplated erecting, and, when Prince stated that he did so construe the contract, Alford stated that he would not erect a new building. Alford then conveyed the lot to Reeves, who discussed the matter with Prince and asked Prince how much he had invested. Prince declined to answer the question, whereupon Reeves said he would erect a building with a front of ten feet. The old building on the lot was twelve feet wide by twenty-six feet long. Prince paid $650 for the lease, and told Reeves that he claimed the right of possession to the lot for the term of the lease, and Reeves answered that he (Reeves) was perfectly safe, as he did not go into anything blindly. It appears that, when the original lease was made, both parties thereto knew that the building on the lot had been condemned under an ordinance of the city and would have to be torn down and removed. After Reeves bought the lot he erected a building twenty-six feet wide and ninety feet long on the lot, and Prince demanded possession of the new buiding, and tendered $50 in payment of the first month's rent. This demand was refused. There was substantial corroboration of the testimony of Prince, in addition to the lease itself, which was offered in evidence.

Alford admitted the execution of the written lease, and that he had it prepared by his attorney. He stated, however, that it was his plan to erect two buildings, or one building with a partition wall. Did not remember telling Reeves that Prince claimed the entire lot before selling to Reeves, but admitted telling Reeves what Prince contended for before the building was erected. Alford admitted that he had an interest in the building, but did not state what that interest was.

Reeves testified that he bought the lot from Alford, who had nothing to do with the erection of the building.

He spoke to Prince about the building, for the reason that he wanted to suit Prince, and that Prince "blew up" when he mentioned the matter to him. Reeves testified that he knew nothing about the lease until after he had bought the property, although he admitted that an abstract was furnished him. He did not state whether the lease was shown on the abstract or not, although the lease was of record. The lease had never been acknowledged.

At the conclusion of the introduction of the testimony the court directed the jury to return a verdict in favor of both Alford and Reeves, and from the judgment pronounced thereon is this appeal.

Inasmuch as a verdict was directed against appellant, we must give the testimony and the inferences reasonably deducible therefrom the interpretation most favorable to him. It may also be said that, inasmuch as appellee, Alford, had the lease prepared by his attorney, any doubt as to its meaning should be resolved against him. *Buffalo Zinc & Copper Co.* v. *Hale*, 136 Ark. 10, 206 S. W. 661.

When the testimony is thus viewed, it may be said that there was a question for the jury, as is contended by appellant, whether the deed from Alford to Reeves was not in fact a mere subterfuge adopted to defeat the lease. The relation between Alford and Reeves and the admission by Alford, which was not explained, that he had an interest in the building, notwithstanding the fact that he had conveyed the lot on which it was erected, authorized the submission of the question whether Alford and Reeves had colluded to defeat the lease. If they did so, both would be liable for that reason.

But appellant's right to recover damages against either Alford or Reeves, or both of them, is not dependent on the affirmative finding that the deed was collusively executed. They may both be liable upon another ground which the testimony sufficiently raises for submission to the jury.

Reeves may have bought with notice of the lease, although he did not buy collusively. It has been said that the lease was not acknowledged, although it was recorded, and, even though it would not therefore be constructive notice, under § 1525, C. & M. Digest, this fact may be considered in determining whether Reeves had actual notice before purchasing the lot. Reeves admitted that he had an abstract of the title made before purchasing, and in this way he may have acquired actual knowledge of the lease. The testimony of Prince tends to show that Reeves had actual notice both from himself and from Alford of the existing lease. We have said that it is not clear whether Prince was in the actual possession of the lot when Reeves purchased. If so, this possession was notice.

At § 10 of the chapter on "Landlord and Tenant" in 16 R. C. L., 538, it is said: "It is a general rule that the possession of a tenant is notice to a purchaser of the reversion of the actual interest of the tenant * * *."

The syllabus in the case of *First National Bank of Paris* v. *Gray,* 168 Ark. 12, 268 S. W. 616, is as follows: "The possession of a tenant or lessee is not only notice as against a subsequent mortgagee of all his rights and interest connected with or or growing out of the tenancy or lease, but is also notice of all interests he may have acquired through subsequent or collateral agreements."

The question whether Reeves purchased with notice should therefore have been submitted to the jury, and, if the finding by the jury be made that Reeves purchased with notice, then he is liable if Alford is liable.

In the case of *Crane* v. *Patton,* 57 Ark. 340, 21 S. W. 466, the facts were that Paddock executed to Patton a certain writing, which the court construed to be a lease, under which Patton had the right to cut and remove certain timber. Thereafter Paddock conveyed the land to Crane, who denied Patton the right to cut and remove the timber, and Patton sued Crane for damages. Upon the trial of the case the court instructed the jury as follows: "2. If the defendant, at the time of his purchase from

Paddock, knew that plaintiff was in possession or control of the land, it was his duty to make reasonable inquiry as to what right or authority he had such possession and the extent of his rights on the land, and is chargeable with knowledge of whatever he might have learned by such inquiry." There was a verdict awarding damages to Patton, and, upon the appeal, the instruction set out was approved. The court, through Mr. Justice HEMINGWAY, said: "The rights of the lessee are vested, not determinable at the will of the lessor; and a sale during the term of the lease, to one having notice of it, could not extinguish it."

It is true the lease did not require Alford to erect a new building, and his grantee was under no duty to do so. But the lease did convey the lot for the term of two years, and gave the right of possession for that period of time, whether a new building was erected or not, the rental to be increased if a new building were constructed.

If, because of the uncertainty whether a new building would be erected, the lease should be construed as being merely a covenant to renew the lease for the portion of the two years then unexpired at the increased rental, the rights and liabilities of the parties would not be changed, because the law is that an unconditional covenant for renewal in a lease is a covenant real which runs with the land and is as binding on a subsequent purchaser as is the lease itself. This is upon the theory that a covenant to renew a lease is a part of the lease and fixes the term thereof. Cases cited in the note to the case of *Neal* v. *Jefferson*, 41 L. R. A. (N. S.) 387, fully support this statement of the law.

At § 402 of the chapter on "Landlord and Tenant," in 16 R. C. L., 897, it is said: "It is the well-recognized general rule that the benefit of the lessor's covenant to renew runs with the leasehold estate and is enforceable by an assignee; and, as a corollary of this rule, after a lessee has assigned the term, he loses his right to enforce the renewal, as such right has passed to his assignee."

In the case of *Crenshaw-Gary Lumber Co.* v. *Norton,* 111 Miss. 720, 72 So. 140, L. R. A. 1916E 1227, the Supreme Court of Mississippi said: "The covenant to renew or extend the lease in the case at bar ran with the land, and could be availed of by the assignee of the lessee as a matter of law. However, this right was carried into the face of the lease. This provision could also be enforced against the lessor or his assigns or grantees. Therefore appellee, Norton, having notice, both actual and constructive, of the provisions of the lease, and actual notice of the intention and purpose of appellant to avail of the extension covenant therein, the same is enforceable against him." See also *Leominster Gaslight Co.* v. *Hillery,* 197 Mass. 267, 83 N. E. 870, where a syllabus reads as follows: "Where a deed conveyed property subject to a lease of part of the premises, the grantee took the property subject to the rights of the lessee secured by the lease, including a covenant running with the land to renew the lease at the expiration of the term."

It follows therefore that, if Reeves took title to the lot with notice of the lease, he is jointly liable with Alford for any damages resulting from the breach of the contract, and the measure of such damages is the difference between the actual value of the leasehold estate that should have been enjoyed and the agreed rental that was to have been paid therefor. *Neal* v. *Jefferson, supra; Wakin* v. *Morgan,* 165 Ark. 234, 263 S. W. 783; *Reeves* v. *Romines,* 132 Ark. 599, 201 S. W. 822.

So far we have considered the joint liability of Alford and Reeves. If it be found that Reeves is not liable, because he took title to the lot without notice of the lease, the individual liability of Alford remains to be considered, and we think his liability is shown by the undisputed testimony.

In *Williams* v. *Young,* 81 Atl. 1118, it was said by the Court of Errors and Appeals of New Jersey that, where a landlord extinguishes his tenant's term by a wrongful conveyance, the tenant has an action against

him for damages to the value of the term, based upon the wrongful destruction of his term.

The lease here involved has now expired, and, upon a new trial, which must be ordered (in the absence of testimony excusing Alford's breach of the lease contract), the jury will assess damages against Alford under the measure herein announced.

The judgment of the court below will therefore be reversed, and the cause remanded for a new trial.

CASEY v. DOUGLAS.

Opinion delivered July 11, 1927.

1. HIGHWAYS—ESTABLISHMENT OF NEW ROADS.—Acts 1923, p. 490, amending Crawford & Moses' Dig., § 5249, as to the mode of establishing new roads, expressly excepted Benton County, thereby leaving § 5249 in force in that county.
2. HIGHWAYS—ESTABLISHMENT—TAKING PROPERTY WITHOUT COMPENSATION.—In the establishment of new roads under Crawford & Moses' Dig., § 5249, county courts cannot disregard any applicable provision of the Constitution, including the provision against the taking of property without compensation, or the provisions of Amendment 11.
3. HIGHWAYS—ESTABLISHMENT—AUTHORITY OF CIRCUIT COURT ON APPEAL.—In a proceeding to establish a new road, under Crawford & Moses' Dig., § 5249, the circuit court on appeal can exercise no greater power or authority than was within the jurisdiction of the county court.
4. HIGHWAYS—ESTABLISHMENT OF NEW ROAD—VALIDITY.—A judgment of the circuit court on appeal in a proceeding to establish a new road which materially changed the route adopted by the county court and made the location dependent on many contingencies as to procuring the right-of-way, payment of damages by certain individuals, release from others, and always upon the existence of sufficient funds in the county treasury, *held* erroneous, since the order establishing the road should be definite and not contingent upon conditions that may not be met or performed for a long or indefinite time or not at all.

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

STATEMENT BY THE COURT.

A. S. Casey and thirteen others filed their petition in the Benton County Court, praying the court to lay out and establish a county road as follows:

"Beginning at Healing Springs and running westerly on and along the right-of-way of the Kansas City & Memphis Railway to the town of Highfill, Arkansas."

On December 27, 1924, the court made an order establishing the road as prayed for, thirty feet in width, and ordered that certain stock-ways or crossings be built at three of the farms through which the road ran, naming the owners. J. M. Douglas *et al.*, on February 5, 1925, filed an affidavit and bond for appeal in the circuit court, which was granted by the county court on the 3d day of March, 1925.

The remonstrants filed an answer, denying the necessity for the road, showing another road already existing which would take care of the public need for the highway, and that their proposal could not be established without great public expense, and that certain portions of it extended into townships whose road funds were already being exhausted, and that the road established could not be paid for.

Demurrer was filed to this answer, and then the petitioners filed the response, denying the allegations of it.

It seems that two appeals were taken from the county court, and that, at the March term of the circuit court, the appeals were consolidated by consent of the parties, and, after a motion made to dismiss the appeal of J. M. Douglas *et al.*, to which a reply was filed, the circuit court, December 31, 1925, made final order providing for the opening of the road, changing the route very materially from the location by the county court on the end of the road coming into the town of Highfill.

Various propositions of citizens for contributions toward the construction of the road and procuring the right-of-way necessary for the road as changed were accepted in the circuit court judgment, and orders made for the completion of the improvement when it could be

done with funds collected and realized in some of the different road districts through which the proposed road was laid out.

Appellant's attorneys say of this judgment: "The circuit court in this case has laid out and established a road that no one asked for. To permit this would be to allow the circuit court to lay out and establish roads without any citizen asking for it."

From the judgment of the circuit court the appeal has been prosecuted to this court.

John Nance and *W. O. Young*, for appellant.

Sam Beasley and *McGill & McGill*, for appellee.

KIRBY, J., (after stating the facts). This road was attempted to be laid out under the provisions of § 5249 Crawford & Moses' Digest, which has been held to be constitutional, and to provide an independent method of authorizing the laying out and establishment of roads without giving notice, appointment of viewers, etc. *Sloan* v. *Lawrence County*, 134 Ark. 121, 203 S. W. 260; *McMahan* v. *Ruble*, 135 Ark. 83, 204 S. W. 746. This statute has been amended by act No. 611 of the Acts of 1923, approved March 23, 1923, which was in force when this proceeding was begun. The amending statute included all that part of the old statute that was to become the law under the amendment, but from its provisions were expressly excepted Benton and other counties of the State, which necessarily had effect, according to the majority opinion, to leave the law, so far as relates to Benton and the other counties excepted from the terms of the amending statute as provided in said § 5249, and as though no amendment to said section had been made, since it is expressly provided that such amendment shall not relate to the excepted counties.

The county courts, when establishing new roads or laying out old roads under the authority of said § 5249, cannot ignore any of the applicable provisions of the Constitution, and, in exercising the power conferred upon it by that statute, cannot disregard the constitutional pro-

vision that "private property shall not be taken, appropriated or damaged for public use without compensation therefor," nor disregard the mandates of Amendment No. 11, but must exercise its authority in conformity with both the said provisions of the Constitution as interpreted by this court. *Independence County* v. *Lester, post,* p. 796.

The circuit court on appeal could exercise, of course, no greater power or authority than was within the jurisdiction of the county court, and, in making its order, not only departed materially from the route proposed and established by the lower court, but made the location of the new road dependent upon many contingencies as to procuring right-of-way and payment of damages by certain individuals, releases from others and always upon proposition that the road as laid out should not be constructed unless and until there should be funds enough on hand in the county treasury to pay for all damages for right-of-way taken for the purpose. It could not have been made a valid order establishing the road that would have authorized the taking the lands of any owners required therefor without compensation first paid, as held in *Independence County* v. *Lester, post,* p. 796.

New roads are to be laid out and established only when the public convenience, as shown under the forms of law provided therefor, requires it shall be done, and, when such necessity is shown to exist, then the order should be made laying out and establishing the road definitely, and not contingent upon conditions that may not be met or performed for a long or indefinite time, nor at all.

More contingencies are recognized and attempted to be provided against in the order of the circuit court laying out the road and changing the route materially from that adopted by the county court than will permit the establishment of the new road with that degree of certainty required by law, and its judgment is reversed, and the cause remanded for further proceedings according to law and not inconsistent with this opinion.

FULTON FERRY & BRIDGE COMPANY v. BLACKWOOD.

Opinion delivered April 11, 1927.

1. BRIDGES—JURISDICTION OF THE COUNTY COURT.—Acts 1925, authorizing the State Highway Commission to build a toll bridge across a navigable river to connect with the existing highway *held* not invalid within Const., art. 7, § 28, giving the county court exclusive jurisdiction of county bridges, either because the act fails to provide for approval of the bridge plans by the county court or for the county to take over its control on its completion.
2. BRIDGES—TOLLS NO TAX ON PUBLIC.—An exaction by way of tolls on users of a toll bridge is not a tax on the general public, being a tax only on those who use the bridge.
3. BRIDGES—DELEGATION OF POWER TO CONSTRUCT.—The Legislature may delegate to the State Highway Commission the power to construct or improve and maintain a toll bridge on an existing highway, without infringing on the jurisdiction of the county court.
4. BRIDGES—VALIDITY OF FRANCHISE TO BUILD TOLL BRIDGE.—Where two adjoining counties granted a franchise to build a toll bridge over a navigable boundary stream upon a condition precedent that the consent of the Federal Government should be obtained, which was denied when Congress granted a conflicting franchise to the State Highway Commission by act of February 4, 1926, the consent of one party to the franchise granted by the two county courts was lacking, and neither party thereto was bound.
5. EMINENT DOMAIN—AUTHORITY OF STATE TO CONDEMN CONFLICTING FRANCHISE.—Under Acts 1925, p. 384, authorizing the State Highway Commission to build a toll bridge over a certain navigable river, and to condemn lands and any existing franchise necessary to the construction of the bridge, the Highway Commission was authorized to condemn and take over lands, and any existing franchise, rights or easement necessary therefor.
6. EMINENT DOMAIN—DELEGATION OF POWER.—Whenever public convenience or necessity is involved, the Legislature may delegate to a public agency the right of condemnation of property.
7. BRIDGES—REASONABLENESS OF TIME LIMIT.—A time limit of five years to begin construction of a county bridge *held* unreasonable.
8. CONSTITUTIONAL LAW—CONTRACTS SUBJECT TO RIGHT OF EMINENT DOMAIN.—Exercise by the State of the right of eminent domain does not interfere with the inviolability of contracts for the reason that all property is held by tenure from the State and all contracts are made subject to the law of eminent domain.

Appeal from Pulaski Chancery Court; *T. M. Mehaffy,* Special Chancellor; affirmed in part.

J. D. Head and *Rose, Hemingway, Cantrell & Loughborough,* for appellant.

H. W. Applegate, Attorney General, *O. A. Graves, W. H. Arnold, W. H. Arnold, Jr.,* and *David C. Arnold,* for appellee.

McHANEY, J. On December 15, 1923, the county courts of Miller County and Hempstead County, Arkansas, by separate identical orders, granted a franchise to J. B. Shults and George T. Conway to build a toll-bridge across Red River, a boundary stream between said counties, "at the point where the improved road from Texarkana to Hope now crosses said river at the town of Fulton, or at such other point for crossing said river by a changed route of said highway as may be found necessary for engineering purposes, or as may be required by Government authorities in the interest of navigation." Said courts made separate findings of fact, in identical language, to the effect that such bridge would be of great benefit to the citizens of these counties, the State and that part of the traveling public having occasion to cross Red River at said point; that the expense of such a project was too great and burdensome for the counties and for the adjacent property, if taxed therefor; and that the petitioners were suitable and competent persons to do so. Said courts, based on said findings, entered their separate orders granting to said Shults and Conway, "their heirs, executors, administrators and assigns," "the exclusive right, privilege and franchise to construct, maintain and operate a toll-bridge for highway purposes over and across the Red River at said point," some of the conditions thereof being as follows: that same shall be in force and effect for 49 years; that the exclusive privilege shall extend for three miles on either side of said bridge, measured along the channel; that said courts will not grant a franchise to build a bridge to any other person on said river in said three miles for the term of 49 years, nor will said courts build such a bridge, either separately

or jointly; that no ferry license shall be granted in said distance for said term; that the right to sell, assign and transfer is granted on certain conditions; that the rate of tolls shall be from 5 cents for pedestrians to $1 for automobiles, driver, and not exceeding seven passengers, with special rates for trucks of $1 for 1½ tons and $1 additional per added ton; that said rates cannot be changed for a period of twenty years, and then only on a joint agreement of both courts, and, if they cannot agree, the chancery court may fix them, and then they must be fixed to grant a "reasonable and proper return per annum upon the investment in said bridge," approaches, abutments, etc., allowance for depreciation, cost of operation, repair, etc; that they shall begin construction in three years after acceptance of the franchise, and shall complete same in three years after construction begins, but time for completion may be extended by said courts on proper showing; that they shall, within two years from date, execute a bond for $10,000 to the county clerk of Hempstead County for the use and benefit of Hempstead County, "conditioned for the beginning and completion of said bridge within the time hereinbefore mentioned, otherwise this franchise to be null and void." A number of other conditions and stipulations are contained in said orders, but we do not deem it necessary to set them out here. On the same date, December 15, 1923, Shults and Conway accepted said franchise in writing to each of said courts, and, on the same day, appropriate orders confirming such acceptance were entered by each of said courts.

The franchise above mentioned was assigned by Shults and Conway to the appellant, Fulton Ferry & Bridge Company, a corporation, and on October 6, 1924, the county court of Hempstead County, on the petition of appellant, extended said "franchise and privilege," as above granted, "for a period of two years from and after the date of the approval of Congress and other governmental body, granting the said Fulton Ferry and Bridge Company the right to construct said bridge, and if the said Fulton Ferry & Bridge Company does not start con-

struction of said bridge in two years from date of said approval of Congress and other governmental bodies, then this franchise is to be null and void; otherwise to remain in full force and effect as called for in said franchise." The county court of Miller County made substantially the same order on October 20, 1924, with this proviso: "Provided that, if the said Fulton Ferry & Bridge Company does not start construction of said bridge within two years from the date of said approval by Congress and other governmental bodies, then said franchise is to become null and void; otherwise to remain in full force and effect, as called for in said franchise; provided further, this extension shall terminate upon the expiration of five years from date hereof, in any event, unless the construction of said bridge shall be sooner begun." These orders of extension were made upon petition which said: "Your petitioner shows to the court that it has endeavored, in good faith, to begin the construction of said bridge, and to that end has secured the introduction in the Congress of the United States a bill authorizing the building and construction of said bridge, but that so far it has been unable to secure the passage of said bill or to secure authority to begin the construction of said bridge from the proper authorities of the United States Government, although it has made diligent efforts so to do; the said Red River being a navigable stream, and the authority of the Congress to erect a bridge over and across the same being required by law. Due to the fact that it required congressional authority or the passage of a bill authorizing the construction of said bridge before petitioner can begin work thereon, and the further fact that it has not yet been able to secure such authority * * * will not be able to obtain such authority for more than a year hereafter," petitioner prays for an extension of two years' time.

At the special session of the Legislature in 1923, an act was passed and approved authorizing the above procedure. It is act 22, page 146, Special Session of 1923, entitled, "An act authorizing privileges for building toll

bridges over watercourses between counties," approved October 15, 1923. Thereafter, at the regular session for 1925, an act was passed authorizing and directing the State Highway Commission to build a bridge across Red River in Hempstead and Miller counties, at a point within five miles of the Missouri Pacific Railway bridge across Red River at Fulton, Arkansas, not to cost exceeding $500,000, including cost of condemnation of lands, purchase of any existing franchise, and all other expenses. This is act No. 136, page 384, Acts 1925, approved March 6, 1925.

This action was brought in the Pulaski Chancery Court by appellants, Fulton Ferry & Bridge Company, asserting rights under its franchise and as a property owner in both counties, and certain other property owners in said counties, against Herbert R. Wilson, Highway Commissioner, and the then members of the State Highway Commission, to enjoin them from taking any steps to build said bridge under act 136 of 1925. Dwight H. Blackwood, successor to Herbert R. Wilson, and the new members of the Highway Commission, as successors to the former members, have been substituted as appellees here. Substantially the facts as above set forth relative to said franchise were set up, and it is charged, in addition, that act 136 of 1925 is unconstitutional and void, in that it is in conflict with § 28, art. 7, of the Constitution of Arkansas. Appellees filed an answer and cross-complaint, denying the invalidity of said act 136, and charging the invalidity of the franchise on many grounds, some of which will be hereafter referred to, and prayed that they be declared void, and that appellant be enjoined from asserting or making a claim under said franchise in conflict with the rights of appellees under act 136 of 1925, and under the act of Congress of 1926 granting to appellees the right to build said bridge.

The chancery court, after hearing all the evidence and arguments of learned counsel, entered a decree dismissing the complaint of appellants and the cross-com-

plaint of appellees for want of equity, and both parties have appealed to this court.

The transcript in this case is a very large one, consisting of 1,622 pages, in four volumes. The evidence is directed very largely to the question of whether Red River at, above and below Fulton is navigable. The chancellor found that the preponderance of the evidence showed Red River to be navigable at Fulton. Both parties to this litigation have so regarded it in the past —appellant, Fulton Ferry & Bridge Company, so regarded it when, in October, 1924, it petitioned the county courts of Hempstead and Miller counties to extend its franchises in the language heretofore quoted; and appellees are so insisting here. Both parties have applied to Congress for authority to build this bridge, same being granted to the appellees by an act approved February 4, 1926, entitled "An act granting the consent of Congress to the State Highway Commission of Arkansas to construct, maintain and operate a bridge across Red River near Fulton, Arkansas," and the authority of appellant to build same has been denied. We have also carefully examined the evidence on this question, and have reached the conclusion that perhaps the fair preponderance of the evidence is in favor of the findings of the chancellor—at least we cannot say that it is against the clear preponderance of the evidence.

But we do not regard the question of the navigability of Red River at Fulton of controlling importance in the case.

The serious and most important question we have to deal with in this case is the validity of act 136 of 1925, tested by § 28 of art. 7 of the Constitution of 1874, and the former decisions of this court construing said section of the Constitution. It is as follows:

"The county courts shall have exclusive original jurisdiction in all matters relating to county taxes, roads, bridges, ferries, paupers, bastardy, vagrants, the apprenticeship of minors, the disbursement of money for county purposes, and in every other case that may be

necessary to the internal improvement and local concerns of the respective counties. The county court shall be held by one judge, except in cases otherwise herein provided."

This section of the Constitution is found in article 7, which deals entirely with the judicial department and matters incidental thereto. The jurisdiction of the several courts is defined, from the Supreme Court on down to justices of the peace.

The act is too long to copy in full in this opinion. It authorizes and directs the Highway Commission to build this bridge; fixes the maximum cost; provides that it shall be a toll-bridge; fixes the tolls for ten years, and thereafter to be fixed by the commission. Also that, when the bridge is paid for, it shall be toll-free, except sufficient to operate it and keep it in repair. State and Federal aid are provided for, together with the power of the commission to borrow money to pay the cost thereof. Section 5 is as follows:

"The State Highway Commission is given authority to borrow money in such sums as may be necessary to construct said bridge with the roads and approaches to connect said bridge with the existing highway from the city of Hope, in Hempstead County, to the city of Texarkana, in Miller County; and also to pay such sums as may be needed or necessary for the purchase or condemnation of lands for right-of-way for said bridge, roads and approaches, including the right to purchase or condemn any existing franchise, right or easement necessary in the construction of said bridge."

Other provisions are for the sale of the notes or bonds, rate of interest and the security. A clause in § 8 provides: "Provided, however, that nothing in this act shall give the State Highway Commission authority to pledge the credit of any county or the State for the indebtedness incurred in building said bridge; and provided further, that the lands adjacent to said bridge, except approaches, shall not be liable for any part of the construction price of said bridge for its maintenance, and

that the bridge and its approaches, together with the tolls collected from said bridge, shall be the sole security for the notes or bonds herein authorized. And said bonds or evidences of indebtedness shall give notice in appropriate language of the limitations of the trust."

It is earnestly insisted by learned counsel for appellant that the act is unconstitutional for the reason that it does not recognize the jurisdiction of the county courts of these counties, either in the approval of the plans or taking over its control on completion, and for the further reason that it provides for the payment of the cost of the bridge by tolls, which is an exaction on the general public.

Let us now examine this act carefully in the light of the former decisions of this court to determine whether this contention is logical and well founded.

In § 5 "the State Highway Commission is given authority to borrow money in such sums as may be necessary to construct said bridge with the roads and approaches to connect said bridge *with the existing highway from the city of Hope, in Hempstead County, to the city of Texarkana, in Miller County.*" It will therefore be seen that this bridge is to be built on an "*existing highway*" running through the State of Arkansas, from Memphis *via* Little Rock to Texarkana, and, as shown by the evidence, one of the main national highways, from the Atlantic seaboard on the east to the Pacific Ocean at San Diego, on the west. Who laid out this "existing highway from the city of Hope, in Hempstead County to the City of Texarkana, in Miller County"? The county courts of Hempstead and Miller counties laid out this "existing highway," and in doing so exercised their "exclusive original jurisdiction." The county courts of both said counties have also laid out a site for said bridge. In making the orders granting appellant the franchise heretofore mentioned, they each provided that said bridge should be located "*at the point where the improved road from Texarkana to Hope now crosses said river at the town of Fulton.*" The site for the bridge has

therefore already been located by said courts, and in doing so they have exercised their constitutional jurisdiction.

It was further provided in said orders locating said bridge that it might be located at that point, "or at such other point for crossing said river by a changed route of said highway as may be found necessary for engineering purposes or as may be required by Government authorities in the interest of navigation." So it will be seen that there has been an exercise of the constitutional jurisdiction of both county courts in making a definite location of said bridge with such deviation from the actual point as may be found necessary for engineering purposes or as may be required by Federal authorities in the interest of navigation, and the act of Congress granting this right to the Highway Commission recognized this necessity by providing that such bridge might be built within five miles of the Missouri Pacific bridge at Fulton.

Turning, now, to the decisions of this court on similar questions, we find the same contention made as urged here in a number of cases involving the constitutionality of acts creating improvement districts for the construction of roads and bridges on existing highways. *Shibley v. Fort Smith & Van Buren District,* 96 Ark. 410, 132 S. W. 144, decided in 1910, involved the validity of an act of 1909 creating an improvement district to construct a free bridge across the Arkansas River between Fort Smith and Van Buren, by levying an assessment on the property in the district to cover the cost. The Arkansas River is a navigable stream, and it is the boundary between Sebastian and Crawford counties. It was urged that the act was repugnant to § 28, art. 7, of the Constitution in that it invaded the jurisdiction of the county courts. In referring to the case of *Road Improvement Dist. No. 1 v. Glover,* 89 Ark. 513, 117 S. W. 544, the court said: "It was not held that the Constitution withholds from the Legislature the power to authorize the construction, as local improvements, of new roads to be paid for by assessments on property to be

benefited, nor is there a justifiable inference to be drawn from the decision that the court should hold that the Legislature cannot authorize the construction of a bridge as a local improvement. The reason given by the court for the ruling was that to put the whole county into a road improvement district would be to substitute the commissioners or board of directors for the county court in the exercise of jurisdiction over the roads, and that it would be a usurpation of the county court's jurisdiction to authorize the construction of a new public road as a local improvement and thrust it upon that court for maintenance as a part of the public road system of the county. We perceive no sound reason why the Legislature may not, without trenching upon the jurisdiction of the county court, authorize the construction of new roads and bridges as local improvements. It does not impose upon the general public the burden of maintaining the improvement, nor does it fasten upon the county court the duty of supervising and maintaining the new road or bridge as a part of the internal affairs of the county. The statute now under consideration, by its express terms, is rescued from such an objection, for it provides that the county courts of said counties *may* take over and acquire the bridge after it has been constructed, and maintain it as a public highway, but that, in the event the county courts do not decide to take it over, then it shall be maintained by levying annual assessments on the property benefited. It is left entirely optional with the county courts of the two counties whether or not the control of the bridge shall be taken over, and this provision leaves unimpaired the jurisdiction of the county court over the bridge when it has seen fit to exercise that jurisdiction.

"This conclusion leaves out of consideration the fact that the bridge is to span a navigable river which is the boundary between two counties, and that it is not and can not be wholly within the jurisdiction of the county court of either county. The result would be the same if it were a bridge to be erected wholly within the bounds of

one county; for we are of the opinion that, even under those circumstances, its construction may be authorized as a local improvement. The construction of an improvement under those circumstances would not be an invasion of the jurisdiction of the county court."

If the Highway Commission builds this bridge, it will "not impose upon the general public the burden of maintaining the improvement, nor does it fasten upon the county court the duty of supervising and maintaining the new road or bridge as a part of the internal affairs of the county." Eminent counsel for appellant stated, in oral argument, that, if the act in question had directed the construction of this bridge by the Highway Commission free of tolls, it would not be repugnant to the Constitution. We cannot agree that an exaction by way of tolls on the users of said bridge is a tax on the general public. It is a tax only on such part of the public as finds it necessary or convenient to use the bridge, just as the tax on gasoline is a toll charge for the privilege of using the roads. The gasoline tax is not a tax on the general public, but only on such part of the public as drive motor vehicles over the highways. If a person does not own an automobile he pays no tax. There are probably hundreds of persons in each county who will never have occasion to use this particular bridge, and will therefore pay no tolls. No funds of either county will ever be required, either in construction or maintenance, and no tax will be levied in either county for any purpose connected therewith. True, there is no provision in the act authorizing the county court to take over this bridge at any time, but such a provision is not necessary to its constitutionality, and it is contemplated that the State Highway Commission forever thereafter shall control, operate, repair and maintain same. In *Conway* v. *Miller County Highway & Bridge Dist.*, 125 Ark. 325, 188 S. W. 822, the question was the authority of the improvement district, embracing lands lying wholly in Miller County, to build roads and a bridge across Red River, at the same location as in this case, from the Miller County side to the Hempstead

County side, and this court said: "The fact that the bridge spans the boundary line of the county does not make an invasion of the jurisdiction of the county courts of either of the counties."

In *Easley* v. *Patterson,* 142 Ark. 62, 218 S. W. 381, this court said: "This statute does not, however, contain any provision that the plan for the improvement must be submitted to and approved by the county court, and it is contended that this constitutes an invasion of the county court's jurisdiction. We have never had that question before us for decision, and now for the first time the question is squarely presented whether or not an improvement district created by statute can be authorized to make improvements on public highways without obtaining the approval of the county court. Our conclusion is that the authority to improve a public highway does not invade the jurisdiction of the county court. The road is a public highway, but the improvement is for the betterment of the contiguous lands. The improvement of the road does not in any sense constitute an interference with the general control of the county court over public highways. The authority of the board of commissioners is to bring about a betterment of the highway."

And in *Johns* v. *Road Improvement Districts of Bradley County,* 142 Ark. 73, 218 S. W. 389, the court said: "It is not true, as contended, that the statute in question invades the province of the county court in authorizing the commissioners to lay out and improve roads not already established as public highways. In describing the various roads in the two districts, the statute does not in each instance refer to the roads as public highways, but it is fairly inferable that they were found by the framers of the statute to be public highways, and there is no showing made in this case that they were not public roads; on the contrary, the proof adduced in the case shows that they are public roads. It is not essential to the validity of the statute that they should be described therein as public roads."

The effect of the holding of these decisions and various others that might be cited is that the Legislature may delegate to an independent agency, such as an improvement district, or to the State Highway Commission, the authority to take over, improve, repair and maintain an existing highway or a bridge thereon without trenching upon the jurisdiction of the various county courts of this State, so long as the proposed improvement exacts no tax from the general public and requires no expenditure of the county's funds for such purposes. This does not in any way interfere with the jurisdiction of the county courts. While in many of the cases coming before this court it has not been the unanimous opinion of this court that the acts of the Legislature in question did not invade the jurisdiction of the county courts, none of the dissenting opinions have ever gone so far as to hold that the Legislature might not delegate to another agency of this State the power to construct or improve a road or bridge over an existing highway. And from the decisions heretofore cited, and from many others too numerous to mention herein, we are of the unanimous opinion that the act in question, authorizing the State Highway Department to construct this bridge, does not invade the jurisdiction of the county courts of Hempstead and Miller counties, either in the failure of the act to provide for a submission of the plans for same to said county courts, or in providing for the taking over of said bridge by said county courts. But the act does recognize the jurisdiction of the county courts in that it provides that said bridge shall be located on the present highway from Hope, in Hempstead County, to Texarkana, in Miller County, and the provision therein for the exaction of tolls from the users of said bridge until same is paid for, and that thereafter it shall be toll-free except for the actual cost of maintenance, is not a tax upon the general public, but only on such part of the public as may find it convenient or necessary to use said bridge. The payment of tolls for the use of said bridge is no more

a tax on the general public, indeed not so much so, as a tax on betterments assessed upon lands embraced in an improvement district created for the purpose of building such a bridge. The result of our deliberations is therefore that the act in question does not offend against § 28 of article 7 of the Constitution, and is therefore a valid exercise of legislative powers.

It is next suggested that, even "if act 136 of 1925 is valid and sufficiently operative to construct the bridge from a practical standpoint, the contract rights of plaintiff set forth in the franchises are destroyed." Let it be conceded that, under §§ 10255-6-7-8 of Crawford & Moses' Digest, and by act 22 of the special session of 1923, which was passed before the granting of franchises in controversy, the county courts had authority to grant franchises to build bridges over county boundary streams, and the county courts of Hempstead and Miller counties have in this instance granted franchises, or a franchise, to appellant to build the bridge in question, still, since Red River at Fulton is a navigable stream, and, the consent of the Federal Government being a condition precedent, such franchise or contract rights have not ripened into maturity. So far as the State of Arkansas is concerned, the franchises already granted appellant are valid, but the consent of Congress to the building of such a bridge by appellants having been denied by the passage of the act of February 4, 1926, granting the consent of Congress to the Highway Commission to build said bridge, leaves the consent of one of the necessary parties to the contract lacking, with neither party bound by the terms thereof.

But, assuming for the sake of argument that Red River is not a navigable stream and that the franchises in question are entirely valid, still the Highway Commission would have the right, under act 136 of 1925, and under the general powers of condemnation in this State, to condemn and take over for public use not only the "lands for right-of-way for said bridge, roads and approaches," but also "any existing franchise, right or

easement necessary in the construction of said bridge." The power of the Legislature would not extend to the condemnation and taking over of such property, including franchises, for private use, nor could it transfer same to any other individual, firm or corporation, but, whenever the public convenience or necessity is involved, the power of the Legislature to delegate to a public agency power of condemnation of private property for public use is supreme.

Furthermore, the franchise granted by Hempstead County is unilateral, and the time limit fixed in the Miller County part of the franchise for performance is unreasonable. The time for commencement of the building of the bridge under the Hempstead County order was "extended for a period of two years from and after the dates of approval of Congress and other governmental body granting the said Fulton Ferry & Bridge Company the right to construct said bridge." Appellant's obligation therefore is conditioned upon its getting the approval of Congress and the consent of other governmental agency, and such approval and consent are too vague and uncertain to bind the appellant to ever construct the bridge or to perform its part of the contract. In other words, there was no mutuality of obligation. *Slayden* v. *Augusta Cooperage Co.*, 163 Ark. 638, 260 S. W. 74; *El Dorado Ice & Planing Mill Co.* v. *Kinard*, 96 Ark. 184, 131 S. W. 460; *Grayling Lumber Co.* v. *Hemingway*, 124 Ark, 354, 187 S. W. 327; *St. L. I. M. & S. R. Co.* v. *Clark*, 90 Ark. 904, 119 S. W. 825.

The provision in the Miller County franchise contained in the order of extension provided that the "extension shall terminate upon the expiration of five years from the date hereof in any event, unless the construction of said bridge shall be sooner begun," is unreasonable and void in that it requires nothing to be done toward the construction of said project for a period of five years. Whether the franchise would be void on account of the unreasonable time and tolls granted appellant in said franchise we do not deem it necessary

to determine in this case. In the case of *White River Bridge Co.* v. *Hurd,* 159 Ark. 652, 252 S. W. 917, which was a case involving the right of the county court to fix the tolls on a bridge over White River, where the court had granted a franchise for a period of ten years, this court said: "Therefore we have concluded that any apparent ambiguity in the statute is made certain when interpreted according to the evident purposes of the act, and are of the opinion that the act conferred upon the county court the power, not only to grant the franchise, but to fix the toll for the first ten years of the life of the franchise. There is nothing in the record to show that the fixing of tolls for this period of time would be unreasonable or arbitrary."

But, if we desired to go into this question, there appears to be ample evidence in the record that the return allowed by reason of the tolls fixed in the franchise, based upon an estimated cost of the bridge of $300,000 by eminent engineers, would be an unreasonable exaction on the users of said bridge, and it might be void for this reason. Since, from what we have said heretofore, it necessarily follows that appellants have acquired no valid rights by reason of the franchise attempted to be granted by the county courts of Hempstead and Miller counties, it becomes unnecessary to go into this question fully.

This is the view of the matter taken by the Supreme Court of the United States. In the *West River Bridge Co.* v. *Dix,* 6 Howard (U. S.) 507, it was held that a bridge owned by an incorporated company, under a charter from a State, may be condemned and taken as a part of a public road, under the laws of the State.

It was further held that, in such a case, the charter is a contract between the State and the company, but, like all private rights, it is subject to the right of eminent domain in the State. The exercise of the right of eminent domain does not interfere with the inviolability of contracts, for the reason that all property is held by tenure

from the State, and all contracts are made subject to the right of eminent domain.

It necessarily follows, from what we have heretofore said in this opinion, that it is within the power of the Legislature to grant to the State Highway Commission, or to any other State agency, the right to enter upon, take over, construct, improve and repair any existing public highway as a part of the State highway system, and to construct, maintain and repair any bridges thereon, whether publicly or privately owned, so long as it does not involve the levying of a tax on the general public for such purposes, and, if privately owned, compensation for the taking of private property for public use will necessarily have to be made in accordance with the proceedings now provided by law.

The decree of the chancery court is therefore affirmed, except in so far as it held that appellants have a valid franchise, and in this respect it is reversed and the cause dismissed.

MEHAFFY, J., not participating.

BALESH v. HOT SPRINGS.

Opinion delivered April 18, 1927.

1. AUCTIONS AND AUCTIONEERS—AUTHORITY OF CITY TO PROHIBIT AUCTIONS.—Crawford & Moses' Dig., § 7753, permitting cities of the first class to prohibit the sale of merchandise by auction *held* unconstitutional as being in conflict with Const., Bill of Rights, § 2, guaranteeing liberty and the right to acquire, possess and protect property.
2. AUCTIONS AND AUCTIONEERS—RIGHT TO REGULATE BUSINESS.—While the Legislature has not the power to prohibit auctioneering, it may require a license or make other reasonable regulations.

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

STATEMENT OF FACTS.

H. E. Balesh brought this suit in equity against the city of Hot Springs and the mayor and the chief of police thereof to enjoin them from interfering with him in the sale of his merchandise at auction.

According to the allegations of his complaint, which are sustained by the proof, the plaintiff is a resident of the city of Hot Springs, Garland County, Arkansas, and has been engaged in business in that city for several years. His merchandise consists chiefly of oriental goods, china, linen, antiques, and other art goods, which he disposes of, for the most part, by auction. He sells very little of his merchandise at private sale, and conducts his auction sales, for the most part, in person.

In November, 1926, the city of Hot Springs, by its city council, passed an ordinance making it a misdemeanor to sell goods, wares or merchandise by auction in the city of Hot Springs. This ordinance was passed pursuant to § 7753 of Crawford & Moses' Digest, which reads as follows: "Cities of the first class are given authority to prohibit or permit, under such regulations as they may determine, the sale of merchandise by auction, except judicial sales and foreclosure sales held in the daytime."

The chancery court upheld the constitutionality of the act and the ordinance based on it, and dismissed the complaint of the plaintiff for want of equity. The case is here on appeal.

Martin, Wootton & Martin, for appellant.

Geo. P. Whittington, A. T. Davies and *Leo P. McLaughlin,* for appellee.

HART, C. J., (after stating the facts). Counsel for the plaintiff attacks the constitutionality of the act under which the ordinance prohibiting him from selling his goods, wares or merchandise at auction was passed, on the ground that it is in violation of § 2 of our Bill of Rights, which reads as follows: "All men are created equally free and independent, and have certain inherent and inalienable rights, amongst which are those of enjoying

and defending life and liberty; of acquiring, possessing and protecting property and reputation; and of pursuing their own happiness. To secure these rights, governments are instituted among men, deriving their just powers from the consent of the governed." This section was substantially taken from the Declaration of Independence.

In *Butchers' Union Co.* v. *Crescent City Co.*, 111 U. S. 746, 4 S. Ct. 652, Mr. Justice Bradley, speaking for the court, said that the right to follow any of the common occupations of life is an inalienable right. Mr. Justice Field, in a concurring opinion, in discussing the inherent rights of men which "have never been more happily expressed than in the Declaration of Independence, that new evangel of liberty for the people," said: "Among these inalienable rights, as proclaimed in that great document, is the right of men to procure their happiness, by which is meant the right to pursue any lawful business or vocation, in any manner not inconsistent with the equal rights of others, which may increase their prosperity or develop their faculties, so as to give to them their highest enjoyment.

"The common business and callings of life, the ordinary trades and pursuits, which are innocuous in themselves, and have been followed in all communities from time immemorial, must therefore be free in this country to all alike upon the same conditions. The right to pursue them, without let or hindrance, except that which is applied to all persons of the same age, sex, and condition, is a distinguishing privilege of citizens of the United States, and an essential element of that freedom which they claim as their birthright."

In *Lawton* v. *Steele*, 152 U. S. 133, 14 S. Ct. 499, the court said: "The Legislature may not, under the guise of protecting the public interest, arbitrarily interfere with private business, or impose unusual or unnecessary regulations upon lawful occupations. In other words, its determination as to what is a proper exercise of its police powers is not final or conclusive, but is subject to the supervi-

sion of the courts." In *Kusnetzky* v. *Security Ins. Co.* (Mo.), 281 S. W. 47, 45 A. L. R. 189, it was held that it is not within the power of the Legislature to forbid a man to transact any business otherwise perfectly lawful. Such a right was held to be guaranteed by a provision of the Constitution of the State of Missouri, declaring that "all persons have a natural right to life, liberty, and the enjoyment of the gains of their own industry."

The business of auctioneering is a lawful and useful one, and is as old as the law of sale. 2 R. C. L., § 2, pages 1116 and 1117; 6 C. J., pages 821 and 822; and 3 Am. & Eng. Enc. of Law, pages 488 and 489. It is universally held that the Legislature has the power to prohibit auctioneering except through licensed auctioneers, and it may also make other regulations which are reasonable and not wholly arbitrary. *Dornberg* v. *Spokane,* 125 Wash. 72, 215 Pac. 518, 31 A. L. R. 295, and case-note at 299; *Biddles* v. *Enright,* 239 N. Y. 354, 146 N. E. 629, 39 A. L. R. 766, and case-note at 773; and *Oldsman* v. *Thomas,* 112 Ohio St. 397, 147 N. E. 750, 39 A. L. R. 760. The Supreme Court of the State of Minnesota has also recognized that the custom of selling goods at auction is as old as the law of sale, and that the occupation of auctioneering is a lawful one. *Mankato* v. *Fowler,* 32 Minn. 364, 20 N. W. 361; and *Anderson* v. *Wis. Cent. Ry. Co.,* 107 Minn. 296, 120 N. W. 39, 20 L. R. A. (N. S.), 1133. Auctioneering, rightly conducted, is a business within the legitimate scope of trade, traffic or merchandise. *People* v. *Gibbs,* 186 Mich. 127, 152 N. W. 1053, Ann. Cas. 1917B, page 830.

The nearest case in point to which our attention has been directed is that of *Robinson* v. *Wood,* 196 N. Y. S. 209. In that case, the Legislature of New York authorized the city to "regulate by license or prohibit auction sales," and the city of New York attempted by ordinance to prohibit auction sales between sunset and eight o'clock in the morning. The court held the ordinance to be invalid as not a proper exercise of the police power of the State. The court said that lawful occupations could

not be arbitrarily interfered with by unusual or unnecessary regulations established under the guise of protecting public interest. It is not necessary for us to approve the holding in that case in its entirety, but we do adopt the reasoning of it in so far as it applies to the principal issue raised in this case, and that is as to the power of the Legislature to pass an act giving cities the authority to prohibit the sale of merchandise by auction.

We have no case in this court directly on the question, but the views announced above are in accord with the reasoning in *Replogle* v. *Little Rock,* 166 Ark. 617, 267 S. W. 353, 36 A. L. R. 1333.

We have not attempted to set out all the proof made in the case at bar, but there is nothing in the record even suggesting any reason for the passage of the act under consideration. We are of the opinion that the statute under consideration is an unreasonable interference with the freedom of trade, and the Legislature had no power to pass an act prohibiting an occupation which has already been regarded as a legitimate one, although it may be made the subject of reasonable regulation under the police power of the State.

It follows that the decree of the chancery court must be reversed, and the cause must be remanded with directions to grant a permanent injunction in favor of the plaintiff, as prayed for in his complaint. It is so ordered.

COLE v. NEW ENGLAND SECURITIES COMPANY.

Opinion delivered April 18, 1927.

1. MORTGAGES—RIGHTS OF PURCHASER AT FORECLOSURE SALE.—A purchaser of land at a mortgage foreclosure sale is entitled to possession and to rents and profits after notice to quit and demand therefor.
2. MORTGAGES—NOTICE TO QUIT—JURY QUESTION.—Whether a purchaser at a mortgage foreclosure sale gave the owner and his tenant notice to quit and made demand for rents, *held* for the jury on conflicting evidence.

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

STATEMENT OF FACTS.

The New England Securities Company instituted this action in the circuit court against Jesse T. Cole and John T. England to recover $130, alleged to be due as the rent for 1924 of sixty acres of land described in the complaint.

The record shows that, on the 3d day of March, 1924, a decree foreclosing a mortgage on said land was entered of record in the Crawford Chancery Court in favor of the New England Securities Company and T. C. Alexander against L. A. Carnes and Jesse Cole, and, in default of the payment of the mortgage indebtedness within the time specified, it was decreed that said land be sold by a commissioner and the proceeds of sale first applied to the satisfaction of the mortgage indebtedness. T. C. Alexander became the purchaser at the foreclosure sale for a sum less than the mortgage debt, and the commissioner duly executed to him a deed to said land, which was examined and approved by the chancery court on the 5th day of May, 1924.

W. R. Willis, field agent of the New England Securities Company, was a witness for it. According to his testimony, he went out to the land in the summer of 1924 and stated to John T. England, who was on the land, cultivating it as a tenant, that he was the agent of the New England Securities Company, and demanded of

England that he pay the rent to him. England agreed to pay the rent as demanded, and, at that time, gave Willis some sweet potatoes as a part payment of the rent.

Jesse T. Cole was a witness for the defendants. According to his testimony, he occupied the land in controversy during the year 1923, and owned it at that time. For the year 1924 he rented the place to J. T. England and put him in possession of it. Cole denied that there had been any demand made upon him for the possession of the land, notice to quit, or demand for the rent for the year 1924. He admitted that England paid him the rent on the land about the first of December, 1924.

According to the testimony of John T. England, Willis came out to the place in the summer of 1924 and told him that it belonged to him. He gave Willis a few peaches and some sweet potatoes. England had rented the place from Jesse Cole, and heard something about a suit against Cole to foreclose a mortgage on the land. Willis did not make any demand upon him for possession of the place and did not demand the rent for the year 1924. Afterwards the witness was advised to pay the rent to Cole, and did pay him $130 as rent for the place for the year 1924.

The court directed a verdict in favor of the plaintiff, and, from the judgment rendered, the defendants have duly prosecuted an appeal to this court.

E. D. Chastain, for appellant.

O. D. Thompson, for appellee.

HART, C. J., (after stating the facts). The court erred in directing a verdict in favor of the plaintiff. The law is that a purchaser at a foreclosure sale under a mortgage is entitled to possession and to the rents and profits after notice to quit and a demand for rents and profits has been made. *North American Trust Co.* v. *Burrow,* 68 Ark. 584, 60 S. W. 950, and *Oliver* v. *Deffenbaugh,* 166 Ark. 118, 265 S. W. 970. According to the evidence for the defendants, no demand for the rents and profits was made upon them, and, under the authorities

cited, their testimony tends to show that they were entitled to the rents and profits for the year 1924.

It is true that, according to the evidence for the plaintiff, a demand for the rents and profits for the year 1924 was made, and the court should have submitted this disputed question of fact to the jury, under proper instructions. It could not direct a verdict in favor of the plaintiff, because there was a dispute upon the question of whether the plaintiff gave the defendants notice to quit and made a demand for rents and profits for the year 1924.

It follows that the judgment must be reversed, and the cause will be remanded for a new trial.

FULMER v. EAST ARKANSAS ABSTRACT & LOAN COMPANY.

Opinion delivered April 18, 1927.

1. INSURANCE—LIABILITY FOR PENALTY AND ATTORNEY'S FEE.—Where the insurance company offered to confess judgment for the face of the policy, less the amount of a premium due thereon in accordance with the terms of the policy, neither the insured nor his assignee would be entitled to recover the penalty and attorney's fees provided by Crawford & Moses' Dig., § 6155.
2. INSURANCE—PRIORITY OF AGENTS' CLAIM ON PROCEEDS OF POLICY.—Where the insured's agent paid the premiums on a fire insurance policy and took a note in which it was stipulated that the note should be paid out of the fund recovered in case of fire, such agent's claim was superior to the rights of an assignee of the policy.
3. INSURANCE—MORTGAGEE'S INTEREST IN POLICY.—Generally, a clause in a mortgage to the effect that the proceeds of an insurance policy shall be payable to the mortgagee as his interest appears is merely collateral to the principal undertaking to pay the mortgagor, and the mortgagee is merely an appointee of the fund, with no more rights than the insured had.
4. INSURANCE—PRIORITY OF AGENT'S CLAIM FOR PREMIUMS PAID.—Where insured contracted with his agent to pay premiums advanced by the agent out of any amount recovered under the policy, the agent was entitled to be paid out of the fund before payment to insured's mortgagee under the loss payable clause in the mortgage.

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

STATEMENT OF FACTS.

The East Arkansas Abstract & Loan Company, hereinafter called the abstract company, instituted an action in the circuit court against J. E. Hollan and J. D. Fulmer, defendants, to recover the sum of $1,164.81, and sued out a writ of garnishment against the Liverpool & London & Globe Insurance Company, hereinafter called the insurance company.

According to the allegations of the complaint, Hollan owned land in Cross County, Arkansas, which he had mortgaged to J. D. Fulmer to secure the sum of $26,000. Hollan obtained from the abstract company, which was engaged in writing fire insurance, policies of insurance on the improvements on said lands, including a gin. Insurance premiums, amounting to $1,164.81 and covering a period of several years, were past due, and Hollan executed his note to the abstract company for said sum. The note was dated September 26, 1924, and recited that it was given for premiums on policies of insurance issued through the abstract company, and that Hollan assigned to said company any return premiums which might be recovered on said policies, to be applied in reduction of said note, and also recites that, "should any of the property insured by said East Arkansas Abstract & Loan Company be destroyed or damaged by fire or otherwise and any loss be proved due and payable to me or us, it is hereby agreed and understood that this note is to be paid out of said funds due on account of said loss." The note was payable December 15, 1924.

Hollan had a policy for $7,400 on his gin, which he had obtained through the abstract company from said insurance company. The policy contained a loss payable clause, first to the Continental Gin Company to the amount of $2,500, and the balance to J. D. Fulmer. The premium on said policy amounted to $291.50, which was never paid. Subsequently to the execution of the note

above referred to by Hollan to the abstract company, he assigned his interest in said policy to J. D. Fulmer. The gin was destroyed by fire during the life of the policy. Service of process in the case in the circuit court was had only upon Hollan, who filed a motion to transfer the case to the chancery court for the purpose of consolidating it with a case filed in that court by the insurance company for the purpose of depositing the amount of money due by said company upon said insurance policy in the registry of the court, to be paid to the person or corporation which the chancery court might decide was entitled to it. By consent the action in the circuit court was transferred to the chancery court and consolidated with said equity suit. By agreement between Hollan and the insurance company, the premium of $291.50 was deducted from the face of the policy of $7,400, and the balance of the insurance policy was deposited in the registry of the court by the insurance company. The abstract company was given judgment for the balance of the note due it, after deducting the premium of $291.50, and the Continental Gin Company was paid the amount due it under the terms of the policy. Fulmer claimed to be entitled to the penalty, attorney's fee and cost provided by the statute, and also to the balance of the fund deposited in court by the insurance company after paying the amount due the Continental Gin Company.

The chancery court found the issues in favor of the abstract company and the insurance company, and a decree was entered of record in accordance with its finding. To reverse that decree J. D. Fulmer has duly prosecuted an appeal to this court.

Jas. R. McDowell and *Ogan & Shaver,* for appellant.

McMillen & Scott, for appellee.

HART, C. J., (after stating the facts). It is first sought to reverse the decree on the ground that the chancery court erred in not allowing to Fulmer the penalty and attorney's fee provided in § 6155 of Crawford & Moses' Digest. It is there provided that, in all cases where loss occurs and the fire or other insurance com-

pany liable therefor shall fail to pay the same within the time specified in the policy, after demand, such company shall be liable to pay the holder of such policy, in addition to the amount of such loss, 12 per cent. damages upon the amount of such loss, together with all reasonable attorney's fees for the prosecution and collection of said loss. The face of the policy was $7,400, and, after the gin was destroyed by fire, the insurance company conceded that Hollan was entitled to recover that sum, and, by mutual agreement, his loss was fixed at the face of the policy, and the company was allowed to deduct an unpaid premium on the policy in the sum of $291.50. If suit had been brought by Hollan, he could not have recovered any more than the amount agreed upon in the adjustment with the company. The reason is that, under the terms of the policy, the company would have been entitled to deduct the amount of the premium for the policy sued on. In such case the company could have avoided the statutory penalty and attorney's fees by offering to confess judgment in favor of Hollan for that amount, and thus have ended the suit. In that event Hollan would not have been entitled to recover the statutory penalty and attorney's fees. *Queen of Arkansas Ins. Co.* v. *Milham,* 102 Ark. 675, 145 S. W. 540, and *Queen of Arkansas Ins. Co.* v. *Bramlett,* 103 Ark. 1, 145 S. W. 541. Hollan had not paid the premium, and, under the terms of the policy, he owed it to the insurance company at the time his gin was destroyed by fire. Under the terms of the policy the insurance company had the right to deduct the unpaid premium and to pay him the remainder of the amount due under the policy. Having agreed upon an adjustment upon this basis, Hollan would not have been entitled to recover the statutory penalty and attorney's fees. He assigned his interest in the policy to Fulmer, and it is perfectly plain that Fulmer could acquire no greater rights in the premises than Hollan. The statute was passed for the benefit of the holder of the policy, and no assignee of the policy could acquire any greater rights

to the penalty and attorney's fees provided by the statute than it gave to the holder of the policy. Therefore the chancellor was right in holding that Fulmer was not entitled to recover the penalty and attorney's fees provided by the statute to the holder of the policy.

It is next insisted that the court erred in allowing the claim of the abstract company against Fulmer. The abstract company was the agent of the insurance company which issued the insurance policies to Hollan, and which advanced the money for him with which to pay the premiums on the policies. Hollan gave the abstract company his note for $1,164.81, the amount of the premiums paid by it for him to obtain policies of insurance on his property. The note given by Hollan provided that any return premiums which might be recovered on said policies should be applied in reduction of the note, and also provided that, in case the insured property was destroyed by fire, the note should be paid out of the fund recovered on account of said loss. This note was executed by Hollan to the abstract company before he assigned his interest in the policy to Fulmer. Hence the right of the abstract company to the proceeds of the insurance recovered by Hollan was superior to that of Fulmer until said note was paid.

Again, it is insisted that Fulmer was entitled to the proceeds of the policy in preference to the abstract company because he had what is called a loss-payable clause in his mortgage. The mortgage by Hollan to Fulmer contained a clause that the proceeds of the policy should be payable to the mortgagee as his interest might appear. The general rule is that this kind of a contract as to the mortgagee is merely collateral to the principal undertaking to pay the mortgagor and that the mortgagee is merely an appointee of the fund. Consequently his rights are no greater than those of the insured. 14 R. C. L., 1037; case-note to 18 L. R. A. (N. S.), 199; and Cooley on Insurance, vol. 2, pages 1069 and 1077. Such holding seems to be approved by this court in *Planters' Mutual*

Insurance Association v. *Southern Savings Fund & Loan Co.*, 68 Ark. 8, 56 S. W. 443. In that case the court said:

"If the transfer be made by the mortgagor to a mortgagee of the insured premises as a collateral security, without any new consideration moving from the assignee to the insurer, the assignee can only recover where his assignor could have done so had no assignment been made. 'Such an assignment does not convert the policy into a contract of indemnity to the mortgagee. It is the interest of the mortgagor alone that is covered by it. Assignee takes it subject to all the express stipulations contained in the policy, and he cannot recover in case of subsequent breach' by the mortgagor of the conditions which render the policy void."

Hence it follows that Fulmer had no greater rights in the policy than Hollan; and, Hollan having contracted with the abstract company to pay the premiums advanced by it out of the amount recovered under the policy, the abstract company was entitled to be paid before any of the fund deposited in the registry of the court by the insurance company should be paid to Fulmer.

Finally, it is insisted that the insurance company had no right to deposit the amount due Hollan in the registry of the court and thereby escape the payment of the statutory penalty and attorney's fees and the cost of the case. As we have already seen, the insurance company and Hollan agreed upon an adjustment of the loss in accordance with the provisions of the policy. The insurance company was ready to pay the amount to whoever should be entitled to it. Fulmer and the abstract company each claimed to be entitled to the fund. Hence, in order to avoid a multiplicity of suits and in order to escape costs, the insurance company was entitled to some relief of an equitable nature concerning the fund in dispute, and should not be burdened with the cost of litigation because there were conflicting claimants for the fund. In no other way could it have protected itself except by

filing a complaint in equity in the nature of a bill of interpleader. *C. R. I. & P. Ry. Co.* v. *Moore*, 92 Ark. 447, 123 S. W. 232.

The result of our views is that the decree of the chancellor was correct, and it will therefore be affirmed.

HAMMOND v. STATE.

Opinion delivered April 18, 1927.

1. LARCENY—"SUNDRY DRUGS" DEFINED.—Under an indictment for stealing sundry drugs, the term "drugs" does not refer to any particular drug or medicine, but includes any substance used as a medicine, and the term "sundry" means separate, divers or various.
2. LARCENY—STEALING SUNDRY DRUGS—SUFFICIENCY.—An indictment alleging that defendant stole "sundry drugs," the property of the prosecuting witness, was sufficiently definite for the jury to determine that the property alleged to have been stolen was the same property as that which the testimony tended to show that the defendant stole from the prosecuting witness.
3. INDICTMENT AND INFORMATION—FORMER JEOPARDY.—Under an indictment charging defendant with stealing sundry drugs from the prosecuting witness, a conviction or acquittal thereof would enable the defendant to plead same if he were again charged during the same period with stealing sundry drugs from the same person.
4. INDICTMENT AND INFORMATION—ALLEGATION THAT NATURE OF SUNDRY DRUGS WAS UNKNOWN.—Under an indictment charging defendant with stealing sundry drugs from another without further description, it was not essential to the validity of the indictment to allege that the exact nature of the drugs was unknown to the grand jury.
5. LARCENY—SUFFICIENCY OF EVIDENCE.—In a prosecution for stealing drugs, evidence tending to prove that defendant and another conspired to steal drugs, and that they jointly participated therein, *held* sufficient to sustain a conviction of defendant.
6. LARCENY—PROOF OF CONSPIRACY.—Under an indictment for stealing drugs, though a conspiracy was not alleged, testimony tending to establish a conspiracy between defendant and another to commit the alleged larceny was competent.
7. LARCENY—COMPETENCY OF TESTIMONY.—In a prosecution for stealing drugs, testimony that chemicals handled only by the

wholesale store from which the drugs were alleged to have been stolen were purchased by a retail drug store from defendant was competent as tending to prove that defendant was procuring stolen drugs and selling them.

8. CRIMINAL LAW—COMPETENCY OF ACTS OF CONSPIRATOR.—In a prosecution for larceny of drugs admission of testimony that another had pleaded guilty to grand larceny of the same drugs and admission of the indictment charging such other with the crime, was error, as the acts of a fellow conspirator, done after the conspiracy has ended, are inadmissible to show defendant's guilt.

Appeal from Garland Circuit Court; *Earl Witt,* Judge; reversed.

A. T. Davies, Witt & Witt and *Murphy & Wood,* for appellant.

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

WOOD, J. Omitting formal parts, the indictment charged that "J. C. Hammond, in the county and State aforesaid, on the.....day of....., A. D. 1926, sundry drugs, the exact nature and character to the grand jury unknown, of the value of $100, and sundry other drugs, the character and value thereof being to the grand jury unknown, the property of W. S. Sorrells, unlawfully and feloniously did steal, take and carry away, * * *."

The testimony tended to prove that W. S. Sorrells was engaged in the wholesale and retail drug business in Hot Springs, Arkansas. According to his testimony he had lost, during the last three years, as he figured, between $15,000 and $20,000 worth of drugs. The heavy stealing occurred during the last month before Dewey Baldwin quit the employment of witness. Baldwin had been working for witness in witness' drugstore some five or six years, and was witness' head man. The appellant and Baldwin were on very friendly terms. Appellant came by the drugstore nearly every night to take Baldwin home. Baldwin would come down in the afternoon with boxes, perhaps eighteen or thirty boxes, patent medicine boxes, to be filled with drugs to be delivered to various

customers as their orders might come in. On several occasions witness observed that all the boxes were gone next morning. They would be in the store when witness left about 10 P. M. and would all be gone the next morning when witness returned to the drugstore at about 8:30 o'clock. Witness, at first, did not suspect Baldwin, who was the head man in his store, of stealing drugs, but, after witness had been informed by one Braughton that he was buying drugs from the appellant, witness finally came to the conclusion that Baldwin, his clerk, was assisting appellant in getting drugs from witness' store. Witness figured that the appellant wouldn't know how to get out just such drugs as Braughton would want to buy, and witness therefore suspected that Baldwin must be fixing the orders for drugs from witness' store which Braughton was buying from appellant.

Mrs. Sorrells, the wife of W. S. Sorrells, testified to the effect that she was often at the drugstore, and many times would see the appellant there. During the last winter the appellant made the remark two or three times to witness as follows: "Why, I have walked around here and looked at the amount of drugs Mr. Sorrells has here, and one could carry off a load and he wouldn't miss them." Witness replied, "No, I don't suppose he would miss them."

Witness Ernest Green testified that he worked in the City Drugstore of Hot Springs during the year 1926, and saw appellant delivering drugs to the City Drugstore two or three times, in a Ford sedan. Appellant would usually deliver the drugs about 7 o'clock in the morning. The drugs were in pasteboard boxes. There was nothing on the drugs to indicate where they came from; the invoice was made on small letter tablet paper. The orders totaled about $300, in lots of $75, $80, or $100 apiece. The drugs were the ordinary line of drugs. The orders were delivered publicly. McKinley Lewis was with witness in the City Drugstore at the time. He testified that he was manager of the City Drugstore in Hot Springs, which was owned by Marsh & Braughton. Wit-

ness was acquainted with the appellant, who was an osteopath and had an office in the Arkansas National Bank Building. The appellant delivered drugs to the City Drugstore in September or October, 1925. These deliveries were the ordinary line of drugs for which witness paid the appellant, giving him a check around $90 or $100. Witness got a discount of 30 per cent. on the drugs. Appellant said something about the drugs coming from Little Rock or Pine Bluff, or somewhere, witness didn't remember; something was said about the drugs being applied on a debt that somebody owed appellant. Witness was not positive, but believed that was what the appellant said. Appellant objected to the above testimony, and moved to exclude same. The court overruled the motion, to which ruling appellant duly excepted.

Witness Bush was engaged in the drug and jewelry business at Benton during 1925 and 1926. Appellant came into witness' store with a list of drugs which he wished to sell the witness. Witness bought drugs from appellant once or twice, and received a discount of 20 or 25 per cent. The goods were delivered to witness in regular packages, and were patented articles. The appellant stated that he was helping a friend to dispose of them. This occurred in the fall or winter of 1925. It was during the regular business hours.

The witness Parker testified that he was in the drug business at Benton, Arkansas, and, during the quail season, between December, 1925, and January, 1926, witness bought razor blades, toothbrushes, tooth paste, milk of magnesia and syrup of pepsin two or three times. The appellant said it was a bankrupt stock of goods which came from a store in Little Rock; that he had a few items left which he was selling at a discount of 20 or 25 per cent. Witness paid the appellant by check for the drugs purchased the sum of $115.

Hockens Smyth testified that he lived at Benton, and was in the drug business. Appellant offered witness, on two different occasions, on Sunday, certain goods at a discount of 20 per cent. Witness thinks that appellant

stated that some one had gone into bankruptcy in Little Rock or some place and appellant was getting the goods from bankrupt stock.

R. A. Moore testified that, the first of the year 1926, the appellant and his mother rented the house diagonally across from where witness lived, on Sorrells Street, and that Dewey Baldwin roomed at the house. While they were there, witness saw Sorrells' delivery wagon, in which were Dr. Hammond and Dewey Baldwin, unload paper and wooden boxes. Witness didn't know what kind of goods these boxes contained. They might have contained household stuff, but witness didn't see any furniture. Appellant was moving into the house, and the truck had Sorrells' Drug Company sign on it, and was loaded with trunks and boxes. Witness thought they were moving in, and had no suspicion that they were storing away stolen goods.

Witness W. O. Green testified that, at the time appellant was arrested, witness asked him what it was all about, and appellant stated that it seemed as though Dewey Baldwin had been accused of stealing drugs and that appellant had delivered some drugs supposed to have been stolen by Dewey Baldwin. Appellant was endeavoring to get witness to sign his bail bond, and appellant did not think he'd have any trouble in proving his innocence.

Witness Hoben testified that he was employed at the Ozark Drugstore in the fall of 1925 and spring of 1926. During that time drugs were delivered at the store, and witness investigated the source whence the drugs came, and ascertained they were delivered to the City Drugstore by the appellant, and in turn were relayed to Ozark Drugstore. Witness noticed that practically all the chemicals in that delivery were made by N. Y. Quinine and Chemical Works, which caused witness to think they came from Sorrells' Drugstore, because the Ozark Drugstore had never received such merchandise from any other wholesale house, as far as witness knew. In the delivery of drugs was a five-pound can of iodide of potassium made by the N. Y. Chemical House, and that brand

was handled exclusively by the Sorrells Drug Company. Witness did not know whether the wholesale company in Little Rock handled the same kind of drugs, but the Ozark Company never received such merchandise from any drug house except from Sorrells. That was the only reasonable place it could have come from.

W. S. Sorrells was recalled, and testified that he did not know of any other wholesale drug house in Hot Springs that handled the N. Y. Chemical drugs. Witness was acquainted with the class of manufacture of drugs handled by the other wholesale houses in the city. Witness usually bought iodide of potassium put up by the N. Y. Chemical Company in five-pound cans and some in one-pound cans—usually ten or twenty-five pounds at a time in five-pound cans. The appellant had no authority to sell drugs from witness' house.

Several witnesses testified, on the part of the appellant, that appellant was a man whose general reputation for honesty, fair dealing, truth and morality was good in the community where he had formerly lived in the State of Iowa. Also witnesses testified that his general reputation for honesty and fair dealing was good in the city of Hot Springs, where he then lived.

There was other testimony adduced by appellant tending to prove that, when appellant moved into the house on Sorrells Street, the boxes unloaded from the truck contained household goods and not drugs. One of the witnesses testified for appellant that he represented the Ellis Drug Company, wholesale druggist, of Little Rock, Arkansas, which made sales to various drugstores in Hot Springs of drugs and chemicals manufactured by the N. Y. Chemical Company, in January, 1926.

The court, in its instructions to the jury numbered three and six, in effect told the jury that, if they believed beyond a reasonable doubt that appellant and Dewey Baldwin entered into a conspiracy for the purpose of unlawfully and feloniously taking the drugs of W. S. Sorrells, and, in pursuance of such conspiracy, did steal the drugs of W. S. Sorrells as charged in the indictment,

then the defendant would be guilty, and the jury should so find; and in its instruction numbered four the court, in effect, told the jury that the unexplained possession of property recently stolen is a circumstance which the jury may take into consideration in determining the innocence or guilt of the defendant, and, if the jury found that drugs of the value of more than $10 had been recently stolen from W. S. Sorrells, as charged in the indictment, and that such drugs were found in the possession of the defendant, and that such possession had been unexplained, the jury might consider this as a circumstance to establish the guilt or innocence of the appellant.

The above are substantially the facts upon which the jury returned the verdict finding the defendant guilty and fixing his punishment at imprisonment in the State Penitentiary for a period of two years. Judgment of sentence was pronounced in accordance with the verdict, from which is this appeal.

1. Appellant contends that the indictment was too indefinite and uncertain to identify the property and to inform the defendant of the offense with which he is charged. The term "drug," as defined by the lexicographers, is "any substance used as a medicine, or in the composition of medicine for internal or external use." See Webster and Funk & Wagnall's dictionaries.

Section 6 of the United States Food and Drug Act, June 30, 1906, reads: "The term 'drug,' as used in this act, shall include all medicines and preparations recognized in the United States Pharmacopœia or National Formulary for internal or external use, and any substance or mixture of substances intended to be used for the cure or mitigation or prevention of disease of man or other animals."

The term "sundry" means separate, divers; several, divers; more than one or two, various. See Web. Int. Dict. This term "drug," as defined by lexicographers, does not refer to any particular drug or medi-

cine, and it is a term commonly understood and accepted as above defined.

In *Dunbar* v. *U. S.*, 150 U. S. 185, it is said: "It is not a valid objection to an indictment that the description of the property in respect to which the offense is charged to have been committed is broad enough to include more than one specific article." See also *Commonwealth* v. *Butt*, 124 Mass. 449; *State* v. *Brinn*, 30 Minn. 522, 16 N. W. 406. Our statute only requires that the act or omission charged as the offense be stated with such a degree of certainty as to enable the court to pronounce judgment of conviction according to the right of the case. Section 3013, C. & M. Digest. Any defect which does not tend to the prejudice of the substantial rights of the defendant on the merits is to be disregarded. Sections 3013 and 3014, C. & M. Digest. Our statute only requires a statement of the acts constituting the offense in ordinary and concise language and in such manner as to enable a person of common understanding to know what is intended. Section 3028, C. & M. Digest, subdiv. 2. In *Jones* v. *State*, 64 Fla. 92, 59 So. 892, L. R. A. 1915B, p. 71, it is said: "If a sufficiently certain description cannot be given because unknown, such fact, if alleged in the indictment or information, will generally cure the otherwise insufficiency, for the law is not inclined to require a greater certainty than the nature of the case affords; and consequently, to avoid what would in many cases result in a failure of justice were the rule requiring a definite description enforced, the courts make an exception in case the ordinarily essential descriptive facts cannot be stated because neither known nor obtainable."

In the case at bar it is obvious that it would have been impracticable, if not impossible, for the pleader to have specifically described a sundry lot of drugs of the value of $100. The indictment, we believe, meets every requirement of good pleading. It is sufficiently definite for the jury to have determined that the property alleged to have been stolen was the same property as that which the testimony tended to show the defendant stole from

W. S. Sorrells. *Osborne* v. *State,* 96 Ark. 400, 132 S. W. 210; *Atchinson* v. *State,* 90 Ark. 457, 119 S. W. 651. A conviction or acquittal on this indictment would enable the appellant to successfully interpose the plea of *autrefois convict* or *acquit,* if he were again charged with stealing, during the same period, of "sundry drugs from W. S. Sorrells of the value of $100." It follows also from the above that the court did not err in refusing appellant's prayer for instruction telling the jury that there had been no evidence to show that the exact nature and character of the drugs that had been stolen were unknown to the grand jury, and the jury therefore should find the defendant not guilty. Since the term "drugs" includes any substance used as medicine, and since there are divers and sundry kinds of medicines, all included within the word *drug,* it was not essential to the validity of the indictment to allege that the exact nature and character of the drugs were unknown to the grand jury. This allegation was immaterial, and should be treated as surplusage.

2. We have set forth in substance the material testimony upon which the verdict was based, and it could serve no useful purpose to comment upon it. We are convinced that the evidence was legally sufficient to sustain the verdict. It tended to prove that the appellant and one Dewey Baldwin were in a conspiracy to steal drugs from W. S. Sorrells and that they jointly took part in the larceny. While the indictment does not charge a conspiracy to commit larceny and does not charge the appellant and Baldwin jointly with the commission of the larceny, nevertheless testimony tending to show that they were conspirators and *particepes criminis* in the commission of the offense was not incompetent. See *Monk* v. State, 130 Ark. 358, 197 S. W. 580; *Davidson* v. *State,* 132 Ark. 116, 200 S. W. 137. The court therefore did not err in refusing to grant appellant's prayer for a directed verdict. *Paxton* v. *State,* 114 Ark. 393, 170 S. W. 80, Ann. Cas. 1916A 1239.

3. Bob Hoben testified, in substance, that a bill of drugs was received at the Ozark Drugstore, and that in this bill were chemicals and iodide of potassium put up by the New York Chemical Company; that he had never known of any of this particular brand of chemicals being received at the Ozark Drugstore except from Sorrells. He further testified that the boys at the City Drugstore told him that the defendant had delivered this bill of drugs to the City Drugstore and that this bill of drugs had been relayed from the City Drugstore to the Ozark Drugstore. Witness, as a rule, checked the bills that came into the Ozark Drugstore when they received merchandise from W. S. Sorrells. There were some chemicals in the order that were generally made by the N. Y. Chemical Works, which naturally made witness think they came from Sorrells' Drugstore, because the Ozark Drugstore had never received such merchandise from any other wholesale house, to his knowledge. Witness stated that there was a five-pound can of potash in the order, and that brand of drug was exclusively handled by the Sorrells Drug Company. While the testimony of Hoben was being given, upon objection by the appellant, the court excluded that part of his testimony in which he stated that the boys in the store told him that the defendant had delivered certain drugs. At the conclusion of the taking of the testimony, the counsel for appellant moved to exclude the entire testimony of Hoben. The court, in ruling upon the motion, said: "As to the testimony of Hoben, his testimony will be excluded; there is none of his testimony that would be competent for the jury to consider, except his testimony as to where a certain quantity of the drugs there shipped to the City Drugstore came from, and explained his reasons; it would be for the jury to say whether or not he had sufficient reasons for knowing that those goods came from the Sorrells Drugstore."

There was no prejudicial error to appellant in the court's ruling. The court excluded the hearsay part of Hoben's testimony. That part of his testimony which tended to prove that the Ozark Drugstore received a cer-

tain bill of drugs containing some chemicals and iodide of potassium from Sorrells Drug Company was competent. This testimony, when taken in connection with the testimony of Sorrells, that his drugstore was the only one that handled drugs of that character in Hot Springs, and the testimony of Braughton, who operated the Ozark Drugstore, to the effect that he bought such drugs from the appellant, rendered the testimony of Hoben competent, because this testimony tended to prove that appellant was procuring drugs from the Sorrells Drug Company and selling the same to the City Drugstore. The testimony tended to throw light upon the issues involved, and the court did not err in refusing to exclude it. See *Brown* v. *State,* 161 Ark. 253-255, 255 S. W. 78.

4. Witness Jones testified that he was the deputy circuit clerk, and was waiting on the court the time Baldwin entered a plea of guilty of grand larceny. Counsel for appellant objected to that testimony, stating that the record is the best evidence. Counsel for appellant then asked the witness: "Has that record been written up yet? A. No sir. Q. All you know is that he pleaded guilty to grand larceny, wasn't it? A. That is all." Later Jones was recalled by the State, and, over the objection of appellant, testified that he had copied the indictment and had same in his hands, and stated that the defendant pleaded guilty to the offense charged in the indictment. The district attorney offered the indictment in evidence. The attorney for appellant objected, and the court stated, "This is for the purpose of showing that he entered a plea of guilty to the larceny of property which this defendant is also charged with taking." The court thereupon overruled the objection, and permitted the indictment charging Dewey Baldwin with the crime of grand larceny in the stealing of sundry drugs, etc., the property of Sorrells, to be read to the jury. At the conclusion of the testimony counsel for appellant moved to exclude the testimony of Jones with reference to the indictment and the plea of guilty of Dewey Baldwin, and moved to exclude the indictment in that case from the

jury. The court overruled the motion, saying, "I explained to the jury the only purpose for which the indictment against Dewey Baldwin could be considered was for the purpose of showing that the crime to which he pleaded guilty was the larceny of the drugs from W. S. Sorrells, and told them, at the time, that the indictment against Dewey Baldwin should not be considered as a circumstance against the defendant here."

The court erred in admitting the above testimony. As we have already observed, the appellant was not jointly indicted with Baldwin for the stealing of the drugs of Sorrells, nor was the appellant charged with entering into a conspiracy with Baldwin to steal the drugs of Sorrells. These were separate prosecutions; there was nothing in the indictment against appellant to indicate that he was charged with stealing the same drugs that Baldwin was charged with stealing, and, if there had been, the plea of guilty of Baldwin could not be used as substantive evidence of appellant's guilt. See *Kirby* v. *U. S.*, 174 U. S. 890, 43 L. ed. 47, 19 S. Ct. 574. To be sure, as already stated, any testimony tending to prove that appellant and Baldwin entered into a conspiracy to steal the drugs of Sorrells, or that they jointly committed the offense, would be relevant evidence, because such testimony would tend to prove the guilt of appellant. But, after the conspiracy is ended and the offense committed, the declaration of a co-conspirator or joint actor in crime cannot be used as evidence against a co-conspirator or co-actor. The many cases of our court announcing this rule are collated in *Counts* v. *State*, 120 Ark. 462, 179 S. W. 662, where we said: "It is thoroughly established that, when a deed is done and the criminal enterprise of the conspirators is ended, the acts or declarations of one conspirator are thereafter inadmissible against his co-conspirator." See also *Housley* v. *State*, 143 Ark. 315, 220 S. W. 40; *W. D. Stroud* v. *State*, 167 Ark. 502, 268 S. W. 850.

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

STATE EX REL. GREENE COUNTY BAR v. HUDDLESTON.

Opinion delivered April 18, 1927.

1. ATTORNEY AND CLIENT—DISBARMENT PROCEEDINGS—RIGHT OF APPEAL.—In proceedings by the State on relation of a county bar association to disbar an attorney, both the State, by her prosecuting attorney, and members of the bar association, could appeal from a judgment merely suspending the attorney from practice.
2. ATTORNEY AND CLIENT—MISCONDUCT OF ATTORNEY—SUSPENSION.—In disbarment proceedings, evidence *held* to sustain findings that the attorney, in selling bonds for theft of which his client was being prosecuted, was guilty of misconduct warranting suspension from practice for one year.
3. ATTORNEY AND CLIENT—MISCONDUCT OF ATTORNEY—DISCRETION OF COURT.—Crawford & Moses' Dig., § 621, directing the trial court in case of conviction in disbarment proceedings to pronounce judgment of removal or suspension according to the facts found, vests the trial court with discretion either to remove or suspend, which discretion will not be disturbed on appeal save for abuse.
4. ATTORNEY AND CLIENT—MISCONDUCT OF ATTORNEY—SUSPENSION.—Where an attorney sold bonds of his client, for theft of which the client was at the time being prosecuted, the action of the court in suspending the attorney from practice for one year, instead of disbarring him, was not an abuse of discretion, in view of his previous good conduct and professed intention to apply the proceeds on the judgment against his client.

Appeal from Greene Circuit Court, First Division; *G. E. Keck,* Judge; affirmed.

Zal B. Harrison, Jeff Bratton and *R. P. Taylor,* for appellant.

Gautney & Dudley, for appellee.

WOOD, J. On the 17th of August, 1925, certain members of the Bar Association of Greene County, Arkansas, exhibited charges of such association against M. P. Huddleston. It was charged, in substance, that Huddleston was a member of the association; that one John Lane was indicted in the Greene County Circuit Court for the larceny of $20,200 of United States Liberty bonds, the property of one James W. Alexander; that he was tried at the December term, 1924, of the court, and convicted, and thereafter appealed to the Supreme Court, where the judgment of conviction was reversed, and the cause

remanded for a new trial. On the day Lane was arrested for the larceny of the bonds, Alexander instituted a civil action against him to replevy the bonds, and caused a *capias* to be issued with the summons. The trial of the civil action resulted in a judgment in favor of Alexander for the return of the bonds. Lane admitted in open court that he had the bonds, but refused to surrender them, and was adjudged guilty of contempt in refusing to return them. An appeal was lodged by Lane in the civil action for recovery of the bonds, and also from the judgment against Lane imprisoning him for contempt. These judgments were affirmed by the Supreme Court on April 27, 1925. On June 6, 1925, the law firm of Gautney & Dudley were employed by Lane to petition the circuit court of Greene County asking that he be purged of contempt. Lane set forth in his petition that he had buried the bonds in controversy upon his father's farm, and that same had been stolen from the place where he had buried them. He stated that $17,600 of the bonds were buried by him in a glass jar in November, 1924, and that, so far as he knew, no one else knew where the bonds were buried; that he sent certain parties to the place where the bonds were buried, and they reported that they did not find the bonds in the place indicated, but found the place, which looked as if something had been buried and very recently removed. In the action to recover the bonds and in the contempt proceedings against Lane, Huddleston was one of his attorneys. He was not Lane's attorney in the petition of Lane asking that he be purged of contempt.

On July 30, 1925, Block & Kirsch, a firm of lawyers at Paragould, Greene County, Arkansas, who were attorneys for Alexander in his action to recover the bonds, received information that the bonds had been sold in St. Louis, Missouri, on the 30th of April, 1925. These attorneys went to St. Louis and ascertained that Huddleston had sold and delivered $17,100 of the bonds through a friend of his in St. Louis, and had directed his friend to receive the proceeds in cash; that Huddleston had rented a safety-deposit box in St. Louis in the name of

his friend, and stated that he would call for the money later. Huddleston, through his friend, drew out of the proceeds of the sale of the bonds the sum of $6,850, leaving the sum of $10,000 in the safety-deposit box, from which his friend afterwards used the sum of $1,250, which latter sum was later replaced. It was charged that Huddleston, on the first day of August, 1925, was confronted with the above facts, and that he admitted that he had delivered the bonds to his friend in St. Louis for sale three days after the Supreme Court determined that the bonds belonged to Alexander. He admitted that he had used $6,850 of the proceeds of the bond sale, and that he was liable for their conversion, and that he also had in his possession a bond for $500 which Lane had placed with him in October, 1924. On the 3d of August, 1925, Huddleston paid to the attorneys for Alexander the sum of $1,680 and delivered also the bond for $500, and gave an order to the agent of the United States Government releasing his friend in St. Louis from liability and directing the said agent to deliver the $11,250, proceeds of the bonds in his possession, to J. W. Alexander, or his attorneys.

At a meeting of the Greene County Bar Association to consider these charges on August 28, 1925, Huddleston appeared, and, after reading the written charges preferred against him, declared said charges to be correct, and that he only wished to add that the $500 bond which Lane placed with him in October, 1924, was taken as collateral security for a loan which he had made to Lane. Huddleston asked the bar association to defer the charges against him until after the December term, 1925, of the circuit court of Greene County, in order to give him an opportunity to try the case of State against Lane *et al.* Huddleston further declared before the bar association that it was his intention, as soon as he could borrow the money, to repay Alexander the amount due for the bonds, and was assured by the chairman of the meeting of the bar association that that was a matter with which the association was not concerned. A motion was made and

unanimously adopted by the bar association expressing it to be the sense of the association that the conduct of Huddleston was so reprehensible and unbecoming as to warrant immediate disbarment proceedings.

On the 3d day of September, 1925, thereafter, a complaint was filed in the circuit court of Greene County by the prosecuting attorney of the Second Judicial Circuit, joined in by nine members of the bar association of Greene County. The complaint alleged, in substance, the above facts, and, further, that these facts proved a scheme on the part of Huddleston and Lane to defraud Alexander and to prevent the recovery of the bonds, which both the Circuit and Supreme courts had adjudged to belong to him. The complaint alleged that such conduct on the part of Huddleston was an attempt to put at naught the judgments rendered by both the circuit and Supreme courts, and was a fraud on both of such courts, and grossly unprofessional. The prayer was that a citation issue to be served upon Huddleston, and that, upon a hearing, his license to practice law be revoked, and that he be hereafter debarred from practicing the profession of an attorney at law in the State of Arkansas. A citation was issued on the above complaint and served on Huddleston September 25, 1925. No answer was filed by Huddleston to the complaint. A jury was impaneled to try the issues of fact, and testimony was adduced by the plaintiff which tended to prove the allegations of the complaint. It was proved that, in the civil action by Alexander to recover the bonds, the sheriff returned that he was unable to get possession of the property. The testimony of both Block and Kirsch was to the effect that they were the attorneys for Alexander in the civil proceedings to recover possession of the bonds, and that the facts were as set forth in the exhibit of the charges before the bar association of Greene County and in the complaint of the plaintiffs. In addition to the facts there stated, their testimony was to the effect that Huddleston, in their office, stated that he had some additional testimony in the criminal case against Lane, and that he did not believe

that Lane stole the bonds. He also stated that he sold the bonds as the agent of Lane, and did not think he had done anything wrong. These attorneys also stated that they and Huddleston agreed on the balances to be paid by him, $5,611.45, as of August 1, 1925; that Huddleston agreed to enter his appearance for the balance due, and that judgment might go against him. Huddleston was given permission to read the charges preferred against him before the bar association, and he stated that these charges were correct, except that the $500 bond had come to him as an innocent purchaser, with the understanding that Lane had won it in a game of dice. No criminal charge at that time had been preferred against Lane. Huddleston said that M. A. Darr delivered the bonds to him in the Statler Hotel, in St. Louis. One of the witnesses stated that Huddleston's reputation prior to the transaction complained of had been good. The other one stated that he had never heard him accused of anything that would call for disbarment, but witness would not call his reputation good—neither would he call it bad. Huddleston did not admit that the bonds had been stolen, but, on the contrary, said he thought that Lane had won them at gaming.

In addition to the above testimony, three other attorneys who were present at the meeting of the Greene County Bar Association corroborated the testimony to the effect that Huddleston admitted that the charges were correct, except as to the $500 bond. One of these witnesses stated that Huddleston mumbled a bit in what he said, but admitted that, in all probability, he would be disbarred. Another one of these witnesses stated that Huddleston said he had done nothing to cause him to be disbarred, but afterwards modified the statement by saying, if he had done anything, the publicity he was getting would be sufficient. And another witness stated that he wished the charges deferred until after the December term of the court, as he had some evidence that he thought would clear Lane, and he wanted to defend him. Witness' impression was that Huddleston said perhaps he ought

to be disbarred for what he had done, or that it was sufficient to disbar him. Two of these witnesses stated that, aside from the matter with which he was charged, Huddleston's previous reputation had been good.

Huddleston testified in his own behalf to the effect that he had been practicing law since 1897. The first information he had about the bonds came from Lane himself, on October 2, 1924. As he was sorting out and packing some papers in a lawsuit preparatory to leaving on a trip for Europe, Lane came to his office and asked him whether, if a fellow had won some bonds in a crap game, they could take them away from him. Witness told him "No." Lane then said he had won $20,000 worth of bonds from Jimmie Alexander, and proceeded to tell where the game was, and how many times he had gambled with Alexander. Witness did not believe, until then, that he meant it at all. Witness asked where the bonds were, and Lane said, "In a box at the National Bank of Commerce." Witness said to Lane, "You go get them—I want to see them—you have got to cite me." Lane went out and was gone for a minute or two, and came back with the bonds in an envelope in his hand, and handed it to witness. Witness asked Lane what he wished to do, and Lane said that he wanted witness to sell the bonds for him. Witness told Lane to sell them himself, but Lane stated that that would give publicity to the crap game, which would ruin his reputation and would kill his mother and embarrass Alexander. Witness then told Lane to get on the train and go with witness that night to St. Louis, stating that witness would not be in St. Louis long enough to sell them, but in Chicago he would sell them. Lane then said that he could not do that, because he had a written agreement with Alexander to allow him sixty days in which to redeem the bonds, and showed the contract to witness. Witness then told Lane if he wished witness to sell the bonds he would have to wait until the witness returned from Europe. Lane then asked witness for a loan of $50, and gave him one of the bonds as collateral. Lane then went out of witness' office,

and, after witness had thought of the strangeness of the thing awhile, it occurred to him that the bonds were registered, and, if so, they would not pass by delivery. Witness afterwards saw Lane passing the office, and called him in, and told him, if the bonds were registered, he could not sell them without a written instrument. Lane went out and returned with the bonds, and witness examined them, and there was nothing on the bonds to indicate that they had been registered. Witness then informed Lane that they would pass by delivery. Witness heard nothing more about the case until he received a letter from his wife while he was in London, informing him that Lane had been arrested for stealing the bonds. As witness came through St. Louis on his way home he met one Harry Reid, whom he had known quite intimately for twenty years. Reid was at that time working for a firm of brokers in St. Louis. Witness was telling Reid about what a strange lawsuit it was about the bonds in controversy, and Reid said, "Why don't you sell them?" Witness said that he had not seen them since he left Arkansas. Reid said, "When you get ready to sell them, bring them to me and I'll sell them for you."

Witness then detailed the trial and conviction of Lane for larceny of the bonds, the appeal to the Supreme Court, and the reversal of the judgment and remand of the cause to the circuit court for a new trial, which had not yet occurred, and also about the result of the trial in the civil action, in which Alexander got judgment for the bonds, which judgment was affirmed by the Supreme Court on April 27, 1925. Witness received information, when he got home, that the bonds had been carried to Missouri and put in a safety-deposit box. Witness knew that, such being the fact, the court had no jurisdiction over the bonds and could not determine any title thereto, as the bonds had been taken out of the State on the 14th of October, and the replevin suit was brought October 24, ten days after they had left the State. Witness knew that the court had no power to determine title to the bonds, and all that it

could do was render personal judgment against John Lane for their value. Witness went to St. Louis to see an expert witness in Lane's case, who was in the employ of the Government. He learned from this witness that the bonds would be delivered to witness at the Statler Hotel in St. Louis, and was told who would deliver them. Witness went to the hotel, and the bonds were delivered to him by M. A. Darr. Witness delivered the bonds to Reid, who sold them, and placed the money in a safety-deposit box that Reid himself rented. Witness never saw the key to the box in which the money was placed. The bonds were sold for the aggregate sum of $17,100, and Reid paid witness at different times, out of the proceeds of the bonds, the sum of $6,800. Witness explained his action in authorizing the sale of the bonds as follows: "My connection with the civil case (the replevin suit against Lane for recovery of the bonds) had ceased entirely when the bonds were sold in St. Louis. That case had been tried in the circuit court and decided, and then appealed and tried and decided in the Supreme Court three or four days before the bonds were ever sold. I couldn't therefore have been acting as his attorney in a professional way in the selling of the bonds, because there was no longer any lawsuit pending for me to represent him in. The reason why I thought I was civilly liable to Alexander for the value of the bonds was this: Alexander had a valid judgment against Lane for the value of the bonds, and I thought the law was that, that being true, the fact that he had property in another State and that I knew about it, if I assisted him in selling that property, would render me liable civilly for the value of the property. I may be wrong about that, but that idea was what I had in mind, and that was the reason I said I would pay Alexander's judgment and have it assigned to me, and then I could turn John out of jail, because I was still representing him in the criminal case. I was not his attorney in any civil case and had not represented him in the cause to purge him of contempt." After the sale of the bonds had been discovered, witness was called by

Block to his office, where Alexander and Kirsch were also present. They told witness that they had found out that he had sold the bonds. Witness informed them that he had not sold them, but that he had had it done, and asked what they wanted. Block stated to witness, "All we are interested in is getting our money for the bonds." Witness then told Block that he would pay them, and asked what he intended to do with witness. Block said, "Nothing—we are not concerned about that at all." Witness knew that he had not committed any crime, and was not particularly afraid of being convicted of any crime, but did not want to be arrested and charged with it. Such a thing as disbarment proceedings had not entered into witness' head at that time. Witness paid $16,800. Witness explained that he had a theory that he might be civilly liable for the value of Alexander's property because he had helped to sell it in another State. That was witness' opinion. He was still representing Lane in the criminal case at the time of the sale of the bonds. Witness was informed of the charges that had been filed against him before the bar association of Greene County, and, upon reading the charges, saw that they contained nothing except a history of the litigation and the fact that witness had caused the bonds to be sold in St. Louis. Witness stated that the statement of the charges was practically correct except as to the $500 bond assigned to witness as collateral for the loan to Lane. He further stated that the question of his moral guilt and reputation depended upon whether or not the bonds were stolen in a gambling game. He wanted the opportunity to try John Lane again before he was embarrassed with this bond proceeding. Witness stated that he had acquired a lot of evidence since the first trial which had convinced him, to a moral certainty, that Lane did not steal the bonds, but that he had won them in a crap game, and he wanted an opportunity to try that. He wanted also an opportunity to attend to his other litigations before any proceedings were instituted for his disbarment. Witness stated that he had said absolutely nothing about going

away and about having done anything to be disbarred for. Witness did not think he had done anything to be disbarred for. Witness sold the bonds merely as a friend of Lane's, and not in the capacity of broker or attorney. In making the sale he did nothing that required the services of a lawyer. He was not acting as Lane's attorney, and could not have been. Witness, on cross-examination, stated that, after he left the bonds with Reid to be sold, he went to Poplar Bluff, Missouri, where he received a telegram. Reid and witness had arranged that, if Reid succeeded in selling the bonds, Reid should telegraph witness in these words, "Fishing is good," or something to that effect. That is the way the telegram read. After discovery of the sale, witness received another telegram from Reid stating that "fishing was bad," and for witness to come to St. Louis at once. Witness then went to St. Louis, and learned that Reid had disclosed witness' connection with the matter, or was going to do so. At the time the bonds were disposed of Lane was in jail for contempt for refusing to deliver the bonds, and was still in jail.

Seven witnesses, reputable practicing attorneys of long standing, testified that they were acquainted with Huddleston, and had been for many years, and that his general reputation as a lawyer in the community where he lived was good.

The above presents the facts which the testimony tended to prove on behalf of the plaintiff and the defendant. At the close of the taking of the testimony the trial court announced that the evidence in the cause was undisputed; that there was no question of fact for a jury to decide, and discharged the jury. Huddleston excepted to the ruling of the court. The court found as follows:

"In this case there was a lawful order of this court that was ignored and intentionally disobeyed. In addition to that, property of a man was taken and disposed of with the intent to deprive him of his property. Two defenses were offered, both technical; one was that your services as attorney had terminated at the time the act

was committed, and the other was that it was done in the State of Missouri. No effort was made by the defense to justify the acts or conduct upon a question of right and wrong.

"My view of it is that no greater wrong would have been committed if a man had gone into another man's place of business and picked up his property and carried it out. At that time you knew that this was the property of Alexander and you knew that you had no right to it, but you disposed of the property and took a part of the proceeds and converted it to your own use and benefit. This offense involved moral turpitude.

"This is true. Your reputation in the past has been good and your conduct in this court at all times has been respectful, courteous and obedient. Those things should be considered and weighed, and I have been considering to a great extent the punishment which should be inflicted in this case.

"Taking everything into consideration, I am inclined to think that the proper punishment should not be absolute disbarment. That would prevent your ever practicing law again, but I am going to suspend you from the practice for a period of one year. That will be the judgment of the court in this case."

Both the plaintiff and the defendant excepted to the above findings and judgment of the court. Both filed motions for a new trial, which were overruled, and both prayed and were granted an appeal. The plaintiff perfected his appeal, but the defendant has not perfected any appeal.

1. The appellee in his brief moves this court to dismiss the appeal on the ground that our statute does not authorize the State nor the Greene County Bar Association to prosecute an appeal from the judgment of the trial court. The procedure concerning the suspension and disbarment of attorneys is found in chapter 12, § § 610-626 inclusive, of C. & M. Digest. Section 610 prescribes the causes for which an attorney may be removed or sus-

pended from practice when charges are exhibited against him. Section 622 provides:

"All charges exhibited under this act shall be verified by affidavit, and shall be prosecuted by the prosecuting attorney of the circuit in which the charges are pending."

Section 623 provides:

"In all cases of a trial of charges, the accused may except to any decision of the court, and may prosecute an appeal to the Supreme Court, or writ of error, in all respects as in actions at law."

The same practice was adopted in this case in preferring charges against the appellee as was pursued in the case of *Wernimont* v. *State, ex rel. Little Rock Bar Assn.*, 101 Ark. 210, 142 S. W. 194, Ann. Cas. 1913B 1156. In that case Wernimont was found guilty of malpractice and declared to be an unfit person to continue the practice of law, and judgment was rendered disbarring him, from which judgment he appealed. While therefore the question of the right of the prosecuting attorney to prosecute an appeal in such cases was not involved in that case, nevertheless it was there decided that the proceedings for the suspension or disbarment of attorneys for professional misconduct are not criminal, but civil in their nature, and are governed by rules applicable to all civil actions. In the absence of a statute specifically conferring upon the prosecuting attorney the right of appeal in such cases, we doubt not that the right of appeal by the State exists from a judgment of suspension in such cases. The right to prosecute such appeal is conferred upon the prosecuting attorney under § 2142, C. & M. Digest, which is as follows:

"Appeals and writs of error may be brought by the prosecuting attorneys for the State, in the name and on behalf of the State, in like manner as by individuals, except when it may be otherwise provided by law."

In *Wernimont* v. *State, supra,* it is said: "The purpose of the proceedings for suspension and disbarment is to protect the court and the public from attorneys

who, disregarding their oath of office, pervert and abuse those privileges which they have obtained by the high office they have secured from the court." The right to practice law is a privilege conferred by statute. Section 596, C. & M. Digest. The prosecuting attorney is an officer of the State, and, since the statute designates him as the one to prosecute the charges that may be exhibited against an attorney, in doing so he represents the State. The action is, in effect, an action by the State either to revoke and cancel the license evidencing the privilege which the State has conferred, or to suspend for a time the exercise of the privilege, according as the proof might warrant. If the prosecuting attorney conceives that the State is aggrieved by the judgment rendered by the court, he unquestionably has the right, under the general statute above, to bring an appeal to this court. The statute (§ 6223 C. & M. Digest) conferring upon the accused attorney the right to prosecute an appeal as defendant in the action from the judgment of the court suspending or disbarring him from the right to practice his profession certainly does not expressly repeal the right of the prosecuting attorney, on behalf of the State, as the plaintiff in the action, to prosecute an appeal under the general statute conferring upon him the right to do so. Of course there is no repeal by implication, because the statute conferring the right of appeal upon the defendant, the accused attorney, has no reference whatever to, and was not intended to affect, the right of the prosecuting attorney representing the State to appeal. That right is conferred upon him, acting for the State, by the general statute above in all cases, both civil and criminal, except as otherwise provided by law.

In addition to the above our Constitution (article 7, § 4), and § § 2130 and 2131, C. & M. Digest, recognize the right of all persons to appeal from judgments or final orders of inferior courts to the Supreme Court. The State of Washington has provisions of precisely similar purport, and, on the issue under review, a similar case arose in *State ex rel. Murphy* v. *Snook,* 78 Washington

Reports 671, 139 Pac. 764, where the Supreme Court of Washington said:

"It seems plain to us that the provision of the general statute quoted above, touching the right of appeal, is sufficiently comprehensive to give that right to the State in disbarment proceedings, in the absence of some subsequently enacted statute evidencing a legislative intent to withhold such right from the State. We can conceive of no argument to be made against this view, except the possible one that the word 'proceeding' as used in the general appeal statute, does not include a disbarment proceeding, upon the theory that it is criminal in its nature. Such a contention, however, has been answered in the negative by this court in *State ex rel. Mackintosh* v. *Rossman,* 53 Wash. 1, 101 Pac. 357, 21 L. R. A. (N. S.) 821, holding that 'the proceeding is in the nature of a civil action.' This is in harmony with the decided weight of authority. The rule and the reason therefor is tersely stated by Justice Bradley, speaking for the Supreme Court of the United States in *Ex parte Wall,* 107 U. S. 265-288, as follows: 'The proceeding is in its nature civil, and collateral to any criminal prosecution by indictment. The proceeding is not for the purpose of punishment, but for the purpose of preserving the courts of justice from the official ministration of persons unfit to practice in them.'." This view is similarly expressed in *Wernimont* v. *State ex rel. Little Rock Bar Assn.,* 101 Ark. 210, 142 S. W. 194, Ann. Cas. 1913D, 1156. The only decision coming to our notice seeming to hold to the contrary is in *State* v. *Tunstall,* 51 Tex. 81, which decision seems to be rested upon the theory that disbarment proceedings are, in their nature, criminal." Then, after further discussion and argument, the Supreme Court of Washington concludes its opinion as follows:

"We conclude that the absence of an express provision in the disbarment statute, as amended, touching the State's right of appeal, in connection with the express provision therein touching the defendant's right of appeal, does not give rise to an inference of sufficient

strength to take from the State its right of appeal so plainly given by the general appeal statute."

Learned counsel for the appellee, in support of their motion to dismiss the appeal, cite 2 Thornton on Attorneys at Law, § 901, p. 1331, as follows: "As the right of appeal is usually given by statute only to a party who is aggrieved or prejudiced, or whose substantial rights are affected by the determination of the court, it is generally held that the accuser or the petitioner cannot appeal from an order or judgment dismissing disbarment proceedings. It has also been held that such a proceeding prosecuted by the State is a *quasi*-criminal case in which no appeal can be taken by the State from a judgment for defendant. On the other hand, it has been held that a county bar association, instituting a special proceeding to recall a license to practice law, is aggrieved by an order dismissing the petition, and may appeal therefrom." They cite the following cases to support the text: *In re Thompson* (Cal.), 45 Pac. 1034; *Byington* v. *Moore,* 70 Ia. 206, 30 N. W. 485; *Brooks* v. *Fleming,* 6 Baxt. (Tenn.) 331; *In re Ault,* 15 Wash. 417, 46 Pac. 644. To support their contention, counsel also cite the following cases: *Fairchild County Bank* v. *Taylor,* 60 Conn. 11, 22 Atl. 441, 13 L. R. A. 767; *Matter of Peck,* 88 Conn. 447, 91 Atl. 274; *Boston Bar Assn.* v. *Casey,* 211 Mass. 187, 97 N. E. 751, 39 L. R. A. (N. S.) 116, Ann. Cases, 1913A, 1226; *Matter of Randall,* 11 Allen 473; *Brooks* v. *Fleming,* 6 Baxt. (Tenn.), 331; *Vernon County Bar Assn.* v. *McKibbin,* 153 Wis. 350, 141 N. W. 283.

It would unduly extend this opinion to review these cases *seriatim.* We have examined them, and find that they may all be differentiated from the case at bar on the facts, and none of them, when considered with reference to the facts upon which the opinions are predicated, are out of harmony with the construction which we place upon our own statutes concerning appeals in such cases. Some of them affirmatively and clearly sustain the views which we have expressed. For instance, in *Vernon*

County Bar Assn. v. *McKibbin,* 153 Wis. 350, 141 N. W. 283, the court concludes its opinion as follows:

"It is needless, perhaps, to say that, since appellant had sufficient interest in the subject of the litigation to possess competency to be heard on the petition in the court below, it is a party aggrieved by the order appealed from within the meaning of the appeal statute, and so, entitled to bring such order to this court for review." So it may be said here.

The members of the Greene County Bar Association who joined with the prosecuting attorney, representing the State, in bringing this action against the appellee, had the right to institute such action for the protection of the courts and the public from a member of the bar whose alleged immoral conduct and practice they deemed so disreputable and reprehensible as to render him unworthy longer to hold a license to practice law. In the procedure prescribed by our statute for the suspension and disbarment of attorneys, it will be observed that the charges may be exhibited against them by any one who shall verify such charges by affidavit. While the statute is silent, and perhaps defective, in not designating that such charges should be exhibited by a member or members only of the local bar association to which the accused belongs, nevertheless the propriety of a member or members of such local association exhibiting charges against one of their fellows, when cognizant of facts justifying such charges, is most obvious. Of all the persons they are, or should be, the most keenly sensitive to and interested in protecting their local courts and the public and their own association from any immoral conduct or corrupt practices on the part of any of their members calculated to bring injury to individuals, disrespect for courts of justice, and reproach upon the profession of law. The true lawyer, be it said, will never forget that his license to practice law confers upon him the exalted privilege of being not only an officer of the court in which he appears, but also a minister of justice as well. His love for the lofty ideals and reverence for the noble

traditions of the ancient and honorable profession to which he belongs will make him ever anxious to preserve these. Therefore, when members of the Greene County Bar Association exhibited charges seeking to disbar one of their members, it cannot be assumed that they were actuated by any sinister motive. In the absence of any showing to the contrary, it must be presumed that they were prompted by the purest and best of motives in lodging their complaint against the appellee. When, after reading their complaint and hearing the evidence adduced by appellants to sustain their charges, the trial court rendered a judgment adverse to their contention, they are certainly parties aggrieved and are clearly within their statutory rights in prosecuting an appeal to this court from such judgment. Moreover, they deserve to be commended for such course rather than criticised or censured, as has been done in brief of counsel for appellee. The motion to dismiss the appeal is therefore without merit, and it is denied.

2. This brings us to a consideration and decision of the issue on the merits. Instead of rendering a judgment suspending the appellee from the practice of law in the courts of the State for a period of one year, should the court have rendered a judgment revoking and canceling his license and thereby permanently disbarring him from the practice of law? In the first place, it should be stated that the appellee filed no answer to the complaint, and therefore raised no issue of fact on its allegations, because, under our civil procedure, "an issue of fact arises upon a material allegation of the complaint denied by the answer." Section 1265, C. & M. Digest. Notwithstanding the appellee failed to answer, the court sent the cause to the jury as if every issue of fact in the complaint had been controverted by the appellee, and gave the widest scope in the production of evidence, admitting testimony of every character which either tended to inculpate or exculpate the appellee. It could serve no useful purpose as a precedent and is therefore unnecessary to comment upon this testimony. We have set forth the material

parts of appellee's testimony, in which apparently he stated fully and frankly his entire connection with the transaction. We have also set forth the explanation of various phases of his conduct which the court allowed him to make, in which he insisted that he had committed no crime; also his opinion that he was not acting in a professional capacity in selling the bonds, as the lawsuit involving the title and possession thereof was ended, and that he was only liable civilly for the value of the property, which he had assisted Lane in selling, and which value he said he had completely restored or made arrangements to restore to the owner of the property as adjudged by the court.

After a careful consideration of the entire record, we are convinced that the findings of fact by the trial court are correct. The statute (§ 621, C. & M. Digest) requires the trial court, in all cases of conviction, to pronounce judgment of removal or suspension according to the facts found, and necessarily vests the trial court with discretion either to remove or suspend according to the facts found. Where the trial court is vested with judicial discretion, it has always been the rule of this court not to reverse the trial court in the exercise of such discretion, unless, in the judgment of this court, under the facts presented, the trial court in its ruling has abused its discretion.

Counsel for the appellee say in their brief: "In this cause it must be conceded by all parties that the trial was before a fair and impartial judge. He did not allow spleen or venom, professional jealousy or professed righteous indignation to arouse him and cause him to do violence by way of judgment. His words show that he calmly considered the entire matter and that, after a careful consideration of all the evidence, it was his judgment that the defendant should be suspended for one year." From a survey of the entire record we are convinced that the above correctly characterizes the conduct and attitude of the trial judge throughout the progress of the trial. Counsel for the appellant do not challenge

the accuracy of the above statement as to the trial judge and the manner in which he conducted the trial, but they present a most forceful and lawyer-like argument to prove that he abused his discretion and therefore erred, upon the facts as found, in not pronouncing judgment of disbarment instead of suspension. Since the case is one of first impression on both issues presented, we realize that the decision is one of vast importance, especially to the legal profession, as well as the appellee. Undoubtedly, on the merits, the facts of this record bring the charges exhibited against the appellee well within the category of delinquencies described by the great Webster in one of his matchless orations, where, speaking of the legal profession, he said: "Our profession is good if practiced in the spirit of it; it is damnable fraud and iniquity when its true spirit is supplied by a spirit of mischief-making and money-getting. The love of fame is extinguished, every ardent wish for knowledge repressed, conscience put in jeopardy, and the best feelings of the heart indurated by the mean, money-catching abominable practices which cover with disgrace some of the modern practitioners of law." Even the most stringent safeguards that may be erected by law, or the rules of the profession, cannot always keep out those who pervert the high standards, duties, and responsibilities of the profession to their own selfish ends and preferments, as described by Mr. Webster. If, perchance, the condign disbarment of the appellee could result in purging the temple of justice of those unworthy devotees who, in the language of Scripture, "have run greedily after the error of Balaam for reward," the immolation of the appellee to appease the wrath of the blind goddess might be fully justified. But we verily believe that the suspension of the appellee from the practice of his profession for a year will have as salutary effect to protect the courts, the public and the profession of the law, as would the more austere decree of banishment forever from the legal fold. An occasional harsh judgment of banishment against those who have already come into the profession

cannot have the effect to purify it entirely and bring it to that ideal status of perfection which every true lawyer contemplates with admiration and pride. A judgment of disbarment against the appellee would deprive him and his family of the livelihood to be gained from the practice of his profession, for which he is so well equipped and to which he has already devoted the best years of his life, and would bring upon him further and irretrievable disgrace, and shame, and upon them much suffering and sorrow. This is his first offense, and, from his good bearing and deportment, except in this single instance, through all the years of his professional career, as testified to by witnesses and found by the trial court, we have every reason to hope that it will be his last. Punishment of the recusant, as we have seen, is not the end to be attained by disbarment proceedings. Therefore it occurs to us that the trial court, under all the circumstances, has not abused its discretion, and that its judgment of suspension has been, and will be, a sufficient warning to the appellee and to all who have been, or may be, like disposed, to refrain from similar derelictions in the future.

The judgment is affirmed.

CHAPMAN v. CLAYBROOK.

Opinion delivered April 18, 1927.

1. APPEAL AND ERROR—PRESUMPTION AS TO JURISDICTION.—Where an action of replevin was transferred from a justice of the peace to the common pleas court, it will be presumed, on appeal from an order denying a motion to dismiss, in the absence of a showing to the contrary, that the venue had been changed by one of the parties as provided by Acts 1905, p. 364.
2. JUSTICES OF THE PEACE—PROCEDURE IN REPLEVIN.—It is not essential in an action of replevin in a justice's court that the plaintiff file a complaint, but an affidavit complying with Crawford & Moses' Dig., § 8640, is necessary to obtain an order of delivery.
3. JUSTICES OF THE PEACE—REPLEVIN—SUFFICIENCY OF AFFIDAVIT.—A verified instrument designated a "complaint" in an action of

replevin in the court of a justice of the peace *held* to constitute an affidavit as required by Crawford & Moses' Dig., § 8640, to obtain an order of delivery, where the requirements of such section were otherwise met, as the name of the pleading is not material.

4. JUSTICES OF THE PEACE—REPLEVIN—SUFFICIENCY OF AFFIDAVIT.—Failure of an affidavit in replevin to show the separate values of articles replevied, though error, in view of Crawford & Moses' Dig., § 8641, is not ground for dismissal of the action, where the aggregate value was stated and was within the court's jurisdiction, as the affidavit could have been amended.

5. REPLEVIN—ORDER OF DELIVERY.—An action of replevin may be tried, though there was no order of delivery.

6. REPLEVIN—ORDER OF DELIVERY.—Where there was no delivery in an action of replevin, the filing of an affidavit was not a prerequisite to jurisdiction, as the cause could proceed as one to try the right to the possession of the property.

Appeal from Crittenden Circuit Court, First Division; *G. E. Keck,* Judge; affirmed.

W. A. Singfield, for appellant.

W. B. Scott, for appellee.

SMITH, J. The transcript on this appeal contains the transcript of the record made in the common pleas court of Crittenden County, as certified to by the clerk of the county court of that county, who is ex-officio clerk of the common pleas court. In the transcript as thus certified there is a complaint, duly verified, which contains all the allegations required by § 8640, C. & M. Digest, to obtain an order of delivery in a replevin suit. The jurat is dated January 5, 1923. There appears also an order of delivery dated January 5, 1923, signed by a justice of the peace of the county, commanding the officer to whom it was directed to take from the possession of the defendant a mule, a two-horse wagon, and forty bushels of corn, more or less, all of the total value of $100, and to deliver possession thereof to the plaintiff upon his giving bond as required by law.

The complaint has the caption: "Before G. M. Coleman, justice of the peace for Bob Ward Township," and alleges that the plaintiff was entitled to the possession of the property there described under the mortgage

therein mentioned given by defendant to plaintiff on May 11, 1921. Attached to the complaint as exhibits thereto are, (a) an itemized statement of the account between plaintiff and defendant, and (b) a copy of the mortgage.

There appears also a bond entitled: "Bond for replevin attachment," which was approved by the justice of the peace on January 5, 1923, conditioned as follows:

"We undertake that the plaintiff, John Claybrook, shall pay to the defendant, William Chapman, all damages which he may sustain by reason of this action, if the order therefor is wrongfully obtained, and the cost of the action."

There appears to have been a trial before the county judge, who is the presiding officer of the court of common pleas, and a judgment for the plaintiff was rendered for the possession of the mule and the wagon, or the value thereof, which was fixed at $100. The judgment contained no reference to the corn.

An appeal was duly prosecuted from the judgment of the common pleas court, and, upon the coming on of the cause for trial in the circuit court, on the appeal, the defendant filed a motion to dismiss the cause of action, for the reason that "said suit purports to be an action for replevin, and originated in the justice of the peace court, but plaintiff failed to make the affidavit as required by § 8640 of Crawford & Moses' Digest, and failed to comply with the law in any regard as provided by §§ 8642 and 8643, Crawford & Moses' Digest, all of which was necessary to give the court jurisdiction."

It thus appears that the suit was begun in the court of a justice of the peace, and that it was transferred to the common pleas court, although it does not appear upon whose application the transfer was made.

Act 149 of the Acts of 1905 (Acts 1905, page 364) created a court of common pleas in Crittenden County, and § 14 thereof reads as follows: "When any civil action or special proceeding is or shall be pending before any justice of the peace in said county, either party may, on motion, have a change of venue from such justice's court

to the court of common pleas, and, on the filing of such motion, the justice shall at once suspend all further proceedings therein, and shall, at once and without delay, make out a certified transcript of his docket entries in the case and all costs therein accrued to date, and transmit the same, together with all the original papers in the case, to the clerk of said common pleas court, for which service the justice shall receive the sum of one dollar, to be paid by the party applying for change of venue, to be taxed as costs in the cause; provided that, where the change of venue is taken by the plaintiff, he shall at the same time pay all costs which may have accrued before such justice."

It thus appears that either the plaintiff or the defendant had the right, under the section quoted, to change the venue in any civil action from any justice court of the county to the common pleas court of the county, and it must be presumed (and especially so in the absence of any showing to the contrary) that one party or the other had the venue of the action changed from the justice before whom the case was brought to the common pleas court.

It has been held that the affidavit to obtain an order of delivery is no part of the complaint (*Donnelly* v. *Wheeler,* 34 Ark. 111), and that the office of the affidavit is to procure the order of delivery, and, when that is accomplished, it has performed its office as an affidavit, and in the justice of the peace court serves as a complaint. *Hawes* v. *Robinson*, 44 Ark. 308.

It was not essential that the plaintiff file a complaint in the justice court, but it was essential that an affidavit complying with § 8640, C. & M. Digest, be filed to obtain the order of delivery. It appears, however, that this was done, although the instrument filed was designated a "complaint," instead of an "affidavit," but the name of a pleading filed is not controlling. The essential thing is that § 8640, C. & M. Digest, be complied with. This section defines the requisites of the affidavit, and the instru-

ment designated "complaint," which was duly verified, contained all the allegations required by that section.

We hold therefore that an affidavit was filed as required by law, and that this action was properly begun as a suit in replevin.

It is insisted that the complaint, if treated as an affidavit, is defective in that it does not show the separate value of the articles replevied. The affidavit does state the aggregate—and not the separate—value of the articles alleged to have been mortgaged to plaintiff by defendant, but the total value stated is within the jurisdiction of a justice of the peace. Section 8641, C. & M. Digest, provides that, where the delivery of several articles of property is claimed, the affidavit must state the value of each, and compliance with this section would, no doubt, have been compelled, had a motion to that effect been made. This defect was not ground to dismiss the cause of action, however, as the affidavit might have been amended in this respect. *Higgason* v. *Braswell,* 163 Ark. 348, 258 S. W. 983; *Hanf* v. *Ford,* 37 Ark. 544; *Noland* v. *Leech,* 10 Ark. 504; *Strode* v. *Holland,* 150 Ark. 122, 233 S. W. 1073.

As appears from the motion to dismiss, set out above, it is contended that the bond given by the plaintiff is not conditioned as required by law to obtain an order of delivery. Answering this contention, it may be said that the return of the constable on the order of delivery reads as follows:

"I have served the within paper by reading the contents thereof to the defendant, William Chapman." The order of delivery appears therefore to have been served as if it were a summons. It does not appear that the officer took possession of the property, or that possession thereof was delivered to the plaintiff, and the judgment of the common pleas court orders that the plaintiff have and recover the possession of the property, or its value, from the defendant.

The case appears to have been tried as if there had been no order of delivery, and this is a permissible prac-

tice. In the case of *United States Automobile Co.* v. *Deshong,* 134 Ark. 392, 204 S. W. 103, it was said:

"It is true replevin is a possessory action (*Spear* v. *Arkansas National Bank,* 111 Ark. 29, 163 S. W. 508), but one may bring a replevin suit without asking a delivery of the property previous to the trial. He may have the title to the property adjudged, even though he asks no immediate delivery of the property upon an order of delivery, which he may have upon making the affidavit and giving the bond required by law. The cause may proceed to judgment without any delivery of the property prior to the judgment. The nature of the suit is not affected by the failure to issue an order of delivery. *Eaton* v. *Langley,* 65 Ark. 448, 47 S. W. 123."

In the case of *Schattler* v. *Heisman,* 85 Ark. 73, 107 S. W. 196, a pleading purporting to be an affidavit was filed with a justice of the peace, but it was not verified. The court there said: "This paper, although not sworn to, was a sufficient complaint to give the court jurisdiction of the subject-matter in replevin; and the court could proceed to try the right to the possession of the property involved without the possession being changed. Sections 6853-54, Kirby's Digest; *Hanner* v. *Bailey,* 30 Ark. 681; *Hawes* v. *Robinson,* 44 Ark. 308; *Eaton* v. *Langley,* 65 Ark. 448, 450, 47 S. W. 123. But, before an order of delivery can issue for the immediate possession of the property in advance of the trial of the rights of property, an affidavit contemplated by § 6854, Kirby's Digest (§ 6854, Kirby's Digest, is identical with § 8640, C. & M. Digest), must be filed. A failure to file such affidavit before the issuance of the order of delivery for the immediate possession is ground for quashing the writ. But it is not a prerequisite to the jurisdiction of the court to settle the rights of property without a change of the possession. *Eaton* v. *Langley, supra.*"

It appears therefore that § 8640, C. & M. Digest, was complied with, and, further, that, if it had not been (inasmuch as there was no delivery of the property), the cause might have proceeded as one to try the right to

the possession of the property involved, and such appears to have been the cause tried in the common pleas court.

It is unnecessary, in view of what we have just said, to consider the effect of plaintiff's failure to execute a bond conditioned as required by § 8643, C. & M. Digest. If it were, the case of *O'Brien* v. *Alford,* 114 Ark. 257, 169 S. W. 774, might be cited.

The motion to dismiss was therefore properly overruled, and, as no other question is presented, the judgment of the court below is affirmed.

COOK v. STATE.

Opinion delivered April 18, 1927.

1. INTOXICATING LIQUORS—MAKING MASH—SUFFICIENCY OF EVIDENCE.—In a prosecution for making mash suitable for distillation of alcoholic liquors, evidence showing probability that defendant was guilty *held* insufficient to sustain conviction.
2. CRIMINAL LAW—WEIGHT AND SUFFICIENCY OF EVIDENCE.—In order to sustain a conviction, the fact that there is a high degree of probability that defendant is guilty is insufficient, but his guilt must be established by substantial evidence to the exclusion of a reasonable doubt.

Appeal from White Circuit Court; *W. A. Davenport,* Judge; reversed.

Mehaffy & Miller and *Culbert L. Pearce,* for appellant.

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

SMITH, J. Appellant was indicted for making mash suitable for the distillation of alcoholic liquors, was convicted, and has appealed. For the reversal of the judgment, it is insisted that the testimony is not legally sufficient to support the verdict, and we have concluded that this assignment of error is well taken.

The testimony, stated in the light most favorable to the State, is as follows: Witnesses Cowan, Smith and

Ray searched appellant's premises, and they found a barrel buried in the ground behind a log. The barrel was covered with a tow-sack and some leaves, and was about two-thirds full of a mash, which was fermenting. Near by were some rocks, with ashes between them. Neither a still nor any part thereof nor any whiskey or other intoxicating liquor was found. The top of appellant's house could be seen from the place where the barrel was found. The barrel was about 200 or 250 yards from appellant's house, and, nearer still to appellant's residence, a hole was found, into which mash had been poured, and a metal barrel was found on appellant's premises, under which a fire had been built, as was evidenced by the fact that the barrel was smoked. The witnesses testified that the mash appeared to have been made of sour meal and shorts, and there was foam over the top of it, but none of the witnesses knew whether the mash was fit for the distillation of alcoholic spirits.

The barrel was not in appellant's inclosure, but was found in his woodland, about 75 yards from his fence. There was no path to the barrel, but, just above where the barrel was found, there was a path leading to the house from the creek farm. The farm was on a creek. The barrel was not on the creek, but on a hillside towards the house. The home of a Mr. Palvin was about the same distance from the barrel as that of appellant, and that of a Mr. Jackson somewhat farther away.

From this testimony it is very probable that appellant made the mash, and that it was fit for the distillation of alcoholic spirits, although no witness stated as a fact that it was fit for that purpose. Appellant was not seen at the barrel, or in possession of it, and no liquor was found on his premises. No still was found, or instrumentality which could have been employed in making liquor, except the smoked barrel. The barrel of mash was on appellant's land, but was not within his inclosure, and was as near the home of Palvin as it was to that of appellant.

We think therefore that, while there is a high degree of probability that appellant was guilty, there is nothing more, and this is not sufficient.

In the case of *Hogan* v. *State,* 170 Ark. 1143, 282 S. W. 984, we reversed the judgment of conviction because of the insufficiency of the testimony, and, in doing so, said: "It devolves upon the State to establish his guilt by legal testimony of a substantive character, and matters of conjecture merely are not sufficient for that purpose."

The judgment in the case of *Reed* v. *State,* 97 Ark. 156, 133 S. W. 604, was reversed on the ground of the insufficiency of the testimony, and in the opinion it was said: "There may be in this testimony some evidence of suspicion against defendants, but, at the most, it is a circumstance of bare suspicion. But mere circumstances of suspicion are not sufficient upon which to base the conviction for a crime, which must be established by substantial evidence to the exclusion of a reasonable doubt." See also *Jones* v. *State,* 85 Ark. 360, 108 S. W. 223; *France* v. *State,* 68 Ark. 529, 60 S. W. 236.

We think the testimony set out does not measure up to this standard, and the judgment will therefore be reversed, and the cause remanded.

HUMPHREYS, J., dissents.

ADAMS v. STATE.

Opinion delivered April 18, 1927.

1. CRIMINAL LAW—PRESUMPTION IN FAVOR OF VERDICT.—On appeal from a conviction of murder in the first degree, in passing on the assignment of error in submitting the question of guilt of any degree of murder to the jury, evidence must be given its highest probative value.
2. HOMICIDE—MURDER—SUFFICIENCY OF EVIDENCE.—In a murder trial, evidence *held* to justify submission to the jury of defendant's guilt of murder in the first degree, and to support a conviction therefor.
3. HOMICIDE—REFUSAL OF INSTRUCTION AS TO RIGHTS OF OFFICER.—In a prosecution for murder of a deputy sheriff the court erred

in refusing to charge that, if the sheriff and his deputy did not go into defendant's store to arrest defendant for a felony, the sheriff and his deputy had no other or better rights in the store at the time than any private individual.

4. HOMICIDE—REFUSAL OF INSTRUCTION AS TO RIGHTS OF OFFICER.—An instruction in a murder case that, if the defendant, at the time of the shooting, when the sheriff and his deputy came into the house, was not disturbing the peace or was not attempting to commit a misdemeanor, or an assault of any kind upon any party, neither the sheriff nor his deputy had any right to arrest him, and if they, or either of them, did shoot at the defendant, the party so shooting, whether the sheriff or his deputy, was violating the law and was aggressor in the fight.

5. CRIMINAL LAW—ORDER OF RECEPTION OF EVIDENCE.—A conviction will not be reversed for the order in which the State's testimony was introduced, in the absence of a showing of abuse of the trial court's discretion.

6. CRIMINAL LAW—ORDER OF INTRODUCTION OF EVIDENCE.—In a prosecution for murder in the first degree, testimony of the State's witness, relied on to show malice and deliberation, should have been offered as a part of the main case, and not in rebuttal.

Appeal from Lafayette Circuit Court; *James H. McCollum,* Judge; reversed.

Luke Monroe, Searcy & Searcy, Carter & Carter and *James D. Head,* for appellant.

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

SMITH, J. Appellant was indicted for the crime of murder in the first degree, alleged to have been committed by shooting and killing one Bob Smith, and, upon his trial, was convicted of that charge and given a life sentence in the penitentiary.

Numerous errors are assigned for the reversal of the judgment of the court below, and, among others, that the undisputed testimony shows that appellant was not guilty of murder in either the first or the second degree, and that the court erred in submitting the question of his guilt of any degree of murder to the jury.

In passing upon this assignment of error, we must, of course, give to the evidence which tends to support that charge its highest probative value, and, when thus

viewed, the testimony may be summarized as follows: In October, 1925, appellant, who had previously served as chief of police of the city of Texarkana, and Virgil Grigson, who was, at the time, constable of the township in which that city is located, were engaged in the retail meat and grocery business in Texarkana. Grigson had invested about $3,000 in the business and appellant about $160. They had disagreed and had quarreled, and, on and prior to the day on which Smith was killed, both had been drinking heavily.

On the morning of the killing appellant went to the home of Osborne Carpenter to get a large pistol, which he had previously exchanged with Carpenter for a smaller one, and, in examining the pistol to ascertain whether it was loaded, it was accidentally discharged. Appellant told Carpenter he wanted the pistol to shoot beeves with, as he had only a single-action one, and, on one occasion, he had shot a beef with a smaller gun, and the bullet had glanced off the head of the beef and came near hitting the man who was employed to help appellant butcher the beef. In addition to this pistol, Grigson had a Winchester rifle, which was kept at the store for the same purpose. Grigson and appellant had a quarrel in the store, and appellant and his sons took Grigson's pistol away from him. Appellant offered several times that day to fight Grigson, but the challenge was not accepted.

Grigson attempted to telephone the police from the store, but appellant refused to permit him to use the telephone. Grigson directed his son to call the police, but the sons of appellant refused to permit him to do so. Grigson went to his car, but appellant took the key out of the car and would not permit Grigson to leave in it. Grigson then went to a filling station a block away from the store and attempted to call the police headquarters, but got no response. Grigson then called the sheriff's office and requested the sheriff to come to the filling station where he then was. In a short time Lish Barber, the sheriff of the county, and Bob Smith, his

deputy, drove up to the filling station in separate cars. Grigson told the officers about the difficulty he had had with appellant, whereupon the sheriff, his deputy and Grigson drove to the store. It was admitted that appellant and his sons knew that Grigson had gone to call the officers. When the party reached the store they walked in, Grigson leading, the sheriff next, and Smith behind, and, as they came into the store, Wallace Adams, a son of appellant, remarked, "Daddy, there is Lish Barber," and appellant replied, "Damn Lish Barber—nobody is going to arrest me."

The State's testimony is to the effect that Allen Adams, a younger son of appellant, was also in the store when the officers came in, and that Adams and his sons placed themselves as follows: Wallace Adams was behind a counter, near the front door, armed with his father's pistol; Allen Adams, the younger son, was in another corner of the store, armed with the Winchester rifle; and appellant was near the center of the store, behind a small counter, armed with a knife. Ruth Shumaker, a young lady whose home was near appellant's store, testified that she saw Barber get out of his car, and that he spoke to her, and smiled.

Barber walked near the center of the store, and, in a friendly way, said, "Hello, Hendricks." The testimony is sharply conflicting as to what then occurred, and the State's version was not developed until after the appellant had put on his testimony, and one of the errors assigned is the order in which the State was permitted to develop its case. We state this testimony at this time to preserve the proper chronology. According to appellant and his sons, who testified in their father's behalf, Barber's first remark was to inquire, "What is the matter with you and the big Irishman?" meaning Grigson. Appellant answered, "The big son-of-a bitch was trying to run me out of my business, and nobody can do that." Appellant testified that, when he said this, Grigson jumped back and began to curse, and, as appellant turned towards Grigson, Barber shot appel-

lant, the ball going through appellant's arm, penetrating his body and lodging in his lung. Appellant further testified that, as soon as Barber shot him, Wallace Adams seized Barber's pistol, and a scuffle for its possession ensued, and that Barber struck Wallace over the head with the pistol. Appellant then took the rifle from the hands of his younger son, Allen, and, as he did so, Barber threw Wallace from him and started towards appellant with his pistol drawn on him, whereupon appellant shot Barber with the rifle. Barber then turned and ran through the screen door, and this was the last appellant saw of Barber.

Grigson, who was called in rebuttal, and whose testimony was objected to upon the ground that his testimony was not rebuttal, stated that, when Barber entered the store, Adams came from behind the counter with the knife in his hand, and advanced on Barber, who slowly retreated, pushing appellant back, and telling appellant to drop his knife, but appellant advanced, and struck at Barber with his knife, cutting Barber's hand and left wrist to the bone, and, when Barber drew his pistol, Allen Adams and Barber both fired, and Wallace Adams shot Smith, inflicting a slight flesh wound. All three shots were fired so near together that you could not tell who fired first. Grigson fell down behind the counter and went out the back door. The shot fired by Allen Adams knocked Grigson's hat off his head. Appellant denied cutting Barber, and denied that Barber was cut, but several witnesses, including the undertaker who prepared Barber's body for burial, testified to the existence of the knife wounds.

Grigson testified that Smith and Barber left the store, and appellant followed them, and, while Barber, who had got into the street, was backing away, appellant shot Barber just above the heart, and Barber died in a few minutes. Just as this fatal shot was fired, Smith, who was about two-thirds across the street, fired two or three shots at appellant as appellant was advancing on Barber. Smith then passed behind an automobile parked

on the side of the street, and from there he went along the walk to the house of a man named Whitney, through whose yard he walked, coming out at the rear of Whitney's lot. Smith then went to the store of J. H. Scott, and appellant saw Smith enter the store. Appellant admitted that, after shooting Barber, he went back into the store, but, in a short time, he came out again and started for Scott's store with the rifle under his arm. Some boys who saw appellant coming remarked, "Yonder he comes, and he will kill all of us." Smith and Scott heard this remark, and they came to the door of Scott's store, and Smith cried out to appellant, "Henry, I give up, I throw my gun away," and as he said this he drew his pistol from his holster and pitched it in the street six or eight feet beyond the sidewalk. Appellant called Smith a vile name and said, "Yes, give your soul to God," and shot Smith. Appellant denied hearing the remark Smith made about giving up, but two witnesses who were further from Smith than appellant was, testified that they heard the remark. Smith ran out of the store, and, as he was passing out the rear door, appellant again shot Smith, who died the following day. Scott remonstrated with appellant, who said, "I'll kill every damn one of them."

It was appellant's theory that Barber was the aggressor in the first shooting, and that, when Barber shot him, he became so greatly enraged that no cooling time intervened before he killed Smith, the man he was tried for killing.

We are of the opinion that the testimony recited fully justified the court in submitting to the jury the question whether appellant was guilty of murder as charged, and that the testimony is legally sufficient to support the verdict returned.

The court gave an elaborate charge on both degrees of murder, and, at appellant's request, gave the following charge on the subject of manslaughter:

"A. You are instructed that manslaughter is the unlawful killing of a human being without malice, either

expressed or implied; that manslaughter must be voluntary, upon a sudden heat of passion irresistible; and if you believe from the evidence that Barber assaulted deceased, Smith, was present aiding or assisting Barber in such assault, or was present for the purpose of aiding or assisting Barber in such assault, and that, while in this condition, and before a sufficient time had elapsed for his passion to cool, he armed himself, pursued unlawfully, and, without justification, killed the deceased, he would not be guilty of either degree of murder, but would be guilty of manslaughter only."

Appellant requested an instruction numbered 6-A, which the court gave as modified, and appellant excepted to the modification. This instruction as amended reads as follows: "You are further instructed that, if you find the defendant was assaulted by the sheriff and his deputy, or either of them, with a murderous intent, the defendant was not bound to retreat, but might stand his ground against the one thus assaulting him and kill his assailant, if he honestly believed, without fault or carelessness, that it was necessary to prevent his assailant from taking his life or doing him great bodily harm."

Appellant requested instructions numbered 7-B, 8 and 8-A. 7-B reads as follows: "You are instructed that, if you find from the evidence that the sheriff and or his deputy did not go into the store for the purpose of arresting the defendant for a felony, then you are instructed that the sheriff and or his deputy had no other or better rights in said store at the time than any private individual." The court refused to give this instruction, and appellant excepted.

Instruction numbered 8 reads as follows: "You are instructed that the sheriff and his deputy had no right, under the law, to attempt to arrest the defendant for any disturbance or row the defendant may have had with Grigson prior to the time of the arrival of the sheriff or his deputy at the store where the shooting occurred, unless you find they had a warrant for him, and, if they or either of them attempted so to do without a warrant,

then you are instructed that, in such attempt, they were acting in violation of the law, and in violation of the rights of the defendant." This instruction was also refused, and appellant excepted.

Instruction numbered 8-A as requested reads as follows: "You are instructed that, if the defendant, at the time of the shooting, when the sheriff and his deputy came into the house, was not disturbing the peace, or was not attempting to commit a misdemeanor, or an assault of any kind upon any party, neither the sheriff nor his deputy had any right whatsoever to arrest him or to attempt to do him any bodily injury, and if they or either of them, under such circumstances, did shoot at the defendant, then you are instructed that the party so shooting, whether the sheriff or his deputy, or both, was himself violating the law and was the aggressor in the fight, if you find a fight occurred." The court refused to give instruction 8-A as requested, but modified it to read as follows: "You are instructed that, if the defendant, at the time the shooting began in Grigson & Adams' store, was not disturbing the peace, or was not attempting to commit a misdemeanor, or an assault of any kind upon any party, neither the sheriff nor his deputy had any right whatsoever to arrest him or to attempt to do him any bodily injury, and if they or either of them, under such circumstances, did shoot at the defendant, then you are instructed that the party so shooting was himself violating the law." Appellant objected to the modification and to giving instruction 8-A as modified, and it was not given.

It is the opinion of the majority—in which Justices WOOD and HUMPHREYS and the writer do not concur—that instructions 7-B and 8 should have been given, and that the refusal to give these instructions, and especially instruction numbered 8, was prejudicial to appellant, inasmuch as no instruction was given which declared the law to be that, if the sheriff and his deputy were not acting in the capacity of officers of the law, with the right so to act, no account should be taken of the fact that they

were officers. In other words, the fact that Barber and Smith were officers of the law was not a circumstance to be considered by the jury, unless the officers had the right to act in that capacity and were so acting, and an instruction should have been given so advising the jury.

Justices WOOD and HUMPHREYS and the writer think that the case was properly submitted to the jury, and that there was no error in the record. As appears from the facts herein recited, the State insisted, and offered testimony tending to show, that appellant was the aggressor throughout. The testimony on the part of the appellant was to the effect that Barber was the aggressor, and shot appellant without provocation, and thereafter appellant was so enraged at Smith, who was present for the purpose of aiding Barber in such assault, that, without having time for his passion to cool, he killed Smith. The instructions declared the law applicable to these issues of fact, and the instructions given made no diminution of appellant's right to defend himself because his assailants were officers, but the instructions fully declared the law to be that Barber and Smith had no right to assault appellant and that appellant had the right to resist any assault upon him by them, or either of them, and the fact that Barber and Smith were officers could have given appellant no greater right than this.

We do not reverse the case because of the time when the testimony of Grigson was introduced. We have many times said that the trial court has a wide discretion in determining the order in which testimony may be introduced, and that we will not reverse on that account unless an abuse of this discretion is shown, and we think no prejudice was shown here. But, inasmuch as the case is to be reversed and remanded for a new trial, we take occasion to say that the testimony of Grigson should properly have been offered as a part of the State's case in chief, and not as rebuttal testimony. It was proper and essential for the State to prove circumstances from which malice and deliberation might be inferred, if a conviction of murder in the first degree was asked, and, as

this was the purpose of Grigson's testimony, it should therefore properly have been offered as a part of the main case, and not in rebuttal.

Numerous other assignments of error are discussed, but no error is found except in the refusal to give instructions 7-B and 8 set out above, and, for the refusal to give these instructions, the judgment will be reversed, and the cause remanded for a new trial.

BLAKEMORE v. COVEY.

Opinion delivered April 18, 1927.

COVENANTS—WARRANTY OF TITLE—IMPROVEMENT TAX.—Under Crawford & Moses' Dig., § 1495, a general covenant of warranty in a deed will not be held to cover an improvement assessment which, subsequent to the execution of the deed, became a lien on the land.

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

R. S. Wilson, for appellant.

C. M. Wofford, for appellee.

HUMPHREYS, J. This suit was instituted by appellant against appellee in the circuit court of Crawford County upon a covenant of warranty contained in a deed to lots 7 and 8, block 42, in the original town of Van Buren, Arkansas, executed by appellees to appellant, to recover $63 paid out by appellant to satisfy an improvement district lien for taxes assessed and levied upon said property on account of expenses incurred in making a preliminary survey of Western Crawford Road Improvement District in which said land, with other lands, was located.

Appellees filed an answer, denying liability under the warranty clause in the deed, on the alleged ground that the lien for the taxes to pay the preliminary expenses of the district did not attach until January 19, 1925, the

date of the last decree fixing the lien for said taxes and ordering the collection thereof.

The cause was submitted upon the pleadings, oral and documentary evidence, which resulted in a judgment dismissing appellant's complaint at his cost, from which is this appeal.

The district in question was created by a special statute (unpublished) at the extraordinary session of the Legislature of the year 1920. The statute contained the following provision with reference to the payment of preliminary expenses:

"Section 25. In case, for any reason, the improvement contemplated by this district is not made, the preliminary expense shall be a first lien upon all of the lands in the district, and shall be paid by levy of a tax thereon upon the assessed value for the county and State taxation, which levy shall be made by the chancery court of Crawford County, and shall be collected by a receiver to be appointed by said court."

The covenant of warranty in the deed is as follows: "And we hereby covenant with the said J. E. Blakemore that we will forever warrant and defend the title to said lands against all lawful claims whatever."

The district was abandoned, and, pursuant to the section of the act quoted, the commissioners of the district obtained an *ex parte* decree in the chancery court on November 3, 1920, levying an assessment of 1.65 per cent. on the assessed valuation of all real estate in the district, as assessed for county and State purposes, to pay the preliminary expenses, amounting to $21,233. On the application of the Missouri Pacific Railroad Company and a number of other real estate owners in the district, the decree of November 3, 1920, was set aside on January 27, 1922, by the chancery court, in order that they might be heard on their contention that the preliminary expenses were excessive, unjust and illegal. On March 8, 1922, the case was again tried, with the result that one claim of $300 for preliminary expenses was disallowed, leaving a total to be paid by the district of $20,611.80;

and levying a tax of 2 per cent. on all real estate in said district, based upon the assessment of benefits to the property by the assessors of the district, on July 30, 1920, from which an appeal was prosecuted to the Supreme Court, where the decree was reversed because the trial court ordered that the payments be made in proportion to the anticipated benefits assessed by the board of assessors, instead of upon the assessed value for county and State purposes. Upon remand of the case the decree was rendered in accordance with the directions of the Supreme Court, levying a tax of 2.10 per cent. against the real estate in the district according to its assessed value for the year 1920, to pay the preliminary expenses, and further ordering the collection thereof, not later than May 1, 1925.

The sole question presented for determination on the record before us, as detailed above, is whether the lien for the taxes required to pay the preliminary expenses of the district attached or became an incumbrance upon the lands in the district before the execution and delivery of said deed or after. The act creating the district is silent as to when the lien attached, but we have a general statute, § 1495 of Crawford & Moses' Digest, which definitely settles the matter as to when the lien attaches between grantor and grantee. The statute is as follows: "All lands, tenements and hereditaments may be aliened and possession thereof transferred by deed without livery of seizin, and the words 'grant, bargain and sell' shall be an express covenant to the grantee, his heirs and assigns, that the grantor is seized of an indefeasible estate in fee simple, free from incumbrance done or suffered from the grantor, except rents or services that may be expressly reserved by such deed, as also for the quiet enjoyment thereof against the grantor, his heirs and assigns, and from the claim and demand of all other persons whatever, unless limited by express words in such deed; provided that, as between the grantor and grantee, neither the statutory nor general express covenant of warranty against incumbrances shall be held

to cover any taxes or assessments of any improvement district of any kind whatever, formed under general statutes authorizing the assessment of lands for local improvements of any kind, or whether such improvement district be formed by public or private act of the Legislature, but the lien for any such local assessment or tax shall run with the land and be assumed by the grantee, and the grantee shall pay any and all installments of such tax or assessment becoming due after the execution and delivery of the deed, unless otherwise expressly provided."

It will be observed that the statute is very broad, covering "taxes or assessments in improvement districts of any kind whatever, formed under general statutes authorizing the assessment of lands for local improvements of any kind, or whether such improvement district be formed by public or private act of the Legislature. * * *"

We think the language broad enough to include a levy made for the purpose of paying preliminary expenses of an abandoned district. At the time the deed was executed the question of the lien and the amount thereof was pending in the courts, and had not become a final and fixed lien for any specific amount until established by the final decree rendered on January 19, 1925. This is the only statute bearing upon the subject, and it contains no exception with reference to the assessment and levy of taxes against the property for the payment of preliminary expenses in an abandoned district.

No error appearing, the judgment is affirmed.

MYERS v. HOEHEIMER.

Opinion delivered April 18, 1927.

1. PRINCIPAL AND SURETY—ABSTRACT INSTRUCTION.—In an action on a note against the makers, an instruction that, if a co-maker delivered a mortgage on personal property to secure the note, and such mortgaged property was lost through plaintiff's negligence, the note should be credited with the value of the mortgaged property, *held* not warranted by the evidence.
2. PRINCIPAL AND SURETY—NOTICE TO SUE PRINCIPAL.—To release a surety, notice to the holder of a note to sue the principal, under Crawford & Moses' Dig., § 8287, 8288, must be in writing.

Appeal from Polk Circuit Court; *B. E. Isbell,* Judge; reversed.

Norwood & Alley, for appellants.

HUMPHREYS, J. This suit was brought by appellant against appellee and G. H. Johnson to recover a balance of $260.24 on a note executed by them and P. M. Morrison to him on December 22, 1919, for money borrowed by Morrison. The note, with the credits thereon, is as follows:

"Hatfield, Arkansas, 12/22/1919.

"One year after date, we or either of us promise to pay to D. E. Myers, or order, the sum of two hundred twenty-five dollars, for value received, with interest at the rate of 10 per cent. per annum from date, payable at the Bank of Hatfield. All principal or interest not paid when due shall bear interest at ten per cent. per annum, and failure to pay interest when due shall cause the whole of the note to become due and collectable at once. Should suit be commenced for the collection of this note, a reasonable amount shall be allowed as attorney fees and taxed with the cost, whether it goes to judgment or not, and holder may sell at public or private sale, without notice, any and all collaterals held as surety for this note, at any time, and credit proceeds on this note, or collect collateral by law and apply proceeds as aforesaid. And the several makers, sureties and indorsers hereto hereby waive appraisement, notice of extension, nonpayment and protest, and agree that any extension of time

made hereon, or renewal thereof, shall not affect their liability, whether they have notice of such extension or renewal or not.

"P. M. Morrison
"John C. Hoeheimer
"G. H. Johnson.

"Credits: 10-30-22, $75.10, wagon and mules. 4-16-23, $17.50, cattle. 5-30-24, $3.60, estate."

G. H. Johnson did not file an answer, and judgment was rendered against him for $276.40, the balance due upon the note with interest to November 14, 1925, the date of said judgment. Appellee, John C. Hoeheimer, interposed the defense that, at the time the note was signed by him, a mortgage was also given by P. M. Morrison to appellant on a pair of mules, wagon and other chattels, the value of which was in excess of the note; that the alleged mortgage was filed and became a lien on the property, but the lien and property covered by the mortgage which secured the note was lost because appellant permitted the property to be removed from the State without objection.

The cause was submitted to a jury upon the pleadings, testimony and instructions of the court, over the objection of appellant, who asked the court to instruct a verdict for him. The jury rendered a verdict for $150 and costs against appellee, and a judgment was rendered in accordance therewith, from which is this appeal.

The court instructed the jury as follows:

"If you believe from a preponderance of the evidence that, when the note in controversy was executed by Morrison, and signed by the defendant, Hoeheimer, as surety, the said Morrison executed and delivered to the plaintiff, Myers, a mortgage conveying to said Myers certain personal property to secure the payment of said note, and that such mortgaged property was lost through the want of diligence or through the negligence of said Myers, you will credit the note, if you find for the plaintiff upon said note, with whatever sum you may find the value of such mortgaged property to have been."

This instruction was not warranted by the testimony, and was therefore abstract and erroneous.

D. E. Myers testified positively that he did not take a mortgage from P. M. Morrison on chattels to secure the payment of the note; that, nearly two years after the execution of the note, he took a mortgage from Morrison upon chattels to secure another note which Morrison owed him, and a second mortgage on four cattle and a wagon as security on the first note, and realized $17.50 out of them, and credited the note with the amount.

Appellee testified that he was sure that Morrison gave Myers a mortgage upon personal property to secure the note in question at the time they executed it, but that, after searching, he failed to find it on file or any record of it having been filed. He pleaded in his answer that it was filed and became a lien upon the property. In order to verify the allegation and meet the issue presented by the positive evidence of Myers to the effect that no such mortgage was executed, he should have presented the mortgage or a record showing that it was filed, or, at least, have testified that such a mortgage was executed. He admitted that he never saw the mortgage, but he stated that he thought one was executed. His testimony on the point was not sufficiently definite to make an issue for the jury, and, for that reason, the court should have peremptorily instructed a verdict in favor of appellant for the full amount due upon the note, after deducting the credits which had been entered thereon.

Although the makers of the note appear to be principals, the record reflects that appellee and Johnson were in fact sureties. P. M. Morrison left the State after the maturity of the note, taking all of his property with him. Testimony was admitted in the trial of the cause relative to a request made by appellee to appellant to bring suit upon the note and to enforce collection thereof against P. M. Morrison before he left the State. The evidence is conflicting upon the point, but the conflict did not present an issue for determination by the jury. Even if the fact had been undisputed, it would not have

exonerated appellee from liability on the note. In order to have escaped liability on this account he must have given written notice to appellant to commence suit against Morrison. Sections 8287 and 8288, Crawford & Moses' Digest.

On account of the error indicated the judgment is reversed, and judgment is directed to be entered here in favor of appellant against appellee for $276.40, with interest at the rate of 10 per cent. per annum from November 14, 1925.

SUN OIL COMPANY v. HEDGE.

Opinion delivered April 18, 1927.

1. PLEADING—NECESSITY OF REPLICATION.—In a suit for personal injuries, where defendant set up a release in defense, it was not necessary for plaintiff to file a reply alleging that the release was given under a mistake of fact induced by misrepresentations as to his condition made by defendant's physician.
2. RELEASE—EFFECT OF MISREPRESENTATIONS OF PHYSICIAN.—A release executed by an injured party, relying upon misrepresentations of the physician of the party responsible for the injury that it was slight and temporary, is not binding upon the party making it.
3. MASTER AND SERVANT—JURY QUESTION.—In an action for personal injuries, the question whether plaintiff's physical condition was caused by the injury sustained by him while employed by defendant was for the jury.
4. TRIAL—INSTRUCTION—ASSUMPTION OF FACTS.—An instruction that, if defendant was injured while in defendant's employ and was sent by defendant to a hospital to be treated by a physician, who assured him that he would be all right after a lapse of time, and that, relying upon such representation, which subsequently proved to be untrue, he executed a release, he would not be bound thereby, *held* not error as assuming that the physician was defendant's agent or that the physician made untrue representations.
5. TRIAL—INSTRUCTION—GENERAL OBJECTION.—In a suit by an employee for personal injuries, an instruction on damages for personal injuiries was not open to a general objection in failing to include the questions of comparative negligence and contributory negligence, no request therefor being made.

6. APPEAL AND ERROR—HARMLESS ERROR.—An instruction on assumed risk which spoke of the "defendant" assuming all risks incident to his employment could not have been prejudicial where it was apparent that the word "defendant" was inadvertently used for "plaintiff."
7. MASTER AND SERVANT—ASSUMED RISK.—A servant does not assume the risk of injury from the negligence of his fellow servants, which was unknown to him and the danger of which he could not appreciate.
8. MASTER AND SERVANT—ASSUMED RISK—BURDEN OF PROOF.—Assumption of risk is an affirmative defense, and the burden of proving it rests upon defendant unless it is shown by plaintiff's testimony.
9. RELEASE—INSTRUCTION.—In a suit by an employee for personal injuries, an instruction that, if the employee executed a release without fraud or misrepresentation on defendant's part, then plaintiff could not recover, was properly refused, since the release was not binding if made under misrepresentations made by a physician furnished by defendant.
10. TRIAL—ABSTRACT INSTRUCTION.—It was not error to refuse an instruction not based on the evidence.
11. NEGLIGENCE—INSTRUCTION AS TO CONTRIBUTORY NEGLIGENCE.—In a suit by an employee for personal injuries, a requested instruction that, if plaintiff gave orders to lower the trap before the guy wires were released, thus causing his own injury, he could not recover, was erroneous, as, under Crawford & Moses' Dig., § 7145, contributory negligence would not bar a servant's right of recovery, but only required a diminution of damages in proportion to the amount of negligence attributable to plaintiff.

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

STATEMENT BY THE COURT.

This appeal is prosecuted by the Sun Oil Company from a judgment for $3,000 damages returned against it in favor of Ben Hedge, on account of a personal injury received by said Hedge while in the employ of the said oil company.

Complaint alleges that plaintiff, with his crew of four other employees, was engaged in "throwing" a gas-trap, that is, stripping the flow-line connection from the gas-trap, the gas-trap being a pipe about 70 feet long, set on the ground in a vertical position, and used to separate

the oil from the gas. It was held in position by four guy-wires fastened near the top and extending in different directions to the ground where they were fastened. That, to remove the trap, it was necessary to unfasten the guy-wires from the bottom and throw the trap in the direction in which it was to fall. That, to do this, it was necessary to hold the guy-wires after they were unfastened until a given signal from the plaintiff, when it was their duty immediately to release the guy-wires, so that the plaintiff could pull the trap in the direction in which it was to fall. Two of such traps had been removed, and plaintiff and his co-employees were engaged in removing the third when the injury complained of occurred. That the guy-wire to said trap had been unfastened at the bottom and plaintiff's co-employees had hold of them when plaintiff gave the signal for them to release the guy-wires; that his co-employees failed and neglected to immediately release said guys as directed by plaintiff, and, as a result thereof, the trap was swerved from the course in which it was intended to fall, in a northerly direction, causing a tree to intervene between the point where the trap fell and where it should and would have fallen if plaintiff's co-employees had released the guy-wires as they were directed and as it was their duty to do. That, by reason of the falling of the trap at the point where it did fall and the intervention of the tree between the point and the point where the plaintiff was standing and where the trap should have fallen, the guy-wire which the plaintiff had hold of, and by which he was attempting to guide the fall of the trap, was drawn around and against said tree in such a manner that, when it was tautened, it struck the plaintiff in the abdomen and side, breaking two of his ribs and severely bruising and injuring him in the abdomen and side. That, if the plaintiff's co-employees had released the said guy-wires as it was their duty to do, said trap, by the guidance of the plaintiff, would have fallen at a point where such an injury as occurred to plaintiff could not have happened, and that said injury was due

solely to the negligence of plaintiff's co-employees by failing to release the wires which they held, as they were instructed to do.

It states further that the defendant company caused him to be treated by its physician; that he remained in the hospital for four days, suffering severe pains in his abdomen and side; and that he was unable to work for thirty days, after which he was given a pumping job requiring no great exertion, and he continued at that work until the 15th of the following May. That thereafter he began to suffer severe pains in his bowels, and any exertion requiring the exercise of the muscles of the abdomen caused him intense pain, and that the condition finally became worse and became so aggravated that he was rendered incapable of performing any manual labor, and that he had to undergo an operation in order to get relief. He was operated on in January, 1925, when it was discovered that his injury had resulted in adhesions of the liver, stomach, intestines and gall bladder. Since the operation he has only suffered slight and dull pains in the region of one of the floating ribs. That two of the ribs are crooked since healing to such an extent that they materially interfere with the normal operation of his body, and that he suffered much pain, lost 30 days from work following the injury, and has ever since been incapacitated from performing his usual and customary work. That he was a strong, able-bodied man, 28 years old, earning $180 per month at the time of the injury, and had expended $500 on account thereof.

The answer denies every material allegation of the complaint. Denies that the guy-wires attached to the trap had all been unfastened at the bottom before plaintiff gave the signal for the men to release them; denies specifically that allegation of the complaint relating thereto, that the injury occurred as stated, and that it was due solely to the negligence of the plaintiff's co-employees by failing to release the guy-wire which they held as they were directed to do; admitted that plaintiff worked for

the company subsequent to his injury until the 15th day of the following May; alleged that injury resulted from his own carelessness and negligence, being the foreman in charge at the time of his alleged injury, wholly failed to take the proper precautions in dismantling said gas trap, or in attempting to throw the said gas-trap to the ground; that he, the said plaintiff, did not require his men to unfasten the guy-wires which were wrapped around trees, eight or ten feet from the gas-trap, before ordering the trap to be thrown to the ground; also pleaded contributory negligence and assumed risk, and a full release from all liability, executed by plaintiff on the 16th day of March, 1923.

The testimony tends to show that plaintiff was the gang pusher of the pipe-line crew and foreman to direct the work over the men, and, if necessary, to help in performing the labor; was engaged in throwing gas-traps, as alleged in the complaint, when the injury occurred, and had been engaged in that work for 12 or 15 days; had thrown two traps of the same kind as the one by which he was injured and two of other styles. He described the occurrence as follows: "The trap we were working on at the time I was injured consisted of an iron pipe about seventy feet high and held in position by four guy-wires fastened to the top of the pipe and extending in four different directions to the ground, where they were fastened to stakes and trees. I was directed by Joe Tipson, foreman of the company, to do this work, and the only directions he gave me was to throw them down, turn loose the guy-wires and throw them down in a manner to save them if I could. My only experience in throwing these traps consisted of about two days' work altogether. In order to do this work, first we stripped the trees of everything, then we took the guy-wires loose from their permanent wrap. We kept one wrap to hold it until I got everything ready. The men were holding these wires where they were tied to the trees and stakes, and, at a given signal, they were to release the wires, and, by pulling of the wire that I held, the trap was guided in the direction I wanted

it to fall. I had personally seen that the wires had been released and were in position before I gave the signal. I gave the signal 'ready,' 'let's go,' or something like that, and the man to my right failed to turn loose. He was out of my sight. There was nothing in the way to keep the men from releasing the wire, if they had obeyed instructions. If the man had released his wire, the trap would have fallen in the way I was pulling. The ones I had already thrown had fallen the way I intended. As the men to the left were slow in turning their line loose, this line on the trap had fallen four feet out of its course before these men to the right ever turned loose. When the trap fell there was a tree here, and the cable went around the tree, and snapped back and hit me across the side and back. Floyd Collins was holding the line with me and helping me guide the trap—he was on the left side of the wire, and out of danger. There was no danger in my position if the men had turned their wire loose as directed. The trap weighed about 1,200 pounds. The men understood what they were to do when the release call was given; they helped me to throw the other two traps. Immediately after I was knocked down by this guy-wire I just felt as if the breath was knocked out of me. That was practically all the pain I had at that time. I had cramps and pain. There was a little streak around my whole body, except a small place in front. I was about a mile from home; I walked this distance, and, while walking home, I had to creep and hold my abdomen as hard as I could with my hands. I cleaned myself up as best I could, and had a little supper. We sent for a doctor then. The company doctor came out there about 11 o'clock. Jess Thomas went after the doctor; he saw Mr. Parks in town, and he went with him to Dr. Neiheuss. He came about 11 at night. The next time I sent for Dr. Neiheuss he sent an ambulance for me. I stayed in the hospital four days. The hospital belonged to Dr. Neiheuss. He bandaged me up, and the nurse gave me an enema. When I left the hospital, the doctor had not declared my condition. I was still wearing an adhesive

tape bandage, which I kept on about ten days. After the bandage was taken off, the doctor gave me a prescription for some medicine; he said it was for my spleen."

Plaintiff stated that the guy-wires had been released and unloosed, except just enough to hold until he gave the signal to let go; that all the other men were in sight but one when he gave the signal, and the signal was given so all could hear. When the pipe fell, it whipped the guy-wire around the tree, and the end struck plaintiff across the abdomen and side. He remained at the place of injury about 20 minutes, and was able to go home by himself. Later he was sent to the hospital by appellant company, and was under the observation of Dr. Neiheuss.

Plaintiff admitted that no representations were made to him about his condition at the time he signed the release, and that he signed it voluntarily, understanding its effect; stated that Dr. Neiheuss had made representations to him before signing it, answering the question relative thereto as follows: "The day I brought the X-ray picture back to Dr. Neiheuss, he told me, he says, 'That shows no fracture.' I asked him in particular if it showed a rupture of the diaphragm. He said no, that the muscles around my ribs were out of place, and when they became normal they would be all right." He said he executed the release upon these representations about four months after they were made.

Dr. Neiheuss stated that he operated a hospital of his own at El Dorado, and treated appellee for the injury, and sent the bill to the oil company. That he saw appellee on the evening of the 16th or the morning of the 17th of November, 1922, and he came to the hospital on the 17th and remained there two days, and was discharged. He returned the 2d of December, and was treated again two or three times before being discharged. He remembered that plaintiff was injured by a guy-wire striking him on the side, lower abdomen or lower chest, over the ribs, and he had a bruised condition. The X-ray taken did not show any fracture of the ribs, and there were no symptoms of any severity that would indicate a fracture.

His general condition was not sufficient to keep him in the hospital any longer than two days, and he told him that he thought he was ready for duty, and would be all right, as was usual in such cases, but, if he did not get all right, to return for treatment. He never returned. Further stated that plaintiff made no complaint about any trouble with his gall bladder, and that, after his treatment of him at the hospital and the examination of the X-ray made, if he, in 1925, had adhesions affecting the gall bladder, witness would not have attributed it to that injury; that adhesions must be the result of an inflammatory condition; plaintiff had no symptoms, at the time he was treated for the injury, of any such trouble. Witness had never had a case of adhesions involving the gall that was caused from an outside injury, and did not think any adhesions involving the gall bladder in 1925 could have been caused by the injury; that such inflammation of the gall bladder region is caused by infection, and none of these conditions existed at the time he made the examination and treated plaintiff.

Other physicians testified to like effect, but one thought that the condition might possibly have developed from the injury, and plaintiff testified that it did.

The court instructed the jury, giving, over appellant's objections, instructions No. 2 and No. 3, and on its own motion gave No. 2 as follows:

"No. 2. If you find from a preponderance of the evidence that the plaintiff was injured while in the employ of the defendant, and was sent by the defendant to a hospital to be treated; that he was treated by a physician or physicians employed in said hospital, and was by said physician discharged; that, later, he returned to the hospital for examination and information, and was assured by the physicians so treating him that there was nothing seriously wrong with him and it would only require time for the muscles and ligaments to heal and stretch, and, after a lapse of time, he would be all right; that the plaintiff believed said representations to be true, and, relying upon such representations, he executed the

release offered in evidence by defendant, and would not have executed said release but for such representations, and it turned out that such representations were untrue, the plaintiff would not be bound by such release, and you should find for him upon that issue.

"No. 3. If you find for the plaintiff you will assess his damages at such sum as will compensate him for the bodily injury sustained, if any; the physical and mental anguish suffered and endured by him in the past, if any; and that which he will endure in the future, if any, by reason of the said injury; his loss of time, if any, and his pecuniary loss from his diminished capacity for earning money in the future, if any; and from these, as proved from the evidence, assess such damages as will compensate him for the injuries received."

"No. 2. You are instructed that, while the defendant assumed all risks incident to his employment, yet you are further instructed that he assumed no risk incident to the negligence of his fellow-employees."

The court refused to give appellant's requested instructions Nos. 4 and 5, as follows:

"No. 4. If you find from the evidence that plaintiff, Ben Hedge, did, on the 16th day of March, 1923, execute the release in the words and figures set out in defendant's answer, without fraud and misrepresentation on the part of the defendant, its servants and employees, and for the consideration named in said release, then the plaintiff is bound by his release, and cannot recover, and your verdict will then be for the defendant.

"No. 5. If you find from the evidence in this case that the plaintiff was foreman at the time and place of the injury, and that, as such foreman, it was his duty to see that the guy-wires were released before the trap was lowered, and that the plaintiff gave orders to lower the trap before the guy-wires were released, and that this was the cause of the injury complained of, and you so find from the evidence, you will find for the defendant."

And also to instruct a verdict in appellant's favor.

The jury returned a verdict against appellant, and from the judgment thereon this appeal is prosecuted.

T. M. Clifford and *Norwood & Alley,* for appellant.

Lake, Lake & Carlton, for appellee.

KIRBY, J., (after stating the facts). It is earnestly insisted by appellant that the court erred in not giving its instruction No. 1, directing the jury to return a verdict in its favor. It is true, as appellant contends, that plaintiff did not plead fraud, misrepresentations or mistake in the procurement of the release, which appellee admitted that he signed voluntarily and understanding its effect, about four months after he had been discharged from the hospital after treatment for the injury, and resumed work. It was not necessary, however, for plaintiff to file a reply alleging that the release was given under a mistake of fact as to his condition, brought about by the misrepresentations of the physician that had treated him, at appellant's instance, at the time of his discharge from the hospital. The answer setting up the release as a discharge from liability did not relate to a counterclaim or set-off, and is deemed controverted, in legal contemplation, as though by direct denial of the allegation or an avoidance of its effect, by such a statement of its procurement as was proved. Section 1231, C. & M. Digest.

This court has frequently held that a release executed by an injured party, relying upon the mistaken opinion of the physician of the party responsible for the injury that it was slight and temporary, and not permanent, is not binding upon the party making it. *St. Louis, I. M. & S. R. Co.* v. *Hambright,* 87 Ark. 614, 113 S. W. 803; *St. Louis, I. M. & S. R. Co.* v. *Reilly,* 110 Ark. 182, 161 S. W. 1052; *St. Louis, I. M. & S. R. Co.* v. *Morgan,* 115 Ark. 529, 171 S. W. 1187; *Griffin* v. *St. Louis, I. M. & S. R. Co.,* 121 Ark. 433, 181 S. W. 278; *C. R. I. & P. Ry. Co.* v. *Smith,* 128 Ark. 233, 193 S. W. 791; and *Kiech Mfg. Co.* v. *James,* 164 Ark. 137, 261 S. W. 24.

This release was executed more than four months after plaintiff was discharged from the hospital, and without any representations whatever made by appellant

to appellee, at the time of its execution, relating to his condition and injury; but the jury apparently believed that appellee relied upon the statement made by the physician employed to treat him, at the time of his discharge from the hospital, that his injury was only temporary and not serious and permanent, and also that the serious condition which developed, necessitating the operation in 1925, was the result of it, notwithstanding the majority of the experts testified that such condition could not have resulted from an outside injury, and was caused from some infection. One physician, however, stated that it might have resulted from such an injury, and appellee testified that it did, and the evidence cannot be said to be undisputed, and the court did not err in refusing to direct a verdict.

No error was committed in the giving of instruction No. 2 complained of. It does not assume that Dr. Neiheuss was an agent of the appellant, as is contended, but leaves to the determination of the jury the question of whether the appellee had been sent by appellant company, after his injury, to the hospital of Dr. Neiheuss for treatment, and also the question of whether or not the physician made to him the untrue representations that his injury was slight and temporary, and but for reliance upon which the release would not have been executed.

It is true that Dr. Neiheuss conducted an independent hospital, but treated, at the appellant's instance, some of the persons injured in its service, and the appellee, by its express direction, as the undisputed testimony shows.

Appellant next contends that the court erred in giving plaintiff's requested instruction No. 3. Only a general objection was made to the giving of said instruction, however, and, if appellant had desired that it should have included the question of comparative negligence or for diminution of the amount of damages on account of the alleged contributory negligence of plaintiff, it should have made such specific objection thereto, or have asked a correct instruction including such phase of the law.

It is obvious, too, that the court, in instruction No. 2, given on its own motion, intended to instruct the jury that the *plaintiff* assumed all risk incident to his employment, instead of the *defendant,* as stated, but a specific objection would have doubtless resulted in the correction of this instruction, which would not have been misunderstood, anyway, it being apparent that the word *defendant* was inadvertently used instead of plaintiff. Under the law the servant does not assume the risk of injury from the negligence of his fellow-servants, which was unknown to him, and the danger of which he could not appreciate, and nothing had occurred, as shown by the undisputed testimony herein, in the conduct of appellee's helper before the falling of the pipe, to indicate that he was not discharging and would not discharge the duty incumbent upon him, which appellee had the right to assume that he would do. *C. R. I. & P. Ry. Co.* v. *Daniel,* 169 Ark. 23, 273 S. W. 15; *Bruce* v. *Yax,* 135 Ark. 480, 215 S. W. 265.

Assumption of risk is an affirmative defense, and the burden of proving it rests upon the defendant, unless it is shown by plaintiff's testimony. *Central Coal & Coke Co.* v. *Burns,* 140 Ark. 147, 215 S. W. 265.

No error was committed in refusing to give appellant's requested instruction No. 4, this question being sufficiently covered and submitted by instruction No. 2, given at plaintiff's request, and No. 3, at the request of defendant, and the court's instruction that the jury should consider all instructions together and as a whole. Then, too, the instruction is not an accurate statement of the law, under the circumstances of this case, since fraud and misrepresentation on the part of the defendant, its servants and employees, was not necessary to be shown in the procurement of the release in order to avoid it, but only the condition as disclosed in said instruction No. 2, given, resulting from reliance upon representations honestly made by appellant's physician, to whom appellee was sent for treatment, and relied upon as being true

by appellee when making the release, and which later proved to be untrue.

There was no testimony upon which to base appellant's requested instruction No. 5, refused, and, if it could be regarded, in effect, an instruction on contributory negligence, it was not a correct declaration, since contributory negligence would not bar the servant's right of recovery, but only require the diminution of damages by the jury in proportion to the amount of negligence attributable to the injured employee, and no error was committed in refusing to give it. Section 7145, C. & M. Digest.

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

CAMPBELL v. PARKIN HOME BANK.

Opinion delivered April 18, 1927.

1. BILLS AND NOTES—MISTAKE IN SIGNING NOTE.—Testimony of the maker of a note, in a suit thereon by the payee bank, that he knew all the facts at the time he signed a note and that no facts were concealed from him, is conclusive against his contention that he signed under a mistake of facts or under false representations.
2. BILLS AND NOTES—FRAUD AND MISREPRESENTATION.—In a suit by the payee of a note where the defenses of mistake of fact and false representations inducing the signing of the note were completely disproved by defendant's testimony, the court properly directed a verdict for plaintiff.

Appeal from Cross Circuit Court; *G. E. Keck*, Judge; affirmed.

T. E. Lines, for appellant.

Killough, Killough & Killough, for appellee.

MEHAFFY, J. The appellees filed suit in the circuit court of Cross County, alleging that the Parkin Home Bank is a banking corporation under the laws of the State of Arkansas, and that the defendants, including appellant, being indebted to plaintiffs on the 9th day of

January, 1924, executed and delivered to plaintiff their promissory notes for $909.44, due and payable on the 15th day of January, 1924.

Albert Campbell, the appellant, filed a separate answer, admitting that he executed the note, but denied that he owed the plaintiff anything. He alleged that, on the date of the execution of the note, he was confined to his bed with pneumonia and under the treatment of his physician, with high fever, and, under pain and misery as well as drugs, and, on account of his physical and mental condition on that day, he was not competent to transact business of any sort; that, while in such condition, the officers and employees or representatives of the bank came to his home and prevailed upon him to sign the note, representing to him that he had purchased a certain lot of cotton, and had not left with the plaintiff funds to cover the check that he had caused to be issued in payment of the cotton; that said representations were false in that defendant had left funds to cover said check; that such information was not at the disposal of the defendant, but was in the possession of the plaintiff; that plaintiff was defendant's banker, and in a position of trust, and defendant had a right to rely upon his representations; that he signed the note on account of said representations and under the conditions he had described. He alleged that the representations were false, and known to plaintiff to be false, and made to the defendant for the purpose of getting his signature covering an overdraft of his codefendant, and with which this defendant had no connection; that this defendant relied upon such representations, acted thereon, and is injured to the extent of any liability that may be attached to said note; that, if there was no fraud, said note was signed by mistake, and is void; that the note should be canceled, and that he had no complete and adequate remedy at law, and asked that the cause be transferred to equity.

The physician testified, in substance, that he attended the defendant, who finally took his bed, and that he

treated him during the month of January; that, on the 9th day of January, he was getting a little better from the pneumonia he had after the grippe. He learned from defendant's wife that he had signed the note that day. He was taking medicine that day. He had been sick about ten days, and was very much depressed, and had quite a bit of fever, but, at that particular time, he had a subnormal temperature; Dr. Smith said he was giving him a stimulant and cough medicine. He had fever all along for 6 or 8 days. When in a subnormal condition, he would not be in condition to do business any more than when his temperature was above normal. He was not delirious, just depressed and weak.

The appellant himself testified, in substance, that he went to the bank and told Mr. Phillips that Max was going to buy some cotton for him, and to honor his cotton checks and he would take care of them. "I covered Max's checks with Memphis checks; I did this nearly every day. I would check up the stubs we kept and the carbon copy, and would make a check to the Parkin Home Bank for the amount; those checks were made payable to the bank; the checks I gave Max for living expenses I made payable to Max; I did not know and was not concerned how the bank was keeping the cotton account, and I do not know how many accounts Max had at the bank. The cotton season closed in December, and I did not buy any cotton in January. Mr. Phillips and Mr. Hueman came into my room; I was sick in bed; I had been in bed a little over a week, with pneumonia; they said that Mr. Green was out there with a check that was given to Connor Brothers for this cotton, and there was no money to pay it. They wanted a note to cover the check. I had never had any of my checks go wrong or anything, and Mr. Hueman said Mr. Green was about to cut his throat, and Mr. Phillips asked me to sign the note, and I did. I really did not give the matter any thought. It was a question of my check going wrong, and I signed the note. I don't suppose they were there over five minutes; I did not see Mr. Green or the check. They said he was out

in front of the house. Mr. Phillips said he would pay the check if I would sign it with Mr. Hueman; neither said anything about the money having been there before to cover the check. Hueman had been buying cotton for me a month or six weeks; I had confidence in his ability to buy cotton; according to the agreement I had with Mr. Phillips, I was to take care of the cotton checks; they should have kept it so they could have told; the bank had authority from me to pay any checks that came in signed from Max Hueman and marked cotton; the bank did not know how many bales I had agreed for Max to buy; no one misrepresented to me the things when they came to the house with the note; they said Mr. Green was there with the check and there was no money to cover it, and I have since learned that that was true. They had let Max draw the money out. I have never had any of my checks to go wrong, and, when they proposed that I sign the note, I signed it. If I had been well, I would have stated that I would not sign the note because I had already gone in and covered the check. I should have known that I had, prior to that time, covered the check, but it just struck me that this check was out there and it was up to me to cover it. Whether I thought of it or not, I knew that I had covered this check. When I signed the note, I knew that I was signing it; I guess there were no facts concealed by the parties when the note was signed. I was familiar with those facts, but there was the question of my check coming back. I thought I had covered everything; I relied on Mr. Phillips for keeping this cotton account at the time I signed the note."

Max Hueman testified with reference to the transaction, but we deem it unnecessary to set out his testimony, because appellant relies on two grounds only, and the testimony of this witness does not affect either proposition. In fact, the testimony of the appellant himself, we think, is conclusive on the questions argued. The first contention of appellant is that there was a mistake of facts. Of course, if there was a mistake of facts, and appellant signed the note with a misapprehension of fact,

after using proper diligence to ascertain and know what the facts were, this would be a defense to this action. But it appears from the record in this case that there were no facts that appellant did not know, and this court has recently said:

"The means of information as to the value of the land was as accessible to Pipkin as it was to Reed. The facts of this record bring the case well within the doctrine of the many cases of this court to the effect that, if the means of the information are equally accessible to both parties, they will be presumed to have information themselves, and, if they have not done so, they must abide by consequences of their own carelessness." *Lone Rock Bank* v. *Pipkin*, 169 Ark. 491, 276 S. W. 588.

But, as we have said, there were no facts in this case that the appellant did not know. The appellant himself testified:

"Q. But you knew those facts as well as any of those parties did, didn't you? A. Yes sir. Q. At the time you signed this note, state whether or not you knew that you had deposited money in the bank to cover this particular check? A. Yes, I was under the impression that I had, but I signed this note to keep this check from going bad. That was what I wanted to do."

Appellant again testified, as abstracted by himself: "Whether I thought of it or not, I knew that I had covered this check. I knew that I had covered all of them. When I signed the note I knew I was signing it. I guess there were no facts concealed by the parties when the note was signed. I was familiar with those facts, but there was the question of my check coming back."

Again, in testifying about the parties coming to him at the time he signed the note, he said: "I do not suppose they were there over five minutes. Mr. Phillips had the note, and went in the room and made it out; I did not see Mr. Green or the check; they said he was out in front of the house; Mr. Phillips said he would pay the check if I would sign the note with Hueman; neither said any-

thing about the money having been there before to cover the check."

It therefore appears, from the appellant's own testimony, that he knew all about the facts, and that there was no mistake of fact that caused him to sign the note.

His next contention is that there was a false representation of facts, but appellant's own testimony completely answers this contention. He does not claim that there was any false representation of fact. He says in his testimony: "No one misrepresented to me the things when they came to the house with the note. They said Mr. Green was there with the check, and there was no money to cover it, and I have since learned that that was a fact; they had let Max draw the money out." Then he said, as we have already quoted, that there were no facts concealed by the parties.

To affect the validity of any contract for false representation or misrepresentation, the misrepresentations must be material. The parties must be deceived, and must rely on the representations made. In this case it conclusively appears that there were no false representations made; that the appellant was not deceived; that no advantage was taken of him or sought to be taken of him, and he does not claim in his testimony that there was.

There was therefore no question of fact to be submitted to the jury, and this court has recently said: "Hence there was no question to be submitted to the jury, and the court did not err in instructing a verdict for the plaintiff." *Mo. Pac. Rd. Co.* v. *Wellborn & Wells,* 170 Ark. 469, 280 S. W. 18.

And we conclude in this case that there were no questions of fact to be submitted to the jury, and that the court did not err in directing a verdict for the appellees, and the case is affirmed.

MISSOURI PACIFIC RAILROAD COMPANY *v.* MYERS.

Opinion delivered April 18, 1927.

1. CARRIERS—NEGLIGENCE IN MAKING DELIVERY.—Evidence *held* to show negligence of the railroad company in permitting a produce company, which was to be notified on arrival of a shipment of potatoes, to remove a portion of the shipment without an order from the shipper and without a bill of lading.
2. CARRIERS—NEGLIGENCE—FAILURE TO NOTIFY SHIPPER.—Evidence *held* to show that a carrier was negligent in failing to notify, within reasonable time, the shipper of the purchaser's failure to accept the shipment.
3. CARRIERS—NEGLIGENCE—FAILURE TO NOTIFY SHIPPER.—Even if a carrier had no notice of the purchaser's refusal to accept a shipment, if it could by exercise of reasonable diligence have known of such refusal, it became its duty to notify the shipper.
4. CARRIERS—SHIPMENT TO CONSIGNOR'S ORDER.—Where a car of potatoes was shipped to consignors with instructions to notify a third person on arrival of shipment, the carrier was not entitled to deliver the shipment without production of the bill of lading.
5. CARRIERS—PRESUMPTION FROM RECEIPT OF GOODS IN GOOD ORDER.—Evidence that a car of potatoes was in good condition when received by the carrier, and were damaged when delivered to the consignee, after the shipment had been rerouted twice, made a *prima facie* case of negligence against the carrier.

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

Thomas B. Pryor and *Vincent M. Miles,* for appellant.

C. M. Wofford, for appellee.

MEHAFFY, J. The appellees, plaintiffs below, brought suit against the railroad company in the Crawford Circuit Court on a carload of sweet potatoes shipped from Van Buren, Arkansas, to Electra, Texas. It was afterwards diverted to Salt Lake City, and then diverted to Butte, Montana. The car was delivered to the railroad company in Van Buren, Arkansas, on October 23, 1924, and a bill of lading was issued to the plaintiffs. The car was consigned to the Myers Commission Company, which was the partnership name of plaintiffs, at Electra, Texas, with directions to advise the Texas Produce Com-

pany and to allow inspection and deliver on the written order of the Myers Commission Company. The car was transported from Van Buren to Electra on schedule time, and arrived at Electra in good condition on the 27th day of October, 1924. The Texas Produce Company was promptly notified of its arrival. A draft had been forwarded to Electra, Texas, with the written order of the plaintiffs attached to it, for the delivery of the car upon the presentation of bill of lading and the payment of the freight. The agent of the Fort Worth & Denver City Railway Company at Electra, Texas, permitted an inspection of the car, and the representative of the Texas Produce Company got into the car and removed a number of baskets of the potatoes, and, and after this was learned by the railroad company, the agent then called on the Texas Produce Company, and it refused to take the car, although a portion of the contents had been removed and the bill of lading had not been surrendered.

It appears that the railroad company did not know about the removal of the potatoes from the car until the morning of the 30th of October, three days after it had arrived at Electra, Texas. The railroad company then asked for disposition of the car, but tried to prevail on the Texas Produce Company to take up the draft, but the produce company refused to do this. The produce company, however, did pay the amount of freight, but did not bring the order which was attached to the draft at the bank. The company held the money that the produce company paid for the freight until it had instructions to divert the car.

The Texas Produce Company never signed for the car. The carrier received instructions to divert the car, and it was diverted, and the company then paid back to the produce company money that it had paid for freight. The shipper was advised of the action of the Texas Produce Company in refusing to take the car, on November 1, and, on that day, ordered the car diverted to Salt Lake City, and, on November 4, ordered it diverted to Butte, Montana. When it arrived

at Butte, Montana, the potatoes were in damaged condition.

Plaintiff alleged in its complaint that it was damaged in the sum of $508.25, the amount that it would have received if the Texas Produce Company had accepted the car and paid the draft. Plaintiff alleged that the potatoes were in good condition when received by the railroad company, and the bill of lading provided that the defendants should deliver said shipment to the consignee only upon the written or telegraphed order of J. W. Myers, but that, without receiving any such order, the railroad company carelessly and negligently permitted the Texas Produce Company to unload and dispose of about 100 bushels of said potatoes without having paid the draft, and, without any written or telegraphed order from Myers, permitted the Texas Produce Company to take charge of said shipment, and that, after the produce company had paid the freight and disposed of a part of the potatoes, the railroad company permitted the produce company to purchase about 100 bushels of potatoes at a local market at Electra, Texas, and place them back in the car, to take the place of the potatoes that defendant had unlawfully allowed the produce company to take out, and the company returned to the produce company the freight, and then notified plaintiff that the produce company had refused to accept the car; that, by this action on the part of the railroad company, the car was delayed for a period of about five days, and potatoes of inferior quality were loaded in the car.

Plaintiff alleged that, in order to prevent as much loss as possible, it then diverted the car as above mentioned; that, when it reached Butte, Montana, it was found that the baskets had been broken and large quantities of potatoes had been bruised and frozen, and were in a decayed condition; that, through the negligence of the railroad company, the car of potatoes was delivered to the Texas Produce Company, and unnecessarily delayed.

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

J. W. Myers testified that he was a member of the firm of Myers Commission Company, and that, on the 23d day of October, 1924, he shipped a carload of sweet potatoes to Electra, Texas. He introduced a copy of the bill of lading, which was in the usual form, and is a receipt for 546 bushels of sweet potatoes; that they were strictly U. S. No. 1 grade of potatoes, consigned to the Myers Commission Company at Electra, Texas, notify Texas Produce Company, with permission to inspect, and directions to the railroad to deliver the potatoes upon surrender of the bill of lading and written order of the Myers Commission Company; that he got no returns on the car, but understood that it had not been delivered; and he testified that he put in a long distance call and talked over the telephone to the agent of the railroad company, and afterwards received a wire from the agent; that he asked the agent if he had delivered the car and if they had paid the freight, and he said they had not. Witness said he told the agent that he had information that the Texas Produce Company had hauled 100 bushels of the potatoes off to Wichita Falls, and that, after another car came in, they filled up with other potatoes, put them in their place. Witness said they had a customer in Butte, Montana, and got in touch with them and sold them the car, but that, when it got to Butte, it was in such bad condition they had to let the customer handle it for what they could get out of it. He said that the order attached to the draft on the car was as follows: "On presentation of this order, and after all freight charges have been paid, deliver to Texas Produce Company, Electra, Texas, Car A. R. T. 12497 sweet potatoes."

Witness further testified that draft was never taken up, and that he had sold the potatoes at a price of $1.75 a bushel, and that that was a fair price for the potatoes at that time; that that would have amounted to $955.50, and, deducting the freight, would leave $754.30; that they actually received $276.41, and had to pay $25 brokerage

and $5.36 telegraph and telephone messages, making a loss to the shipper of $508.25.

Bill of lading with the draft attached had been forwarded to a bank in Electra, Texas, with a notation on it allowing inspection and to deliver on written order to Meyers Commission Company.

By agreement, statement of L. V. Omberg, cashier, made to Huggins, agent at Electra, Texas, was introduced in evidence. This statement showed that the freight was $201.21, that the car was received at Van Buren on the 23d of October, 1924, and, after its arrival at Electra, Texas, the Texas Produce Company was notified, and that the car remained on hand until October 29, and nothing had been said as to whether they had accepted it; that then, on the morning of the 30th of October, the produce company was asked about it, and stated they were not going to accept it, and an investigation was made, and found that a man had got into the car, but they did not know how many potatoes he removed; called on the Texas Produce Company, and was told they would not accept the car, and finally the Texas Produce Company refused to pay the draft, but paid the freight, but did not bring the order which was attached to the draft at the bank; that witness held this money until they had instructions to divert the car; that he was not in position to watch shippers' order carloads of freight to see that the consignee does not get into them before payment of draft and freight charges.

Joseph W. Wallisch testified, in substance, that he was an inspector for the Department of Agriculture of Montana, and lived in Butte. That he inspected this car, and testified that potatoes have commercial grades, but that practically no cars coming from the South are graded according to United States grading rules. That the potatoes would not have met the requirements if they had not been decayed; they would simply have been graded as sweet potatoes. There was no evidence that they had been frozen.

Wm. F. Sweet testified, in substance, that he was the manager of Sweet Brothers, Inc., of Butte, Montana; that the car arrived in Butte on November 17 in very bad condition, showing about 36 per cent. decay; that a large percentage of the baskets were crushed and broken, and that the damage was caused by rough handling and being in transit too long.

Hugh Rouw testified, in substance, that, when an inspection of a shipment of sweet potatoes is permitted by the bill of lading, it only means that the receiver of the potatoes is permitted to break the seal and to look at the goods. In the diversion order given to the agent of the railroad company at Van Buren is the following:

"This is to notify: We will handle this car to the very best advantage, and if there is any difference between the amount that we realize from the sale and the original price that it was sold to the Texas Produce Company, we will file claim for the difference on the ground that agent at Electra allowed part of the contents of this car to be removed, and failed to notify us that the car was on hand, allowing it to remain at Electra for five days."

The defendant asked a number of instructions which the court refused to give, and the court gave a number of instructions over the objections of the defendant. These are all brought forward in defendant's motion for a new trial, but the defendant only argues two questions. Its first contention is that, when the Texas Produce Company was notified of the arrival of the car, the railroad company had complied with its contract, and that the plaintiffs could not recover unless it was shown that some of the potatoes were removed from the car and not put back; and, second, that the trial court adopted the wrong measure or rule of damage in permitting plaintiff to recover the contract price at which the potatoes were sold at Electra, Texas, less freight charges.

The appellant argues that, when the carrier promptly notified the Texas Produce Company of the arrival of the car and gave them a reasonable time to remove the

potatoes, it had performed its duty as a carrier, and was no longer liable as an insurer. They argue also that the Texas Produce Company was the agent of the shipper.

We think that it is unnecessary to decide whether the railroad company, in this case, was an insurer, or simply liable for negligence, because, under the view we take of the case, the railroad company was negligent in permitting the Texas Produce Company to remove a part of the potatoes without the order from the shipper and without the bill of lading, and it was also negligent in its failure to notify the shipper in a reasonable time, and this would be true whether there were any contract or not, but, under the contract in this case, the carrier was prohibited from delivering the car to the Texas Produce Company without the written or telegraphed order of the shipper and without the payment of the draft and freight charges.

"The carrier is not required to notify the shipper until it has notice, or, by the exercise of ordinary diligence, could have known, of the refusal of the consignee to receive the goods. After the carrier has notified the shipper that the consignee has refused to receive the goods shipped, it is liable only as a bailee, and the consignor is bound to demand delivery of the goods to himself and to take charge of them." 10 C. J. 271.

It will be observed that, whether the carrier had notice of the refusal or not, if it could, by the exercise of ordinary diligence, have known of the refusal, then it became its duty to notify the shipper. The car was received on October 27, and, according to the proof in the case, the carrier itself used no diligence, and did not know, until three or four days later, anything about the produce company having gone into the car, and had made no efforts to find out whether it had inspected or whether it intended to take the car. The Texas Produce Company was not the consignee, but was merely to be notified, and the carrier then was, under its contract, bound to deliver the car to the Texas Produce Company when

the written order was presented and payment was made according to the contract.

"Where a bill of lading or a shipping receipt contains a clause providing that a third person shall be notified of the arrival of the goods, or where it contains this clause and an additional clause reciting that the goods are shipped to the consignor's order, the carrier is not authorized to treat the person to be notified as a consignee, and, if it delivers the goods to him without production and surrender of the receipt or the bill of lading, it will be liable to the true owner of the goods for any loss resulting from such delivery. Delivery of the goods, under these circumstances, without surrender of the receipt or the bill of lading, constitutes a conversion. A direction of this character in a shipping receipt or a bill of lading raises no presumption that the person to be notified is the consignee, but, on the contrary, indicates that the carrier is not entitled to deliver the goods except on production of the bill of lading. The fact that a carrier was instructed to notify a third party of the arrival of goods gives him no right to require a delivery without the production and the surrender of the bill of lading, properly indorsed." 10 C. J. 259; *Tedford* v. *C. R. I. & P. Ry. Co.*, 116 Ark. 198, 172 S. W. 1006.

There are many cases cited in Corpus Juris under the section last referred to which fully sustain the rule announced.

"A shipment to the order of the consignor with directions to notify the consignee is an unmistakable indication by the shipper to the carrier that the title to the goods will not pass and the duty to deliver will not arise until the draft has been paid, the bill of lading taken up, and the latter presented to the railroad company." *Louisville, etc., R. Co.* v. *U. S. Fidelity Co.*, 148 S. W. 671, 125 Tenn. 658.

In this case we think that the evidence is ample to show that the goods were in good condition when received by the carrier and were damaged when delivered to the consignee at Butte, Montana, and this would make a

prima facie case of negligence of the carrier, if there were no other proof or evidence introduced, but the evidence introduced clearly showed negligence on the part of the carrier, and it would be liable to the shipper if the goods were injured by its negligence, whether it was an insurer or not.

The appellant next contends that the court erred in its measure of damages. We think it a sufficient answer to this to call attention to the fact that the evidence shows that the market value at Butte, Montana, was greater than the market value at Electra, Texas, or greater than the measure contended for by the plaintiff, and the appellant could not be prejudiced by this because the undisputed evidence is that plaintiff was entitled to recover more, if the rule now contended for by the appellant had been adopted, than he did recover.

Numbers of instructions were requested by the appellant and refused by the court, but the appellant does not argue any of them and does not argue the instructions given by the court. It is therefore unnecessary to set out the instructions or call attention particularly to them. We are of the opinion, however, that the court properly instructed the jury, and there is sufficient evidence to sustain the verdict. The judgment is therefore affirmed.

MADISON COUNTY v. SIMPSON.

Opinion delivered April 18, 1927.

1. COUNTIES—DISALLOWANCE OF CLAIM—TIME OF TRIAL ON APPEAL.—It was not error for the circuit court to hear an appeal from an order of the county court disallowing a claim in the absence of the county judge and his attorney, where the prosecuting attorney was present and announced that he had no defense, and the circuit court was not advised that the county judge desired to contest the allowance.
2. COUNTIES—AUTHORITY OF CIRCUIT CLERK TO PURCHASE TYPEWRITER.—The circuit clerk of Madison County was authorized to purchase a typewriter, under Crawford & Moses' Dig., § 1371, authorizing him to purchase things necessary for his office;

§§ 1976 and 2283, prohibiting a contract without an appropriation therefor, having no application to that county.

Appeal from Madison Circuit Court; *W. A. Dickson,* Judge; affirmed.

J. S. Jameson and *J. B. Harris,* for appellant.

J. W. Nance and *Earl Blansett,* for appellee.

MEHAFFY, J. The appellee, D. Simpson, filed the following account in Madison County Court on the 6th day of June, 1925:

"County of Madison, to Dick Simpson, circuit clerk and ex-officio recorder.

1 Royal Typewriter for recording for county, cash basis	$107.50
Total	$107.50

"State of Arkansas, County of Madison.

"I, D. Simpson, do solemnly swear that the foregoing claim is correct, and that no part was paid previously; that the materials furnished were actually furnished, and that the charges therefor do not exceed the amount allowed by law or customary charges for similar services or materials furnished when paid for in lawful money of the United States, and that such accounts, claims, demands, or fee bills are not enlarged, enhanced or otherwise made greater in consequence or by reason of any estimated or real depreciation in value of county warrants. Dick Simpson.

"Subscribed and sworn to before me this 6th day of June, 1925. (Seal) Dewey Glass, Clerk."

And the court made the following order disallowing the claim:

"Examined and disallowed: First, for the reason that there was no appropriation made to buy fixtures for the courthouse; second, for the reason that the quorum court of October, 1925, refused to make a levy to buy typewriter for the circuit clerk's office; third, that the county never bought a typewriter from D. Simpson. This 21st day of January, 1926. Charley King, county judge.

"Filed January 22, 1926.

"D. Simpson, clerk."

The appellee filed affidavit for appeal, the appeal was granted, and the circuit court reversed the finding of the county court and found in favor of the appellee for $107.50.

The appellant, Madison County, filed motion for a new trial, which was as follows:

"First. The court erred in permitting said cause to be heard without calling the case in regular order and hearing the cause in the absence of Charley King, county judge of said county, who had been in attendance on said court throughout the entire term for the purpose of contesting the allowance of the claim herein allowed by the court.

"Second. That said case was heard and judgment rendered without any evidence being adduced before the court in proof of said claim.

"Third. That said cause was heard and judgment rendered in the absence and without the knowledge of J. B. Harris, the attorney employed by the county judge of said county for the purpose of representing said county in contesting the allowance of said claim herein allowed.

"Fourth. That the court erred in allowing said claim and rendering judgment against the county for same, since there was no appropriation made to pay such claim by the levying court of said county.

"Fifth. That said judgment so rendered herein is contrary to law.

"Sixth. That said judgment is contrary to the evidence, since there was no evidence adduced.

"Seventh. That, for the misconduct of the plaintiff, D. Simpson, in having or procuring said cause to be heard in the absence of the county judge and the said attorney, which conduct resulted in a surprise to defendant that ordinary prudence could not have guarded against, to the great prejudice of the defendant.

"Premises being considered, defendant, Madison County, through its county judge, Charley King, respectfully moves the court or judge in vacation to set aside the judgment herein rendered against it and to grant it a new

trial, in order that justice may be done; but that, in case the court overrules this motion, defendant prays the court or judge to grant it an appeal to the Supreme Court of Arkansas. Charley King, county judge."

The court overruled the motion for new trial, and the appellant prayed an appeal to the Supreme Court, which was granted.

There is no bill of exceptions; no evidence was introduced except the verified account. The circuit court based its finding on § 1371 of Crawford & Moses' Digest, which is as follows:

"He shall preserve the seal and other property belonging to his office, and shall provide suitable books, stationery, furniture, and other things necessary for his office."

The appellant contends that the court erred in permitting the cause to be heard without calling it in regular order and in the absence of the county judge; second, that the judgment was rendered without any evidence; third, that it was rendered in the absence and without the knowledge of the attorney appointed to represent the county; fourth, that the court erred in allowing the claim, because no appropriation had been made by the levying court, and he also contends that the judgment is contrary to the law, and that no evidence was introduced, and it ought to be reversed for misconduct of plaintiff in procuring said cause to be heard in the absence of the county judge and his attorney.

The appellant relies on § 1976 of Crawford & Moses' Digest, as amended by Acts of 1917, which provides no county court or agent of any county shall hereafter make any contract on behalf of the county unless an appropriation has previously been made therefor and is wholly or in part unexpended, and in no event shall any county court or agent of any county court make any contract in excess of any such appropriation made, and the amount of any such contract or contracts shall be limited to the amount of the appropriations made by the quorum court.

Another section, 2283, of Crawford & Moses' Digest, prescribes the penalty for violating the above section.

It is earnestly contended by appellant that these statutes prevent or prohibit a recovery by the appellee in this case, and we think it would do this but for the act of March 3, 1919, which exempts Madison County from the provisions of this act. The act of 1917 amends § 1976 of Crawford & Moses' Digest, but excepts some counties from the provision of said act, but does not except Madison County. But the act of 1919, amending the act of 1917, does exempt Madison County from the provisions of the act. We therefore conclude that these statutes do not apply to Madison County.

As to whether plaintiff was authorized to purchase the typewriter depends upon the meaning of the clause, "and other things necessary for his office," in § 1371 of Crawford & Moses' Digest. This section authorizes the clerk to provide suitable books, stationery, furniture, and other things necessary for his office. If Madison County is exempt from the provisions of § 1976 and acts amendatory thereof, and we think it is, then the clerk could buy these things that were necessary without an appropriation having been made. Is a typewriter for recording for the county necessary?

We think that the order of the trial court overruling the motion for new trial answers the contentions of the appellant as to calling the case in regular order in the absence of the county judge and his attorney. The motion for new trial states that the county judge had been in attendance on the court throughout the entire term for the purpose of contesting the allowance of the claim. The order of the circuit court recites that no attorney was entered as special counsel, but, as a matter of fact, Mr. Harris had been employed to aid the prosecuting attorney, but that his employment had not been made known to the court or to the prosecuting attorney. The county judge, according to the recital in the order of the circuit court, had been present several days, but did not advise the court that he desired to contest the

cause. The county judge, being in attendance, doubtless knew that it was about the end of the term, and he does not allege that he called the case or had it called, or that he took any action at all with reference to it, and it is also recited in the order that the prosecuting attorney was present, and announced that he had no defense to make against the claim.

In the view we take of the case we do not think the circuit court erred in disposing of the case when it did. The prosecuting attorney was present as the representative of the county, but evidently took the view that, the typewriter being necessary, the clerk had authority to purchase it. Necessary, as used in the Digest, does not mean absolutely essential. The word "necessary" must be considered in the connection in which it is used, and, in this sense, we think it means convenient, useful, appropriate, suitable, proper, or conducive to the end sought. If it meant absolutely essential, then there are many things necessary and proper to have in the clerk's office that could not be said to be absolutely essential, but it seems to us that a typewriter is certainly one of the things necessary which the clerk would be authorized to purchase. *Motley* v. *Pike County,* 233 Mo. 32, 135 S. W. 39; *Ewing* v. *Vernon County,* 216 Mo. 681, 116 S. W. 518.

If Madison County had not been exempted from the provisions of the act, of course the clerk would have been bound by the statute relied on by appellant, and could not have purchased anything or made any contract binding the county unless there had been an appropriation made. But, since Madison County is exempted from the provisions of that act, and the other statute authorizes clerks to buy things necessary for their offices, we conclude that the clerk had authority to purchase the typewriter for the county, and the judgment of the circuit court is therefore affirmed.

CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY *v.* PERRY COUNTY.

Opinion delivered April 18, 1927.

JUDGMENT—RES JUDICATA.—The former decision of the Supreme Court denying recovery of taxes illegally assessed on the ground that the payment was voluntary *held res judicata* on a subsequent application for a refund of such taxes, under Crawford & Moses' Dig., § 10180, notwithstanding certain other taxpayers had recovered a refund, under such section, of taxes paid under said assessment.

Appeal from Perry Circuit Court; *Marvin Harris,* Judge; affirmed.

Thos. S. Buzbee, Geo. B. Pugh and *H. T. Harrison,* for appellant.

Boyd Cypert, for appellee.

McHANEY, J. Appellant has stated the case correctly, and we adopt its statement as follows:

"In April, 1923, appellant herein brought a suit in the Perry Circuit Court against Oscar Brazil, as sheriff and ex-officio collector, to recover $3,957.21, which the complaint alleged had been paid to the collector by the plaintiff on an erroneous assessment of taxes made against the property of the plaintiff for the year 1922, which sum it was alleged the collector had in his possession for the use of the plaintiff. The case was tried in the Perry Circuit Court on an agreed statement of facts, and a judgment was rendered dismissing the plaintiff's complaint. An appeal was duly prosecuted to the Supreme Court, which affirmed the judgment of the Perry Circuit Court, on the ground that the payment of the taxes illegally assessed was voluntary. This case is reported in 166 Ark. 246-251, 266 S. W. 66, under the style of the *Chicago, R. I. & Pacific Ry. Co.* v. *Brazil.*

"In the meantime, eighty-four other taxpayers of Perry County filed a petition in the Perry County Court, under the provisions of § 10180, C. & M. Digest, for a refund of the taxes paid by them under said erroneous assessment, which claim for a refund was allowed by

this court in the case of *Paschal* v. *Munsey,* 168 Ark. 58-64, 268 S. W. 849.

"On the 24th day of March, 1925, and subsequent to the decision of this court in the case of *Chicago, R. I. & P. Ry. Co.* v. *Brazil, supra,* appellant filed its petition in the Perry County Court, setting up the erroneous assessment of taxes made against its property for the year 1922 and the payment of same, and asking for a refund of same under the provisions of § 10180 of C. & M. Digest. The county, in response to this claim, pleaded the judgment of the court in the case of *Chicago, R. I. & P. Ry. Co.* v. *Brazil, supra,* as *res judicata.* The Perry County Court denied appellant's petition. An appeal was duly perfected to the Perry Circuit Court and a judgment was rendered in that court denying said petition, from which judgment this appeal is prosecuted."

The judgments of the county and circuit courts are right. The same point now before the court was decided adversely to appellant's contention in the case of *Chicago, R. I. & P. Ry. Co.* v. *Brazil,* 166 Ark. 246, 266 S. W. 66. Appellee set up this case in a proper plea as *res judicata,* and the circuit court properly so held. No useful purpose could be served in reviewing the facts in the former case, as we hold that the former decision was right, and it is decisive of this case.

The judgment is affirmed.

WARD FURNITURE MANUFACTURING COMPANY *v.* WEIGAND.

Opinion delivered April 18, 1927.

1. MASTER AND SERVANT—ASSUMED RISK.—An experienced employee, thoroughly familiar with the machine at which he was working and with the proximity of exposed cogs, being injured by his hand slipping from a lever to the exposed cogs, *held* to have assumed the risk, where he had made no complaint as to the lack of a guard over the cogs.
2. MASTER AND SERVANT—ASSUMED RISK AND CONTRIBUTORY NEGLIGENCE DISTINGUISHED.—The defense of contributory negligence, resting upon the fault or negligence of plaintiff concurring with

that of defendant, is distinguished from the defense of assumed risk, which rests on contract, and does not imply negligence on the master's part.

3. MASTER AND SERVANT—ASSUMED RISK AS A DEFENSE.—The defense of assumed risk remains in full force in this State, though contributory negligence has been abolished as a complete defense in this State as to all corporations except while engaged in interstate commerce.

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

C. W. Knott, for appellant.

Cravens & Cravens, for appellee.

McHANEY, J. This is an action by appellee to recover damages for a personal injury sustained by him in appellant's factory, in which several fingers of his right hand were torn off while working on a dovetail machine. He alleged in this complaint that his injury was the result of the negligence of appellant in furnishing him an unsafe place in which to work, in that he was required to work upon this machine, with the cogs which operate the machine located in a dark place, without any guards about them, which, he alleged, could have been done without interfering with the operation and efficiency of the machine. The power which operated this machine was brought to it by a belt operating over a pulley, and, when the operator wished to stop the machine, he did so by pushing the belt on to an idle-pulley by means of a bar of wood located underneath the machine, in close proximity to the cogs. In attempting to stop the machine by shifting the belt to the idle-pulley, his right hand slipped off the bar of wood and was caught in the cog-wheels, resulting in the injury aforesaid.

Appellant denied the allegation of negligence, and pleaded assumption of risk.

The plaintiff, appellee, was the only witness in the case, and he testified very frankly about the facts in the case. At the conclusion of the testimony appellant requested a peremptory instruction, which the court

denied. The case was submitted to the jury, under instructions not complained of here, which resulted in a verdict and judgment of $2,000 against appellant, from which comes this appeal.

The only ground urged here for reversal is the refusal of the court to instruct a verdict for appellant, because the uncontradicted evidence of the appellee himself shows that he assumed the risk of the injury complained of, and of any negligence of appellant in the manner charged, and that therefore the court should have said as a matter of law that he was not entitled to recover. We agree with counsel for appellant in this contention. The substance of the proof is that appellee had been working for the appellant continuously from the 28th day of December, 1921, until the date of his injury, which was on October 22, 1925; that he was injured on one of the older dovetail machines, which he had operated at intervals from the time he began working for appellant to the date of his injury. When he first began working on this machine, it was located on the floor of the factory above, but, for approximately two years before the date of the injury, it had been located on the ground floor of the factory, and had a different instrumentality for switching the belt to the idle-pulley, but he had operated this machine on the lower floor at intervals as much as three or four hours at a time. He knew the machine did not have a guard on it to protect his hand from getting into the cog-wheels, and he knew that it never had had such a guard; he knew the location of the shifting lever relative to the cogs, that is, how close the end of the shifting lever came to the cogs; he knew that, if he got his fingers into the cogs, he would be injured, and says that, when he attempted to shift the belt at the time of his injury, he saw the shifting lever. He had never registered any complaint to appellant or to any of its officers or agents about the absence of a guard or that the machine was dangerous to operate in its then condition. He admitted that he was an experienced employee, thirty-five years of age, and represented

himself to be an experienced machine man when he applied for employment with appellant, and had been engaged in operating this and other machines for appellant for the past four years. There was a big electric light right over the machine, only a short distance above it, and was burning at the time appellee was hurt.

In view of the undisputed facts we think it was the duty of the trial court to have instructed a verdict for the appellant.

In the case of *Hunt* v. *Dell,* 147 Ark. 95, 266 S. W. 1055, this court said: "The evidence revealed that appellee was a young man, almost grown, of intelligence, and, at the time of the injury, he had had considerable experience in the operation of the machinery on which he was injured. If the failure to replace the compressed air starter was a defect in the machinery, it was patent to one of reasonable intelligence, exercising ordinary care for his own safety. The danger of going between the flywheels to assist in turning them, so as to crank the engine, was likewise obvious to such an employee. Under this state of the case, established by the undisputed facts, the law attributes to the employee knowledge and appreciation of the danger incident to the work in which the employee is engaged, and exempts the employer from any liability to him on account of the injury received."

There is a distinction between the defenses of assumed risk and contributory negligence, and nowhere is this distinction better stated than in an opinion rendered by Judge RIDDICK in *Choctaw, O. & G. Rd. Co.* v. *Jones,* 77 Ark. 367, 92 S. W. 244, and, on page 372, he used this language: "There is, of course, a distinction between the defense of assumed risk and that of contributory negligence. The defense of contributory negligence rests on some fault or omission of duty on the part of the plaintiff, and is maintainable when, though the defendant has been guilty of negligence, yet the direct or proximate cause of the injury is the negligence of the plaintiff but for which the injury would not have happened. It applies when the plaintiff is asking damages for an injury which would not

have happened but for his own carelessness. On the other hand, the defense of assumed risk is said to rest on contract, which is generally implied from the circumstances of the case; it being a term which the law imports into the contract, when nothing is said to the contrary, that the servant will assume the ordinary risks of the service for which he is paid. The defense of assumed risk comes within the principle expressed by the maxim, *volenti non fit injuria.* This defense does not impliedly admit negligence on the part of the defendant and defeat the right of action therefor, as the defense of contributory negligence does, for, where the injury was the result of a risk assumed by the servant, no right of action arises in his favor at all, as the master owes no legal duty to the servant to protect him against dangers the risk of which he assumed as a part of his contract of service. *Narramore* v. *Cleveland R. Co.,* 96 Fed. Rep. 298.

"In other words, the defense of assumed risk rests on the fact that the servant voluntarily, or at least without physical coercion, exposed himself to the danger, and thus assumed the risk thereof. Having done this of his own accord, he has no right, if an injury results, to call on another to compensate him therefor, whether he was guilty of carelessness or not. *Smith* v. *Baker* (1891), Appeal Cases, 325; Opinion of Lord Bowen in *Thomas* v. *Quartermaine,* 18 Q. B. Div. 685."

Again, on page 374, this language is used: "In the application of the doctrine of assumption of risks a distinction must be also made between those cases where the injury is due to one of the ordinary risks of the service and where it is due to some altered condition of the service, caused by the negligence of the master. The servant is presumed to know the ordinary risks. It is his duty to inform himself of them; and, if he negligently fails to do so, he will still be held to have assumed them. The decision in the recent case of *Grayson-McLeod Co.* v. *Carter,* 76 Ark. 69, 88 S. W. 597, rests on that ground, as do many other cases found in the reports. But the servant is not presumed to know of risks and dangers caused by the

negligence of the master, after he enters the service, which changes the condition of the service. If he is injured by such negligence he cannot be said to have assumed the risk, in the absence of knowledge on his part that there was such a danger; for, as we have before stated, the doctrine of assumed risk rests on consent; but, if the injury was caused in part by his own negligence, he may be guilty of contributory negligence. On the other hand, if he realizes the danger, and still elects to go ahead and expose himself to it, then, although he acts with the greatest care, he may, if injured, be held to have assumed the risk." Citing cases.

This is not a case where the servant has made a complaint to the master of the unsafe condition of the machinery and a promise had been made to correct the condition, as was the case of *St. Louis, I. M. & S. R. Ry Co.* v. *Holman,* 90 Ark. 555, 120 S. W. 146, nor is it a case of a young and inexperienced employee, where, it is held in numerous decisions by this court, by reason of his youth and inexperience he is not aware of and does not appreciate the danger incident to the work or the danger of the place he is assigned to work, in which cases he does not assume the risk of his employment until his master apprises him of the dangers, as was so ably stated by Mr. Justice BATTLE in the case of *Emma Cotton Seed Oil Co.* v. *Hale,* 56 Ark. 232, 19 S. W. 600. In this case the court said: "If, having sufficient intelligence and knowledge to enable him to see and appreciate the danger to which he will be exposed, he knowingly assents to occupy a place set apart to him by the master, and does so, he thereby assumes the risks incident thereto, and dispenses with the obligation of the master to furnish him with a better place. It is then no longer a question whether such a place could not, with reasonable care and diligence, be made safe. Having voluntarily accepted the place occupied by him, he cannot hold the master liable for injuries received by him because the place was not safe. If, however, the servant, by reason of his youth and inexperience, is not aware of or does not appreciate the

danger incident to the work he is employed to do or to the place he is engaged to occupy, he does not assume the risks of his employment until the master apprises him of the dangers."

But, in the case at bar, the appellee was not only a man thirty-five years of age, but was a man of great experience in the operation of machinery in general, and of this particular machine, and knew the exact location of the cog-wheels and the location of the shifting-lever and its distance from the cog-wheels. He knew what would happen to him if he should get his hand into the cog-wheels. We therefore hold, as a matter of law, that appellee assumed the risk of the danger incident to that employment.

Contributory negligence, on the other hand, has been abolished as a complete defense in this State as to all corporations, except while engaged in interstate commerce (§ 7145, C. & M. Digest); but the doctrine of assumed risk still remains in force and effect in this State, and has been sustained by a long line of decisions of this court, and has been applied in numerous cases where the undisputed facts are applicable, such as in this case, as a complete bar to recovery.

The result of our views is that the court should have directed a verdict in appellant's favor, and, for the error in failing to do so, the judgment is reversed, and, it appearing that the evidence has been fully developed, the cause will be dismissed.

It is so ordered.

MILLHORN v. JONESBORO, LAKE CITY & EASTERN RAILROAD COMPANY.

Opinion delivered April 18, 1927.

1. APPEAL AND ERROR—CONCLUSIVENESS OF VERDICT.—Where disputed questions of defendant railroad company's negligence and fraud in obtaining a release from an injured brakeman were submitted to the jury under instructions not complained of, the verdict in favor of the defendant is binding on the Supreme Court.
2. TRIAL—INSTRUCTION NOT INVADING JURY'S PROVINCE.—In an action against a railroad company, an instruction that, if the jury found for plaintiff, they should determine the amount and deduct therefrom a sum named as the total amount of checks already paid by plaintiff to defendant, *held* not erroneous as invading the jury's province, where there was no dispute as to the amount received by plaintiff.

Appeal from Mississippi Circuit Court, Chickasawba District; *W. W. Bandy,* Judge; affirmed.

J. T. Coston, for appellant.

Eugene Sloan, for appellee.

McHANEY, J. Appellant has stated the facts correctly, and we adopt it as follows:

"This is an action by Millhorn against the Jonesboro, Lake City & Eastern Railroad Company to recover damages for an injury sustained by him, August 28, 1924, while in the employ of said railroad company as brakeman on one of its freight trains. The complaint alleges and the evidence shows that the 'steps on either side of the caboose sagged so that the rear end was about six inches lower than the front end, thereby causing the same to be defective and dangerous, all of which was unknown to the plaintiff, but the same was known, or, by the exercise of reasonable, ordinary care could and would have been known, by the defendant. On said day, when plaintiff was attempting to board said train, just west of Blytheville, by reason and on account of said defective condition of said step, when the plaintiff placed his foot thereon and attempted to board the train, his foot slipped and fell to the ground, dragging the plaintiff along until his foot caught in the unblocked frog in

defendant's track, thereby crushing, mangling, fracturing and breaking the bones in the plaintiff's ankle.' Millhorn was confined in the hospital, as a result of his injuries, from August 18 to September 4, 1924. Dr. Lutterloh, the physician for the railroad, attended him. After he left the hospital he made several trips from his home back to Jonesboro for examination by Dr. Lutterloh, from time to time, as directed by the doctor. About January 1, 1925, he was directed to report at Jonesboro again for examination. 'I started up to his office, and he said he was going to dinner, and asked me if there was anything urgent, and I said No, I just wanted to report to him, and he said, Let's see, what is your case? and I told him, and he said, Well, let's go down here in the drugstore, and he put me in one of these soda fountain chairs and looked at my foot, and said, That is fine; you are all ready to go to work. He said, You get in touch with Mr. Garner; you are ready to go to work; you are O. K.' He then reported to Garner, the manager, who assigned Millhorn to a job."

Before he went to work he signed a release agreement, releasing appellee, for an expressed consideration of $1, "from any and all claims for damages, past, present or prospective (including whatever has been suffered in the past and what may be suffered in the future from known or unknown results or effects) for or by reason of said injury; and the party of the first part accepts the consideration named herein in full, complete and final compromise and satisfaction of all the matters existing between the parties hereto relating or growing out of the accident and injuries aforesaid."

The release is dated January 1, 1925. The case was tried by a jury, resulting in a verdict and judgment for defendant, and plaintiff has appealed to this court.

While it is suggested that the undisputed evidence shows appellee was guilty of negligence, and that the release above mentioned was obtained from appellant by fraud, both of these questions were submitted to the jury under proper instructions, at least they were not

complained of, and the verdict of the jury is therefore binding on this court, both being disputed questions of fact. The only real contention made by counsel for appellant is that the court erred in giving to the jury instruction No. 11, over his objection. The instruction complained of is as follows: "If, under all the evidence and instructions given you, you should find that the plaintiff is entitled to a verdict, you shall first determine this amount and deduct from said amount so determined the sum of $687.47, which is the total amount of the checks that the defendant has already paid to the plaintiff, and your verdict should be for the difference."

The contention is made, and specific objection was raised to it on this ground, that it invaded the province of the jury, in that the court should have left to the jury to say how much money had been paid appellant after the injury, and while appellant was doing no work and performing no service for appellee. We do not think the instruction is open to this objection. The evidence as to the amount received by appellant from the date of his injury, August 18, to the date of his returning to work, January 7, 1925, was undisputed. Appellant himself testified to the various checks he had received, and the instruction of the court simply told the jury that, if they found for the plaintiff in any sum, they should first determine such sum and then deduct from that the total amount of the checks that had already been paid to plaintiff, and stated the sum to be $687.47. If the court should have been in error as to the correct amount, counsel for appellant should have suggested to the court the error in his calculation and had the amount corrected, or the jury could have added up the amount of checks he had received and have deducted the correct amount, if the court had erroneously stated the total.

No error appearing, the judgment of the circuit court was right, and it is therefore affirmed.

Missouri & North Arkansas Railroad Company v. Fowler.

Opinion delivered April 18, 1927.

1. Physicians and surgeons—"medical attention" defined.—A contract by which a doctor, in consideration of a railroad pass over lines within the State, agreed "to render free medical attention to patrons and employees" when injury has been sustained by reason of the company's negligence, *held* not to require surgical attention to an injured employee without compensation.
2. Physicians and surgeons—"free medical attention" construed.—A contract between a railroad and a doctor by which the doctor agreed to render "free medical attention" to patrons and employees of the railroad, being written by the latter, must be strictly construed against it.
3. Contracts—intention of parties.—In determining the meaning of a contract, courts try to determine the intention of the parties as ascertained from the words employed, the connection in which they are used, and the subject-matter.
4. Physicians and surgeons—contract to give medical attention.—A doctor's contract to render medical attention to employees of a railroad in cases where the company is liable for an injury did not require such attention to an employee who executed a general release to the company, which denied any liability.

Appeal from Boone Chancery Court; *Sam Williams*, Chancellor; affirmed.

Shouse & Rowland, for appellant.

George J. Crump, for appellee.

McHaney, J. This suit was begun in the Boone Circuit Court by the First National Bank of Harrison against appellees, Dr. J. H. Fowler and J. B. Price, to recover on a past due promissory note for $305, dated November 2, 1923, with interest from date at 10 per cent., executed by Price to Dr. Fowler for medical and surgical treatment, which note had been assigned to the bank by Dr. Fowler. Price filed an answer, admitting the indebtedness, and a cross-complaint against appellant railway company, who appeared and moved to dismiss for misjoinder. Its motion being overruled, appellant asked that the cause be transferred to equity, which was done by consent of all parties. Appellant then filed an answer to the cross-complaint of Price, and made its answer a

cross-complaint against Dr. Fowler. The facts are substantially as follows:

Dr. J. H. Fowler is a reputable physician and surgeon residing in Harrison. He had been a local surgeon for appellant in 1922, and, on February 2, 1923, he was again thus honored, appellant's vice president and general manager writing him the following letter:

"Agreement.

"Dear sir: I am handing you herewith annual pass No. T295, good over this railroad between stations in Arkansas, limited to December 31, 1923, which has been issued in your favor account local surgeon, with the understanding that, in accepting same, you agree, during the period it remains in effect, to render free medical attention to all patrons and employees of this company when called upon. Such medical attention to be rendered to patrons and employees when injury has been sustained by them on account of negligence of this company or its employees and when this company is legally liable for such injury. It being distinctly understood, however, that nothing in this agreement nor the acceptance by you of pass referred to authorizes you to act as an official or representative of this company in any matters, medical or otherwise.

"This agreement is written in duplicate, and the return to me of the attached copy, properly signed and dated, will be sufficient record of agreement and cancel all previous agreements between the parties hereto covering medical attention.

"This agreement and the transportation herein mentioned shall remain in effect until December 31, 1923, unless previously canceled by either party giving to the other thirty days advance notice.

Exhibit A.

"J. C. Murray,
"Vice Pres. & Gen'l. Manager.

"I acknowledge receipt of transportation referred to and accept the above named conditions.

(Sig.) "J. H. Fowler,
"Harrison, Ark."

In August, 1923, appellee, Price, while working in the shops of appellant, received a severe, painful and dangerous injury to a very delicate and private part of his person, under such circumstances, as he claimed, and the railway company denied, liability therefor. He was taken to the office of Dr. Fowler, where he received treatment in the nature of first aid, and was then removed to his home, where, at his and the railway company's joint request, he was treated for several months, two skillful and successful surgical operations being performed by Dr. Fowler during such time. On October 18 Price made a settlement with appellant for $236, and executed a written release therefor, at the conclusion of which the following paragraph appears: "I accept the above amount in full settlement, less fifty dollars advanced me September 5, 1923, or a total of $186, with understanding railway company pays medical and doctor bills due for injury."

On the same date Dr. Fowler, at the suggestion of Mr. Flinn, claim agent for appellant, rendered a statement of his account in the sum of $362.50 for professional services to Mr. Price, payment of which was, on October 26, refused, for the reason that, under its construction of the pass contract, such services were to be given free. Dr. Fowler then demanded payment of Price, and accepted the note sued on from Price, which he later transferred to the First National Bank.

Only two witnesses testified, Dr. Fowler for Price on his cross-complaint against appellant, Mr. Flinn for appellant. The contract hereinbefore set out between Dr. Fowler and appellant was offered in evidence, as was also the release agreement executed by Price.

At the conclusion of the testimony the chancellor entered a decree in favor of the First National Bank against Fowler and Price for the amount of the note, with accrued interest, in the sum of $372.60, and in favor of Price on his cross-complaint against the railway company in the sum of $372.60, and dismissed the cross-com-

plaint of appellant against Dr. Fowler, from which the railway company has appealed.

The principal question for consideration here, as well as in the court below, is the proper construction to be placed upon the written contract between Dr. Fowler and appellant. Dr. Fowler's construction of the contract was that, under it, he was to do office work in minor injuries, and give first aid treatment to persons suffering injury at appellant's shops, who would call at his office for treatment, but that, if he went out to homes, he would be entitled to make a charge therefor. Appellant, on the contrary, insists that the contract was clear and unambiguous, and, in accepting said pass, he agreed "to render free medical attention to all patrons and employees of this company when called upon. Such medical attention to be rendered to patrons and employees when injury has been sustained by them on account of negligence of this company or its employees, and when this company is legally liable for such injury. It being distinctly understood, however, that nothing in this agreement nor the acceptance by you of pass referred to authorizes you to act as an official or representative of this company in any matters, medical or otherwise." Appellant insists that this clause of the contract makes it obligatory on Dr. Fowler to render, not only medical attention, but surgical attention to such employees and patrons of the company as it may call upon him to render. We do not agree with appellant in this contention. In the first place, this is a contract written by appellant, and must be strictly construed against it. Nowhere in the contract is it provided that Dr. Fowler shall render any surgical attention to any employee or patron. Furthermore, we do not think it was in the contemplation of the parties, when the contract was written by appellant and accepted by Dr. Fowler, that he should be called upon to render any extensive medical attention to appellant's employees and patrons, but only such as might require first aid treatment, or for temporary or minor complaints and injuries. If appellant's contention is right, a situation might very

easily be seen where the entire time, or a large portion thereof, of the doctor might be taken up in treating patrons and employees of appellant who received injury due to its negligence. But such was not the intention of the parties, as evidenced by this contract. It was not intended that any great amount of the doctor's time should be demanded by appellant, and this construction is borne out by the small consideration for the contract, a pass over appellant's line in Arkansas.

In determining the meaning of the contract the courts try to determine the intention of the parties and give effect to that intention. We find the law on this subject well expressed in 6 R. C. L., 225: "Generally speaking, the cardinal rule in the interpretation of contracts is to ascertain the intention of the parties and to give effect to that intention if it can be done consistently with legal principles. It has been said that to this paramount rule all others are subordinate. The parties should be bound for what they intended to be bound for, and no more. The courts will hold them bound to that extent, if their intention can be arrived at. To hold any one bound further would be to impose on him an obligation which he never assented to, or intended to take upon himself, and would be the height of injustice and oppression."

Again, the same authority, in § 226, uses this language: "The intention of the parties is to be ascertained from the words employed, the connection in which they are used, and the subject-matter in reference to which the parties are contracting."

Other cardinal rules for the construction of contracts are laid down by the same authority in subsequent sections.

Many authorities might be cited from our own court to sustain this legal principle. This conclusion is further borne out by the language of the last sentence of the contract above quoted, stipulating that the doctor could not act as an official or representative of the company in any matter, medical or otherwise, conclusively

showing that he was not occupying the position of a general physician or surgeon for the company. Then the clause in the contract providing that he should render medical services free of charge only in cases where the company is legally liable for such injury strengthens the contention of appellee, for, in the instrument executed by Price, called a "general release," it denied any liability, and the payment of only $236 somewhat strengthened the idea of non-liability, inasmuch as it was agreed that Price received a very painful, severe and dangerous injury from which he suffered several months. Since the medical attention was not required by the contract to be rendered except in cases where the company was legally liable, it follows that, if the company should require the services of a doctor in non-liability cases, he would be entitled to compensation for such services.

Our conclusion is that the decree of the chancery court is right, and it is therefore affirmed.

COURTNEY v. G. A. LINAKER COMPANY.

Opinion delivered April 25, 1927.

1. APPEAL AND ERROR—CONCLUSIVENESS OF FINDING.—Where testimony of plaintiff contradicted that of defendant, a finding for plaintiff is conclusive on appeal.
2. PRINCIPAL AND AGENT—REVOCATION OF AGENCY—NOTICE.—A creditor of a store owner may recover the price of goods sold to her agent, after her agent had purchased the business from her, where she had not notified the creditor of the revocation of the agency.
3. EVIDENCE—BEST EVIDENCE.—In a creditor's action against a grocer for the price of goods sold to the agent of the grocer who had bought out the grocer's business, testimony as to publication in a newspaper of a notice of the sale of the business *held* inadmissible on the ground that proof of the publication was the best evidence.

Appeal from Desha Circuit Court; *T. G. Parham*, Judge; affirmed.

STATEMENT OF FACTS.

The G. A. Linaker Company, a corporation, sued Mrs. Emma E. Courtney to recover the sum of $321.61, with accrued interest, alleged to be due upon a merchandise account. Mrs. Courtney defended the suit on the ground that she had not purchased the merchandise sued for.

G. H. Linaker, president of the G. A. Linaker Company, a corporation, engaged in the business of handling wholesale packinghouse products at McGehee, Arkansas, was the principal witness for the plaintiff. According to his testimony, the invoices exhibited with the complaint are for merchandise sold to Mrs. E. E. Courtney, and there is a balance due on said account of $321.61, with six per cent. interest from May 5, 1925, unpaid. C. A. Courtney, a son of Mrs. E. E. Courtney, had charge of the store and purchased the goods, which were charged to her account. The plaintiff never knew that the defendant sold out to C. A. Courtney and executed a bill of sale to him and his brother for the merchandise on hand. The plaintiff dealt exclusively with Mrs. E. E. Courtney, and never had any notice whatever that there was any change of ownership in the business.

According to the evidence for the defendant, Mrs. E. E. Courtney operated a store in the town of McGehee which was managed by her son, C. A. Courtney. Subsequently she sold the business to C. A. Courtney and Guy H. Courtney and executed to them a bill of sale. They moved the business to another part of McGehee and operated it as their own. They told a salesman of the plaintiff that they had purchased the business from Mrs. Courtney, their mother, and were operating the store as their own. They purchased the goods involved in this lawsuit after they had bought out their mother. Mrs. Courtney had nothing whatever to do with the purchase of the goods.

The case was tried before the circuit court sitting as a jury, and from a finding and judgment in favor of the

plaintiff the defendant has duly prosecuted an appeal to this court.

Williamson & Williamson, for appellant.

Poff & Smith, for appellee.

HART, C. J., (after stating the facts). The record shows that the business was first owned by the defendant, Mrs. E. E. Courtney, and that she subsequently sold it to her two sons, who moved the store from one part of the town of McGehee to another part of it. According to the evidence for the plaintiff, it had no notice that Mrs. Courtney had sold the business to her sons and that they were operating it as their own when the bill of goods in question was purchased. It is true that the goods were purchased after the bill of sale had been executed, but, according to the evidence for the plaintiff, it had no notice that Mrs. Courtney had sold the business to her sons, and it sold the goods to the sons believing that they were the agents of their mother and were purchasing the goods for her. While the testimony of the plaintiff on this point was contradicted by that of the defendant, the finding of the circuit court in favor of the plaintiff is conclusive upon us upon appeal.

The case then stands here as if the plaintiff, not being notified of the sale of the store to C. A. Courtney and his brother, and consequently not being notified of the revocation of his authority as the agent of his mother, was justified in acting upon the presumption of its continuance. On its face the agency of C. A. Courtney as the representative of his mother in operating the store was a continuing authority, on which the plaintiff had a right to rely until its revocation. Persons who deal with an agent before notice of the recall of his powers are not affected by the recall. *Hatch* v. *Coddington,* 95 U. S. 48; *Insurance Co.* v. *McCain,* 96 U. S. 84; *Johnson* v. *Christian,* 128 U. S. 374; 9 S. Ct. 87, 2 C. J. § 650 (3), page 920, and 21 R. C. L. § 37, page 860.

In a note to 41 L. R. A. (N. S.), at page 664, it is said that it is settled that the acts of an agent, after his authority has been revoked, bind a principal as against third

persons who, in the absence of notice of the revocation of the agent's authority, rely upon its continued existence. It is also said that the cases are practically unanimous on this general rule, and most of them summarily state it as if it were an axiom. Many cases are cited in support of the rule. The cases hold that the duty of the principal to notify third persons of the termination of the agency is of the same character and requires the same degree of certainty as that which the law imposes upon the members of a partnership in the case of dissolution as a measure of protection against liability by reason of the subsequent acts of the former members of the dissolved firm.

This court is committed to the rule that the retiring members of a dissolved partnership continue liable to creditors who deal with the remaining members upon the faith of its continued existence without notice of its dissolution. *Bluff City Lumber Co.* v. *Bank of Clarksville,* 95 Ark. 1, 128 S. W. 58, and cases cited.

It is next insisted that the testimony of C. A. Courtney to the effect that notice was published in a newspaper in McGehee, stating that the business would be operated thereafter in the name of C. A. Courtney, grocer, was notice to the creditors that the sale had been made. The court properly sustained an objection to this testimony because proof of publication of the notice itself would have been the best evidence, and no foundation was laid for admitting secondary evidence of the publication of the notice. Moreover, if primary evidence of the publication of the notice had been introduced, it would only have been evidence of the fact of the sale and consequent revocation of the authority of C. A. Courtney to act as agent for his mother as between themselves. Under the authorities cited above, after a principal has appointed an agent in a particular business, parties dealing with him in that business have a right to rely upon the continuance of his authority until in some way informed of its revocation.

It follows that the judgment must be affirmed.

CARTER SPECIAL SCHOOL DISTRICT *v.* HOLLIS SPECIAL SCHOOL DISTRICT.

Opinion delivered April 25, 1927.

1. SCHOOL AND SCHOOL DISTRICTS—LEGISLATIVE CREATION—DISSOLUTION.—A special school district which was organized under Acts 1915, p. 1280, could not thereafter be abolished by the county board of education and its territory distributed between two adjoining districts.
2. SCHOOLS AND SCHOOL DISTRICTS—LEGISLATIVE CREATION.—When the Legislature creates a special school district, the county board of education has no power to change its boundaries without express authority from the Legislature so to do.
3. COURTS—POWER OF CIRCUIT COURT ON APPEAL.—Where the county court had no authority to make an order dissolving a special school district created by the Legislature, the circuit court had no jurisdiction on appeal, and thus no validity could be given to the order on appeal.
4. SCHOOLS AND SCHOOL DISTRICTS—EFFECT OF VOID ORDER OF DISSOLUTION.—Where the county court rendered a void order dissolving a special school district in 1915, the district could attack the order in a suit instituted in 1925, in the absence of circumstances creating an estoppel.
5. SCHOOLS AND SCHOOL DISTRICTS—RECOVERY OF FUNDS ERRONEOUSLY DISTRIBUTED.—A school district rightfully entitled thereto cannot recover funds erroneously distributed to and consumed in educational purposes by a district to which they did not belong.
6. SCHOOLS AND SCHOOL DISTRICTS—RECOVERY OF FUNDS ERRONEOUSLY DISTRIBUTED.—A school district, dissolved by a void order and erroneously deprived of its revenue, should proceed by injunction to prevent a wrongful apportionment of the taxes or bring suit against the district erroneously receiving them before they are expended for school purposes by the district improperly receiving them.

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

STATEMENT OF FACTS.

Carter Special School District of Cleveland County, Arkansas, brought this suit in equity against Hollis Special School District of Cleveland County, Arkansas, and the members of the county board of education in said county, to enjoin said board from apportioning the funds

voted and collected for Carter Special School District to Hollis Special School District or any other school district in said county. The complaint also prays that a master be appointed to take proof and ascertain the amount due by Hollis Special School District to Carter Special School District and order the amount so found to be paid into the county treasury of Cleveland County for the use and benefit of Carter Special School District.

The record shows that on March 26, 1915, an act of the Legislature was approved organizing certain territory in Cleveland County, Arkansas, into a special school district, to be known as Hollis Special School District. Acts of 1915, page 964. On March 30, 1915, an act of the Legislature was approved organizing certain territory in Cleveland County, Arkansas, into a special school district to be known as Carter Special School District. Acts of 1915, page 1280. On the 6th day of September, 1915, the county court of Cleveland County, Arkansas, made an order annexing to Hollis Special School District three sections of land situated in Carter Special School District, and Carter Special School District was dissolved and the balance of the territory thereof annexed to the common school district from which it had been taken by the Legislature in forming Carter Special School District.

An appeal was taken to the circuit court, and the order and judgment of the county court was there affirmed. The chancellor, under the pleadings and proof in the case at bar, found the facts as stated above and entered of record a decree sustaining a demurrer of the defendants to the complaint of the plaintiff on the ground that plaintiff did not have legal capacity to maintain the action. To reverse that decree the plaintiff has duly prosecuted an appeal to this court.

B. L. Beasley, for appellant.

George Brown, for appellee.

HART, C. J., (after stating the facts). The decree of the chancery court was erroneous. It appears from the record that Carter Special School District was organized

by a special act of the Legislature in 1915, and the county board of education could not thereafter abolish said special school district and add a part thereof to Hollis Special School District and the remaining part of its territory to the common school district from which the same had been taken.

It is the settled law of this State that, when the Legislature itself creates a special school district, neither the county board of education nor any other governmental agency has the power to change the boundaries thereof, without express authority of the Legislature so to do. *School Dist. No. 25* v. *Pyatt Special School Dist.*, 172 Ark. 602, 289 S. W. 778; *Park* v. *Rural Special School Dist. No. 26, ante* p. 514; and *Helvering* v. *McDougal*, 119 Ark. 162, 177 S. W. 937.

It follows that the order of the county court dissolving Carter Special School District and including a part of its territory within Hollis Special School District was void. In so far as it affected the territory of the plaintiff, it was a void order which the county court had no power to make, and consequently no validity could be given to the order by appeal to the circuit court. The circuit court could acquire no greater jurisdiction upon appeal than that possessed by the county court. In the very nature of things, if the county court had no jurisdiction the circuit court could acquire none upon appeal.

But it is insisted that the judgment of the county court cannot be attacked at this late date. We do not agree with counsel in this contention. If the order was void, and not merely voidable, no validity could be given to it by waiting from 1915 until June, 1925, when the present suit was instituted. No special circumstances are disclosed by the record why this delay could create any estoppel. As said in *Cotter Special School District No. 60* v. *School District No. 53*, 111 Ark. 79, 162 S. W. 59, certiorari will issue at the instance of the directors of a dismembered school district to quash a void order of the county court affecting the same, when there are no spe-

cial circumstances barring the action by laches or estoppel. In discussing the question, the court said:

"The directors of the special school district could not, by consent, deprive the people of the district, whom they represent, of their rights by consenting to an illegal and void order dismembering the territory of the district. And it was their duty, as soon as they discovered their mistake, to seek to have the same corrected, and it cannot be said that either the directors or the people, by long acquiescence in the conditions created by the void order, have estopped themselves from seeking to have the same quashed."

In the case at bar no special circumstances are presented which might operate as an estoppel or as a bar by laches, even if it could be said that lapse of time, under special circumstances, might bar the plaintiff from maintaining its action against the defendant.

Plaintiff also asks for a master to be appointed to state an account between Carter Special School District and Hollis Special School District as to the funds heretofore received by the latter district which should have been apportioned to the former. In this contention counsel for the plaintiff is wrong. In *Lepanto Special School District* v. *Marked Tree Special School District, ante* p. 82, it was held that school taxes collected under a regular assessment and levy and erroneously distributed to and consumed in educational purposes by a district to which they did not belong, cannot be recovered by the district which was rightfully entitled thereto. In such a case the district erroneously deprived of its revenue should proceed by injunction to prevent the wrongful assessment and apportionment of the taxes, or should bring a suit for the recovery thereof before such funds have been expended for educational purposes by the district erroneously receiving them.

The result of our views is that the decree will be reversed and the cause remanded for further proceedings in accordance with this opinion and with the general principles of equity.

NEWPORT v. YOUNG.

Opinion delivered April 25, 1927.

1. LICENSES—FEE FOR RESTAURANTS.—A license fee of $50 for each restaurant or wiener stand in a city of the second class with a population of 4,000 *held* not unreasonable as matter of law.
2. LICENSES—REGULATION OF BUSINESS.—A city may impose a license fee on a business sufficiently large to cover the expense of issuing the license and to pay the expenses incurred in enforcing such police and sanitary inspections as may be required.
3. LICENSES—REGULATION OF BUSINESS.—An ordinance imposing a license fee of $50 per annum on restaurants and wiener stands is not invalid because the officers made no inspection of such places, and the money collected was used for another purpose.
4. LICENSES—VALIDITY OF FEE OF RESTAURANTS AND WIENER STANDS.—That two defendants operating wiener stands did not do nearly as much business as the two defendants operating restaurants *held* not to make arbitrary and discriminatory an order which imposed an annual license fee of $50 on both wiener stands and restaurants.

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

STATEMENT OF FACTS.

William Ruffner, W. L. French, Joe Cullins and W. C. Young were each fined $25 in the mayor's court in the city of Newport for violating an ordinance licensing certain occupations. A great many occupations are enumerated in the ordinance, and the license fee for each restaurant or hamburger or wiener stand is $50 per annum. The defendants appealed to the circuit court, and the cases were consolidated and tried before the circuit court sitting as a jury. The ordinance was introduced in evidence.

The mayor of the city was also a witness. According to his testimony, a great many complaints of disorderly conduct were made about the restaurants. People frequently gathered there at night and were guilty of disorderly conduct. The demands of those running the restaurants for protection against disorderly persons were so numerous that the council passed the ordinance in ques-

tion so that additional policemen might be employed at night.

According to the testimony of the city health officer, it was necessary for him to look closely after restaurants and wiener stands where meats, milk and other foods and drinks were prepared and served in order to see that they were kept in a sanitary condition. It would require one man's time to do this, and his services would be worth $250 per month.

According to the evidence for the defendants, no inspection or regulation was made of their places of business by either the police or the health department of the city of Newport, and no such regulation as testified to by the city was needed. They operated their places so as to keep them in a sanitary condition, and no disorder ever occurred there from their patrons or other persons who congregated there.

The circuit court found that Newport was a city of the second class, with a population of 4,000, and that a license fee of $50 was beyond the reasonable expense of issuing the license and regulating the business. Therefore the circuit court held that $50 was excessive as a fee for regulating the business, and was an unreasonable exercise of the police power. From the judgment rendered the city of Newport has duly prosecuted an appeal to this court.

John H. Caldwell, for appellant.

Gustave Jones, for appellee.

HART, C. J., (after stating the facts). We do not think the license fee of $50 for each restaurant or wiener stand is so large and so out of proportion to any lawful purpose to which it could be applied in the use of the police power that it must be declared, as a matter of law, unreasonable and illegal. In *Fort Smith* v. *Gunter*, 106 Ark. 371, 154 S. W. 181, it was held that a charge by the city of $25 per year, $15 for six months and $3 for one month as a license fee on restaurants, was not an unreasonable charge. In the very nature of things there might be a necessity for closer inspection and regulation in one

city than in another. Conditions vary greatly in different localities, and the city council is the judge of each case. The amount the city council has a right to demand for a license fee depends upon the extent and expense of supervision made necessary by the business in the city or town where it is licensed. A fee sufficient to cover the expenses of issuing the license and to pay the expenses which may be incurred in the enforcement of such police and sanitary inspections as may be lawfully exercised over the business may be required. The amount necessary to meet all expenses cannot in all cases be ascertained in advance, and expenses reasonably anticipated may be included. In fixing the fee the city may take notice of local conditions and the extent and character of police regulation required. *Fayetteville* v. *Carter,* 52 Ark. 301, 12 S. W. 573, 6 L. R. A. 509; *Texarkana* v. *Hudgins Produce Co.,* 112 Ark. 17, 164 S. W. 736, 51 L. R. A. N. S. 1035; *Kirby* v. *Paragould,* 159 Ark. 29, 251 S. W. 374; *North Little Rock* v. *Kirk, ante* p. 554. When the testimony introduced by the city as to the requirements necessary for police and sanitary inspection of restaurants is considered, it cannot be said as a matter of law that a license fee of $50 is unreasonable and therefore illegal.

It is next contended that the ordinance was invalid because the evidence for the defendants shows that no police inspection of their places of business was made. Under the authorities cited the city council was the judge of whether local conditions required police and sanitary inspections. Whether or not the officers discharged their duty can be of no avail in declaring the ordinance valid or invalid. Neither can the fact that the money collected was used for another purpose be considered by us in testing the validity of the ordinance. There is a way of compelling officers to discharge their duties and to expend the city funds for the purpose for which they were collected, and the fact that they did not do so, if such be the fact, can in no manner affect the validity of an ordinance of this kind.

It is next insisted that the ordinance is arbitrary and discriminatory because two of the defendants were operating wiener stands and that they did not do nearly as much business as the other two defendants who were operating restaurants. This is a matter which we cannot consider. It may be that the situation and local conditions required more expense in regulating wiener stands than in regulating restaurants. This might be due from the character of the people frequenting the different places. In any event this was a matter addressed to the city council, and cannot be considered by the courts as affecting the validity of licensing ordinances.

The result of our views is that the court erred in declaring the ordinance on its face to be a revenue measure and therefore void. The judgment will be reversed, and the cause remanded for further proceedings according to law and not inconsistent with this opinion.

BOWERS v. RIGHTSELL.

Opinion delivered April 25, 1927.

1. EJECTMENT—PRAYER FOR ACCOUNTING—TRANSFER TO EQUITY.—In a suit in ejectment by a tenant in common, a prayer for judgment for half of any rents and profits defendant may have received from the land calls for an accounting, and a motion to transfer to equity was properly granted.
2. EQUITY—COMPLETE RELIEF.—When the chancery court takes jurisdiction of a case for one purpose, it will decide all the issues raised by the pleadings.
3. TENANCY IN COMMON—RIGHT TO MAKE IMPROVEMENTS.—A tenant in common has a right to make improvements on the land without the consent of his co-tenants, and, although he has no lien on the land for the value of the improvements, he will be indemnified for them, whether made by him or by those claiming under him, in a proceeding in equity to partition the land between himself and his co-tenants, either by having the part upon which the improvements are located allotted to him, or by having compensation for them if thrown into the common mass.

4. EJECTMENT—EQUITABLE DEFENSE.—In ejectment defendant did not have to wait until the title to the land was settled before asserting an equitable right for compensation for improvements.
5. TRIAL—TRANSFER OF CAUSE.—A defendant, when sued at law, must make all the defenses he has, both legal and equitable, and if any of them are exclusively cognizable in equity, he is entitled to have the cause transferred to equity.
6. APPEAL AND ERROR—PLEADINGS AMENDED TO CONFORM TO PROOF.—In ejectment, where the undisputed evidence showed that defendant had made valuable improvements, the pleadings will be considered on appeal as amended so as to entitle him to compensation for them in equity.
7. DESCENT AND DISTRIBUTION—NEW ACQUISITION.—In case of a new acquisition, a surviving widow, in the absence of any children, takes a half interest in her deceased husband's land, as tenant in common with his heirs at law.
8. ADVERSE POSSESSION—GRANTEE OF TENANT IN COMMON.—Where a tenant in common of a half interest in land conveys the entire estate to another who takes possession under claim of the entire estate, his possession is adverse to the other tenants in common, and he acquires title by occupancy for the statutory period, except as to those under disability.
9. ADVERSE POSSESSION—CO-TENANCY.—In order for possession of a co-tenant to be adverse to his co-tenants, knowledge of his adverse claim must be brought home to them directly or by such notorious acts that notice may be presumed.
10. ADVERSE POSSESSION—EXTENT.—Actual possession of a part of land under deed describing a larger tract uninclosed is possession of the entire tract.

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

STATEMENT OF FACTS.

Wash Bowers instituted an action of ejectment in the circuit court against W. W. Rightsell and W. M. Ramsey to recover an undivided one-half interest in eighty acres of land and for one-half of the rents and profits.

According to the allegations of the complaint, both parties claim from a common source of title. Daniel Bowers died intestate in Pulaski County, Arkansas, on the 28th day of February, 1908, owning the land in controversy. He had no children, and, the lands being a new

acquisition, one-half went to his widow, Betty Bowers, and one-half to his mother, Melvina Farmer, for life, and then to the collateral heirs of Dan Bowers. Melvina Farmer died in October, 1908, and Betty Bowers and the collateral heirs of said Daniel Bowers became tenants in common of said land. The collateral heirs of Daniel Bowers are his brother, Wash Bowers, the plaintiff in this action, and certain nephews and nieces, who have not conveyed their interest in said land to the plaintiff, and certain other collateral heirs who have conveyed their interest to the plaintiff. The names of all the collateral heirs are set out in the complaint. Betty Bowers executed a deed to said land to W. W. Rightsell, who is now in possession of it and is withholding a one-half undivided interest in it from this plaintiff. The plaintiff further alleges that said Rightsell has sold, rented or in some manner let a part of said tract of land to the defendant, W. M. Ramsey, who is now unlawfully withholding the possession of same from this plaintiff.

The defendant, Rightsell, filed an answer, denying the allegations of the complaint and claiming title to the land by mesne conveyances from Melvina Farmer and by adverse possession. He moved for a transfer to equity, which was granted, over the objections of the plaintiff.

The plaintiff introduced evidence tending to prove the allegations of his complaint.

The defendant, Rightsell, introduced in evidence a deed to said land from Melvina Farmer to Betty Bowers, executed on the 11th day of March, 1908, and a deed from Betty Bowers to himself, executed on the 20th day of January, 1912. As soon as Rightsell obtained possession of the land, under his deed from Betty Bowers, he inclosed the same with a wire fence in 1912, and ever since has been in exclusive possession of said land, claiming it as his own. He owned land next to it, which was occupied by his tenants, and he rented the land in question to them, and they cultivated a part of it. Rightsell has

paid taxes on the land ever since he received a deed to it. The plaintiff, Wash Bowers, helped to inclose the land with a wire fence, and ever since then has lived within two miles of the land, and knew that W. W. Rightsell had possession of it and was claiming it as his own. About three years before the trial of the case, which was in March, 1926, the defendant, Rightsell, erected a filling station on the land at a cost of $1,500, and also a small house. On the part of the plaintiff it was shown that, in 1917, a part of the wire fence was torn down, and was not thereafter rebuilt. Other facts will be stated or referred to in the opinion.

The chancellor found the issues in favor of the defendants, and it was decreed that the complaint of the plaintiff should be dismissed for want of equity and the title to said land be confirmed in W. W. Rightsell, free from any claim or interest of the plaintiff. To reverse that decree the plaintiff has duly prosecuted an appeal to this court.

J. F. Wills and *Frank Strangways,* for appellant.

Robinson, House & Moses, for appellee.

HART, C. J., (after stating the facts). It is earnestly insisted by counsel for the plaintiff that the decree should be reversed because the plaintiff had a right to maintain his action of ejectment in the circuit court, and that it was reversible error to transfer the case to the chancery court and try it there. It is true that it was held in *Trapnall* v. *Hill,* 31 Ark. 345, that, where one tenant in common ousts another, or does some act amounting to a total denial of his rights as co-tenant, the latter may maintain ejectment, and, under the statute, may recover his proportion of the rents and profits in the action. It is also held in that case that, in matters of account, especially where a trust exists as between tenants in common, courts of equity exercise concurrent jurisdiction with courts of law. Hence in that case it was held that, upon a complaint in equity by a tenant in common, alleging an ouster by his co-tenant and praying an account of

the rents and profits received by him, and possession of his share of the premises, the court will entertain jurisdiction.

The difference between that case and the case at bar is that, in the former case, the plaintiff elected to sue in equity, and in the present case he elected to sue at law, and the case went to equity over his objections. It will be noted, however, that the plaintiff in his complaint alleged matters which gave the chancery court jurisdiction. He did not sue for the rents in a lump sum in the way of damages, but prayed judgment "for one-half of any rents and profits said Rightsell may have received from" said land. This amounted to a prayer for an accounting, and, from the allegations of the complaint, it appears that the defendant has been in possession of the land for several years and that he has sold a part of the land to W. M. Ramsey and put him in possession of the same. Thus it appears that the accounts would run through several years; and the court, in its discretion, might transfer the case to the chancery court for the reason that the accounting could be better settled in a court of equity than by a jury. It is the settled rule in this State that, when a chancery court takes jurisdiction of a case for one purpose, it will decide all the issues raised by the pleadings.

Moreover, the plaintiff alleges that Rightsell had sold a part of the land to W. M. Ramsey and had placed him in possession of it. The proof on the part of the defendant, Rightsell, shows that he had erected a filling station on the land at a cost of $1,500, and also a small house. In this connection it may be stated that we are testing the question of jurisdiction under the allegations of the complaint and the proof offered to establish them. According to the allegations and proof made by the plaintiff, he was a tenant in common with the defendant, Rightsell. It is well settled in this State that, in his relation as tenant in common, one has a right to make improvements on the land without the consent of his

co-tenants; and, although he has no lien on the land for the value of his improvements, he will be indemnified for them, whether made by himself or those claiming under him, in a proceeding in equity to partition the land between himself and co-tenants, either by having the part upon which the improvements are located allotted to him, or by having compensation for them, if thrown into the common mass. *Drennen* v. *Walker,* 21 Ark. 539; *Dunavant* v. *Fields,* 68 Ark. 534, 60 S. W. 420; and *Lemly* v. *Works,* 138 Ark. 426, 211 S. W. 362. The undisputed proof shows that the land was situated near the city of Little Rock and on a public road leading into the city. Rightsell built a small house and, in addition thereto, a filling station, at a cost of $1,500. Under the authorities above cited, Rightsell would have the right in equity to be compensated for these improvements if they could be allotted to him in the division of the land, or, if not, he could be compensated for them, if that could be done without doing injustice to his co-tenant.

It is true that Rightsell was claiming title to the land by adverse possession, and that his claim of title to the whole of the land should be first settled. But, in the event that the court should decide adversely to him, he would have been entitled to have the case transferred to equity to assert his rights to compensation for improvements, under the rule stated. He need not wait until the title to the land was settled before asserting his rights. It is well settled in this State that a defendant, when sued at law, must make all the defenses he has, both legal and equitable, and, if any of them are exclusively cognizable in equity, he is entitled to a transfer to equity. *Daniel* v. *Garner,* 71 Ark. 484, 76 S. W. 1063, and *Langless* v. *McCarthy,* 169 Ark. 948, 277 S. W. 27.

It is also well settled that the pleadings in a case may be considered amended so as to conform to the proof. *Britton* v. *Meriwether,* 166 Ark. 414, 265 S. W. 364. The undisputed evidence shows that Rightsell made these improvements, and the pleadings should be con-

sidered amended so as to entitle him to be compensated for them in equity.

The result of our views is that the chancery court had jurisdiction of the case on the question of accounting by Rightsell in his fiduciary relation to the plaintiff under the allegations of the complaint, and also in asserting his rights to compensation in equity for the improvements if the plaintiff should prevail as to his claim of title. Hence there was no error in transferring the case to the chancery court and trying it there.

The defendant, Rightsell, asserted title to the land by adverse possession. Daniel Bowers died, leaving his widow, Betty Bowers, and no children. He also left surviving him his mother, Melvina Farmer, and the plaintiff, his brother, and other collateral heirs. His widow became invested with an undivided one-half interest in the land as tenant in common with his brothers and sisters, after the death of his mother. *Avera* v. *Banks,* 168 Ark. 718, 271 S. W. 970. According to the allegations of the complaint, the estate was a new acquisition, and Betty Bowers became a tenant in common with the plaintiff and other collateral heirs of Dan Bowers after the death of Melvina Farmer, the mother. Melvina Farmer executed a deed conveying the title to all the land to Betty Bowers, and she in turn conveyed all of the land to the defendant, Rightsell. A conveyance by a co-tenant of the entire estate to a stranger gives color of title; if possession is taken thereunder, and the grantee claims the whole, his possession is adverse to the other tenants in common, and he acquires title by occupancy for the statutory period, except as to those under disability. *Jackson* v. *Cole,* 146 Ark. 565, 226 S. W. 513, and *Parsons* v. *Sharpe,* 102 Ark. 611, 145 S. W. 537.

It is also well settled that, in order for the possession of a tenant in common to be adverse to that of his co-tenants, knowledge of the adverse claim must be brought home to him directly or by such notorious acts of unequivocal character that notice may be presumed. *Singer* v. *Narron,* 99 Ark. 446, 138 S. W. 958; and *Oliver*

v. *Howie,* 170 Ark. 758, 281 S. W. 17. In the case at bar, when Rightsell received his deed from Betty Bowers in 1912 he took possession of the entire tract as his own, and erected a woven wire fence forty-two inches high around it. He put two barbed wires above the woven wire. The plaintiff helped him erect the fence, and has lived within two miles of the place ever since. The evidence for the defendant, Rightsell, shows that he has been in the exclusive adverse possession of the land ever since he received the deed to it in 1912 and has paid the taxes on the land since that time.

The evidence for the defendant shows that he took possession of the land under a deed in January, 1912, which constituted color of title, and has held adverse possession of it ever since, which was more than seven years before this suit was brought. It is true that the plaintiff attempts to contradict his evidence on this point by showing that the fence which the plaintiff helped the defendant build when he took possession of the land in 1912 was broken down in places by soldiers from Camp Pike passing through it in 1917, but we do not think the evidence sufficient for that purpose. It has been repeatedly held by this court that the actual possession of a part of the land under a deed describing the entire tract is in law possession to the limit of the whole land. *Johnson* v. *Elder,* 92 Ark. 30, 121 S. W. 1066, and cases cited; and *Moore* v. *McHenry,* 167 Ark. 483, 268 S. W. 858. The undisputed evidence shows that the defendant's tenants cultivated some parts of the land each year after the defendant took possession of it in January, 1912. The plaintiff could not have been, in any event, prejudiced by the action of the court in transferring the case to chancery and trying it there. The result should have been the same whether the case was tried at law or in equity.

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

INDEPENDENCE COUNTY v. LESTER.

Opinion delivered April 25, 1927.

1. COUNTIES—OPENING OF HIGHWAYS—COMPENSATION FOR LAND TAKEN.—Crawford & Moses' Dig., § 5249, providing for opening of highways by the county court and giving the landowner the right to present his claim to the county court for taking of property for right-of-way, *held* not in conflict with Const., Amdt. 11, prohibiting cities and counties from making allowance for any purpose in excess of the revenue from all sources for the fiscal year, in view of Const., art. 2, § 22, providing that property shall not be taken, appropriated, or damaged for public use without compensation.
2. EMINENT DOMAIN—COMPENSATION FOR LAND TAKEN FOR HIGHWAY.—A county had no right to enter upon land appropriated for a highway without paying therefor, though the county fund for the year was exhausted, preventing the county from allowing the claim under Amdt. 11 to the Constitution.
3. EMINENT DOMAIN—TAKING OF LAND FOR HIGHWAY—CLAIM AGAINST COUNTY.—Condemnation of land for highway purposes by the county court under § 5249 creates *ipso facto* a valid claim for compensation in favor of the landowner against the county.

Appeal from Independence Chancery Court; *A. S. Irby,* Chancellor; affirmed.

W. K. Ruddell, for appellant.

Coleman & Reeder, for appellee.

WOOD, J. This is an action by Desha Lester, the appellee, against Independence County, the appellant, to restrain the latter from taking possession of 6,000 feet of the right-of-way of the Batesville & Heber Springs Highway, which was a Federal and State project, until he received compensation therefor. He alleged that his land had been opened and established as part of the State and Federal highway by the county court under § 5249 of C. & M. Digest; that he had presented his claim for damages to the county court, and that the claim was disallowed on the ground that the county court was without jurisdiction to allow the claim because the fiscal year had expired, and the revenue during the fiscal year in which appellee's claim accrued had been exhausted, and that therefore the county court was prohibited by

Amendment No. 11 of the Constitution from allowing the claim; that, notwithstanding the fact that the county court refused to allow him compensation for his lands condemned by such court, the county judge had entered upon such land, cleared the right-of-way, and is proceeding with the construction of such road, and, unless restrained, the road will be opened to the public. The appellee alleged that § 5249, *supra,* had been rendered unconstitutional by the adoption of Amendment No. 11 of the Constitution. Appellee prayed that the county be restrained from appropriating his land for use as the highway until he had received compensation for same. The appellee made an exhibit to his complaint the order of the county court condemning his lands and authorizing the Highway Department to go upon the same and construct the road. The appellant demurred to the complaint on the ground that the condemnation order showed that the road had been taken over by the Highway Department of the State and the same was being constructed by such department, and that the complaint was otherwise insufficient to state a cause of action.

The court overruled the demurrer, and tried the cause upon the facts as stated in the pleadings and an agreed statement showing the work that had been done on the highway. The court rendered a judgment in favor of the appellee, restraining the county judge, the county of Independence, and all persons acting under the authority of the order of the county court, from taking possession of the appellee's lands until he had been compensated for same. From that judgment this appeal is duly prosecuted.

Section 5249 of C. & M. Digest, under which the land of the appellee was condemned for highway purposes, is not unconstitutional, as held by this court in *Sloan* v. *Lawrence County,* 134 Ark. 121, 203 S. W. 260. The above decision, declaring § 5249 valid, was prior to the adoption of Amendment No. 11 to the Constitution; but Amendment No. 11 to the Constitution, adopted in 1924, does not have the effect of rendering § 5249, *supra,*

unconstitutional. It is clearly the duty of county courts, when establishing new roads or laying out old roads under the authority of § 5249, not to ignore any of the applicable provisions of the Constitution. Section 22 of article 2 of the Constitution provides that the right of property is before and higher than any constitutional sanction, and private property shall not be taken, appropriated, or damaged, for public use, without compensation therefor. The county court, in exercising the authority conferred upon it in § 5249, *supra,* cannot disregard the above provision of the Constitution, nor can it disobey the mandates of Amendment No. 11. To be valid, the official acts of the county court, in exercising its authority under § 5249, *supra,* must be in conformity with both of these provisions as they have been interpreted by the decisions of this court. The statute above, under which the county court was proceeding to condemn the appellee's lands, provides:

"If the owner of the land over which any road shall hereafter be so laid out by the court shall refuse to give a right-of-way therefor, or to agree upon the damages therefor, then such owner shall have the right to present his claim to the county court, duly verified, for such damages as he may claim by reason of said road being laid out on his land; and, if he is not satisfied with the amount allowed him by the court, he shall have the right to appeal as now provided by law from judgments of the county court; provided, however, no claim shall be presented for such damages after twelve months from the date of the order laying out or changing any road; provided further, that, when such order is made and entered of record laying out or changing any road, the county court or the judge thereof shall have the right to enter upon the lands of such owner and proceed with the construction of such road. Provided further, all damages allowed under this act shall be paid out of any funds appropriated for roads and bridges, and, if none such, then to be paid out of the general revenue funds of the county."

Construing this statute in *Sloan* v. *Lawrence County, supra,* we said:

"The statute under consideration meets every constitutional requirement. It authorizes the county court to determine, without notice, the necessity for taking lands for public use, but contains ample provisions concerning notice and hearing upon the question of compensation, or damage, which mean the same thing in that connection. There is no provision for formal notice, but the order itself and the taking of the property thereunder are, in the very nature of things, acts of such publicity as to constitute notice, and the property owner is given twelve months within which to apply to the county court for an allowance of compensation, and the hearing is then given on that question."

In *Kirk* v. *High,* 169 Ark. 152, 273 S. W. 389, 41 A. L. R. 782; *Nelson* v. *Walker,* 170 Ark. 170, 279 S. W. 11; *McGregor* v. *Miller, ante* p. 459, construing Amendment No. 11, we said:

"We think the amendment means just this: that, if a county, city or town avails itself of the provision authorizing the taking up of its outstanding indebtedness, it shall not thereafter draw warrants upon the treasurer for an amount in excess of its annual revenues. It must stay out of debt. It means further that, if a city, county or town has any outstanding unpaid warrants which it does not take up by issuing bonds as authorized by the amendment, it must not add to its existing indebtedness by issuing more warrants than can be paid out of the revenues of the current year."

In the case of *McGregor* v. *Miller, supra,* we held that the fiscal year mentioned in Amendment No. 11 begins on January 1 and ends on December 31; and we also held that warrants issued as well as obligations incurred which are in excess of the revenues are void, and the action of the court in issuing a warrant, or in making an allowance upon which a warrant might be later issued, is *coram non judice,* and said warrants and allowances are void.

Now, as Amendment No. 11 was adopted after the enactment of § 5249, *supra*, it is necessary for county courts hereafter, in proceeding upon the authority of the above section, to do so, and they can only do so, provided the finances of their counties will justify making compensation to the landowner for the damages he has sustained by reason of taking his land for public use. County courts cannot claim any authority, or exercise any power, under the statute to condemn private land for public use as a highway, without making provision for compensation to the landowner for the damages he has incurred by the taking of his land. If county judges have not so managed the budgets of their counties that compensation may be made to landowners for lands which may be deemed necessary for use as a public highway, then it is certain that county courts, in such a situation, have no power to condemn the owners' lands for highways. The county court, according to the pleadings and the agreed statement of facts in this record, had condemned, and the county judge was proceeding to use, appellee's land for a highway, and, at the same time, refused to allow appellee's claim for compensation on the ground that the court was without authority to allow the claim because the fiscal year had expired and the revenues were exhausted. Such being the fact, the appellee's land could not be taken for a highway. When the county court condemned appellee's land for a highway, it *ipso facto* created a valid claim for compensation in his favor against the county, under the above provision of our Constitution and statute, which claim the owner of the land taken could present to the county court at any time within twelve months after the date of the order laying out or changing the road. The budget thereafter would have to be so framed and restricted as to provide for the payment of this claim. The fiscal affairs of the county could not be so manipulated as to deprive the landowner of his property for public use without compensation.

The statute, *supra,* under which the order of condemnation was made, provides that all damages allowed thereunder shall be paid out of any funds for roads and bridges, and, if none such, then out of the general revenue of the county. What effect subsequent general highway laws may have upon this particular provision we are not called upon to decide in this lawsuit. See, for instance, §§ 30 and 69 of act No. 5 of the extraordinary session, approved October 10, 1923, and § 5 of act 116, approved March 5, 1927; and there may be other pertinent sections. The appellee is not concerned as to what governmental agency exercises the power of eminent domain, nor as to the particular fund out of which he is to be paid; his only concern here is that he shall receive compensation; he is entitled to it. If the county courts cannot manage their financial affairs so as to provide compensation for damages to landowners for their land taken for public use, then, in such case, these courts are powerless to condemn the land. Under the facts of this record it appears that the county court has condemned appellee's land and is proceeding to appropriate same for a State highway, without providing any compensation to appellee for damages, and it appears that the county court claims that it has no authority to make such compensation. If not, as already stated, it had no power to condemn, and its order to that effect is absolutely void. Therefore it is obvious that the county court and all those who claim to be acting under the authority of such order, in appropriating and using appellee's land for a highway, are doing so without any right whatever. The finding of the chancery court so holding is correct.

The facts of this record, as stated in the pleadings and the agreed statement, show a cause of action to be maintained in the chancery court. Appellee had no adequate remedy at law. The decree restraining the appellant and all others from taking possession of appellee's land and opening the same to public use and travel until he has been paid for same is therefore affirmed. See *Lemon* v. *Tanner, ante,* p. 414.

WOFFORD v. YOUNG.

Opinion delivered April 25, 1927.

1. MORTGAGES—PETITION TO SET ASIDE FORECLOSURE SALE.—Under Crawford & Moses' Dig., § 2190, the chancery court had jurisdiction to hear and determine, by consent, in vacation, a second petition to set aside a mortgage foreclosure sale, such petition having been filed at an adjourned term.
2. MORTGAGES—FORECLOSURE SALE—SETTING ASIDE.—It was error to refuse to set aside a mortgage foreclosure sale, where the evidence showed that the price paid was grossly inadequate, and that the mortgagors were lulled into security by the mortgagee's assurance that he would buy the property in and give them an opportunity to redeem by paying the debt and cost of foreclosure.
3. MORTGAGES—PURCHASER AT FORECLOSURE SALE—RENTS.—On setting aside a purchase of a half interest in land at foreclosure sale, the purchaser was entitled to a half interest in the rents from the date of the purchase to the time when the motion to set aside the sale was made.

Appeal from Crittenden Chancery Court; *J. M. Futrell,* Chancellor; reversed.

Kenneth Rayner and *W. H. Fisher,* for appellant.

S. V. Neely, for appellee.

WOOD, J. J. L. Mercer, doing business under the name of J. L. Mercer & Company, was the beneficiary in a deed of trust in which W. S. Ayers was the trustee. The deed of trust was executed on March 28, 1923, by James L. Wofford and Frances Wofford, covering the northeast quarter of section 4, township 5 north, range 7 east, containing 160 acres, in Crittenden County, Arkansas, and was given to secure a promissory note in the sum of $676, of even date, and other advances made by Mercer to the Woffords. This action was instituted on February 3, 1925, by Mercer against the Woffords to foreclose the deed of trust in the sum of $1,204.63, the amount alleged to be due at that date under the deed. It was alleged that J. L. Wofford owned an undivided half interest in the land and that Frances Wofford owned a life estate therein.

In the affidavit for warning order against Frances Wofford it was alleged that she resided in Clay County, Kentucky, and was absent from Crittenden County, Arkansas. Wofford was served with summons, and Frank Berry was appointed attorney *ad litem* for Frances Wofford and a warning order issued for her February 3, 1925. A decree was rendered on March 16, 1925, against J. L. Wofford and against Frances Wofford, the latter by default, for $1,204.63, balance claimed to be due Mercer by the Woffords. The land as described in the deed of trust was described in the decree, and the court declared the amount of the decree "to be a lien against the interests of the defendant in the land described," and directed that the land be sold. A commissioner was appointed to make the sale upon giving notice of the time, place and terms of the sale. The notice described the land to be sold as contained in the deed of trust. The report of the sale by the commissioner showed that he sold the land condemned in the decree and that C. G. Young "became the purchaser of the whole of said premises at and for the sum of $1,314.13, he being the highest and best bidder for said lands." The lands were sold subject to a prior indebtedness in favor of the Federal Land Bank of St. Louis, Missouri. After the report of the commissioner was made to the court and confirmed, the clerk of the court interpolated in the report of the commissioner the words, "all the interest of the defendants herein," so as to make the same mean that the commissioner had sold all the interest of the defendants in the land as described in the deed of trust. Mercer had arranged with his counsel to be present at the sale, but failed to get notice and did not attend. His counsel put in a bid for him, but the property was sold for the sum of $1,314.13, and was purchased by C. G. Young, as reported by the commissioner.

There was no appeal from the decree of foreclosure. The attorneys for Wofford, on October 19, 1925, filed exceptions to the report of sale by the commissioner and a motion to set same aside on the ground that same had

sold for gross inadequacy of consideration; that the lands were worth $14,400; that they were incumbered by liens amounting in the aggregate to about $2,000, and that the rents thereon for the year 1925 amounted to $1,193, and the purchaser bid for same only $1,314.13, the net price of $21.13 an acre, when the lands were worth $90 per acre. The Woffords tendered into court the amount of the indebtedness for which the lands sold, and asked that the sale be set aside. The motion was supported by the affidavits of four landowners, residents of Crittenden County, who were familiar with the land in controversy and who placed the market value thereof at $90 per acre. Each of the affiants stated that they had no interest in the matter.

The purchaser, C. G. Young, responded to the motion to set aside the sale, and specifically denied the same. On October 21, 1925, the chancery court heard the report of sale of the commissioner and the exceptions thereto, and the motion by the Woffords to set the sale aside and to redeem the land, and the response thereto, and the oral evidence of Wheeler, Young and Reese, and the court found that the sale was in all respects properly conducted, and that the Woffords had no right to redeem, and overruled the exceptions to the report of sale, and entered its decree confirming the same and directing the commissioner to make a deed to Young, the purchaser.

On December 14, 1925, which was the first day the court would meet after rendition of the confirmation decree, the Woffords filed their petition to rehear the former motion to set aside the sale, in which they reiterated the facts substantially as above set forth as grounds for vacating the sale. They said, among other things, that they were misled by the actions of Mercer in the foreclosure suit, who informed them that he had no intention to deprive them of their farm; that he intended to foreclose and bid the land in at the sale, and that all he wanted was his money, and that, if the Woffords would pay him his money in the fall, they should have their lands back; that they were, by these representations, lulled into

security, and gave no further attention to the foreclosure proceedings. They set up that the foreclosure proceedings were all misleading as to a description of the property, in that the entire interest was advertised to be sold, whereas the Woffords only owned a half undivided interest, and a widow's interest, and the decree failed to declare her interest and to fix the interest of the owner of the other undivided interest; that, as a result, the apparent title to the entire tract had been placed in the purchaser. The Woffords further alleged that they had new evidence which they were unable to produce at the former hearing through no fault of theirs. They again asked that the sale be set aside and that they be allowed to pay the purchaser the purchase money, and asked that he be required to account for the rents.

C. G. Young filed a demurrer and response to this additional petition, and alleged that the issue was *res judicata,* and denied all the allegations of the petition.

There was the following stipulation of facts: "Right after the rendition of the decree of October 21, 1925, appellants engaged other counsel, who went to Marion, Arkansas, to examine the record, and found that the decree had not then been reduced to writing, and that the report of sale indicated that the entire interest in the land had been sold; counsel called the attention of the clerk to this state of affairs, pointing out that the decree had clouded the title of the bystander, Jessie May Smith. Counsel was in Marion again on December 14, 1925, and the clerk called his attention to the interpolation which the clerk had made in the report of sale and the decree, by adding the words, "all the interests of the defendants herein." Counsel asked to see the published notice of sale, but this could not be found. Counsel later procured a copy of the paper in which the notice of sale was published, and filed it. The notice is copied in the stipulation. It is further stipulated that Mr. Mercer's attorney was present at the sale and bid for Mr. Mercer the amount of the debt and costs. Also that the petition for receiver was never presented to the court, but instead, an arrange-

ment was made between counsel, as a result of which W. B. Rhodes, cashier of the local bank, collected the rents as custodian. That Rhodes collected $1,038 of the rents for 1925, and J. L. Wofford collected $155. That C. G. Young now claims only two-thirds of the rents, and Rhodes paid over to Jessie May Smith $346, being one-third of the amount he had collected. That there was a Federal Land Bank loan, a prior lien on the land, amounting to $1,820 at date of sale. That Col. Berry represented appellants at the trial of the first motion, October 21, 1925, and R. V. Wheeler testified for them. That Col. Berry got a postponement of the hearing from October 19 to October 21, in order to have Mr. Mercer present as a witness, but did not produce him, and, on October 21, the sale was confirmed.

There was testimony adduced by the Woffords tending to prove the facts set forth in their petition to set aside the sale. Two witnesses, who had been landowners in Crittenden County and who were familiar with land values there, testified, in effect, that the land in controversy was worth $90 an acre. Wofford and his sister, Jessie May Smith, the other owner of the undivided half interest in the fee of the land, testified that Mercer told them that he was going to file suit in the fall to protect his interest, but stated to them the sale would not take place, and that the Woffords would have plenty of time to redeem the land. Wofford testified that he was not present at the sale and did not know of it until after it occurred. He then employed an attorney, and got the affidavits of landowners appraising the land, and turned them over to his attorney. He got up money to make the tender and six affidavits of landowners as to the value of the land. He was present in court when the petition to set aside the sale was heard, but was not familiar with court procedure, and did not know what was going on. He stated that Mercer told him that if he sold the land he would buy it in and give witness a chance to buy it back.

Mercer testified to the effect that he employed an attorney to foreclose. He wrote to his attorney, asking

when the sale would take place, and had a reply to the effect that the sale had already taken place. Witness then wrote that he was sorry he had not learned of the sale in time to attend. His attorney wrote him, but he did not get the letter. The effect of his testimony in regard to the conversation with Wofford and his sister was that he assured them that he did not want the land. He told them that the foreclosure proceedings had been started, and it was possible that he might not buy the land, but might have to buy it to protect himself. It was his intention, if he purchased the land and they raised the money, to deed the land back to them upon their payment of his debt, costs and attorney's fee. He gave Jessie May Smith that impression in his conversation with her. He urged her to get the matter straightened out before the sale. She did not do this, as she continued with the impression that witness would buy and let them redeem, as was in fact witness' intention. Witness had never seen the land, but was familiar with land values, and placed a value of $75 an acre on the land. Witness did not tell Jessie May Smith that he would continue the case until fall, because he was always under the impression that he could be the one to buy in the land at the sale, and he did not think it made any difference.

The decree, on the hearing of the final petition, recites that it was heard *at chambers in vacation by consent,* upon the petition of the Woffords and the demurrer and response of Young and the testimony on file. The court thereupon entered its decree overruling the petition and refusing to set aside the sale, and dismissed the petition of the Woffords, and decreed certain rents to Young, from which the Woffords prayed an appeal.

1. The court had jurisdiction to hear and determine the second petition of the appellees to set aside the sale of June 12, 1925. Although a former petition to that effect had been filed and overruled, this second petition was filed at an adjourned day of the same term of court and on the last day of the adjourned term. The issue

was joined by the appellees on this petition, and a hearing thereon was had by consent in vacation. The decree from which this appeal comes so recites. Authority for such procedure is found in § 2190 of C. & M. Digest. See also *Bickle* v. *Turner,* 103 Ark. 536, 202 S. W. 203; *Davis* v. *Sparks,* 135 Ark. 412, 205 S. W. 803. The court had not adjourned *sine die* at the time the second petition to vacate the sale was filed, and, even though such petition was filed on the last day of the adjourned term, that was sufficient to give the court jurisdiction to hear and determine the issue joined on such petition, and the statute above confers upon a chancellor authority to try causes by consent of parties and to render decrees in vacation. See *Wells* v. *Baker Lumber Co.,* 107 Ark. 415, 155 S. W. 122; *Mydyett* v. *Kirby,* 129 Ark. 301, 195 S. W. 674; *Tire Co.* v. *McFarlane,* 146 Ark. 491, 225 S. W. 632.

2. The trial court erred in confirming the report of the commissioner and approving the sale made by him of the land in controversy on June 11, 1925. We have set forth fully the testimony bearing upon this issue. It speaks for itself; we deem it unnecessary to discuss the testimony in detail. The decided preponderance of the evidence shows that the lands were sold and purchased by the appellee, Young, for a grossly inadequate price. The appellee paid the sum of $1,314.13 for the land. He received rents for the land for the year he purchased, amounting to $692. The lands were thus acquired by the appellee for a net outlay of $622.13. A preponderance of the evidence shows that the entire farm, unincumbered, was worth $14,400; that the net value of J. L. Wofford's undivided half interest in the land is $6,290. The testimony of Mercer, the mortgagee, was to the effect that he gave the Woffords, the mortgagors, to understand that it was his intention to buy in the land at the foreclosure sale and to permit them to redeem the same by paying the amount of their mortgage debt and the costs of the foreclosure proceedings. His testimony shows that he would have consummated this purpose if he had

received the letter of his attorney advising him of the date of the sale.

Without reiterating the testimony on behalf of the appellants, it tends strongly to prove that they believed that they were secure in the promise of Mercer that, if the land was sold, he would buy it in and give the appellants a chance to buy it back. It cannot be doubted, from the testimony in this record, that the appellants were lulled into security by the conversations with Mercer, in which he assured them that they would have an opportunity to redeem the land by paying their debt to Mercer and the cost of the foreclosure proceedings. We are convinced that, if the appellants had not believed and trusted Mercer to thus protect their interests, as he assured them he would, the appellants would have protected themselves from the sacrifice of their property at the sale through some one else. Because, for aught that appears to the contrary, they experienced no difficulty in raising the necessary funds to redeem the lands from the sale.

The case in the facts comes well within the doctrine announced by this court, through Chief Justice McCULLOCH, in *Chaplin* v. *Quisenberry*, 138 Ark. 68, 210 S. W. 341, where we held, quoting syllabus:

"The court properly refused to confirm a judicial sale where the property brought a grossly inadequate price and the sale was attended with circumstances working out a harsh result against the owner's interests, though the purchaser himself was guilty of no fraud or misconduct." See also other cases cited in that opinion.

3. The appellee, Young, as the purchaser of an undivided half interest of the Woffords in the land in controversy, is entitled to an undivided half interest in the rents of the land for the year 1925 from the date of his purchase. That proportion of the rent of the land for the year 1925 earned prior to the date of the sale should be awarded to the appellants, and that proportion of the rents for the year 1925 earned subsequent to the date of his purchase should be awarded to the appellee

Young. This result necessarily follows as a corollary to the rule announced in *North American Trust Co.* v. *Burrow,* 68 Ark. 584, 60 S. W. 950; *Gailey* v. *Rickets,* 123 Ark. 18, 184 S. W. 422; *Tallman* v. *Heuck,* 152 Ark. 438, 238 S. W. 603.

The decree is therefore reversed, and the cause is remanded with directions to the chancery court to enter a decree vacating its decree confirming the sale of the land in controversy to the appellee, canceling the deed of its commissioner to the appellee, and quieting title of the appellants to the lands in controversy upon their payment to the appellee of the amount of the purchase money with interest thereon from the date of his purchase at the rate of six per cent. per annum until paid, and awarding rents to the respective parties as herein directed, and for such other and further proceedings as may be necessary according to law and not inconsistent with this opinion.

AMERICAN RAILWAY EXPRESS COMPANY *v.* H. ROUW COMPANY.

Opinion delivered April 25, 1927.

1. CONSTITUTIONAL LAW—JURISDICTION IN TRANSITORY ACTION.—Crawford & Moses' Dig., §§ 1147, 1151, 1826, 1829, providing for service of process on agents of foreign corporations, *held* to permit an action to be brought against foreign corporations engaged in interstate commerce for damages for breach of a contract without violating the commerce clause or the due process and equal protection clauses of the Federal Constitution, where plaintiff is a resident and the foreign corporation was doing business in the State, though the controversy arose from a contract of carriage in which the points of origin and destination and all intervening points were outside the State.
2. COURTS—TRANSITORY ACTION.—An action against an express company for damages for failure to deliver strawberries in as good condition as that in which they were received, *held* a transitory action, not required to be brought in the State where the contract was entered into or performed.
3. CORPORATIONS—TRANSITORY ACTIONS.—A foreign corporation, doing business in the State and having a designated agent on

whom process may be served, may be sued in any county in this State by serving summons on the agent outside the county in which the suit is brought.

4. CARRIERS—NECESSITY OF NOTICE OF DAMAGES.—A carrier, sued for damages to strawberries in transit, could not avail itself of the defense that a written notice of the claim had not been given as required by the contract of shipment, where the jury found that the damage was due to the carrier's negligence, since negligence was excepted by the terms of the contract.

5. CARRIERS—DAMAGE TO SHIPMENT—BURDEN OF PROOF.—In an action against a carrier for damages to a shipment in transit, the burden is on the plaintiff to prove that the goods were in good condition when delivered to the carrier, and that damage resulted while they remained in defendant's possession as a common carrier.

6. CARRIERS—DAMAGE TO SHIPMENT—INSTRUCTIONS.—In an action against a carrier for damage to goods in transit, an instruction that the burden was on the shipper to show that the shipment was delivered to the carrier in good condition, and that damage resulted while in the carrier's hands, was not in conflict with another instruction that the proof of delivery to the carrier in good condition and of delivery by the carrier in bad condition established a *prima facie* case of negligence.

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

Warner, Hardin & Warner, for appellant.

C. M. Wofford, for appellee.

WOOD, J. This is an action by the plaintiff, H. Rouw Company, against the defendant, the American Railway Express Company, in the circuit court of Crawford County, begun June 11, 1925, to recover damages in the sum of $489.50.

The plaintiff alleged, in substance, that, on June 17, 1924, it purchased a car of strawberries at Sarcoxie, Missouri, consisting of 480 crates of berries, which was delivered to the defendant, consigned to W. W. Stevens at Kansas City, Missouri; that plaintiff diverted the car to the Becker-Wiel Company at Detroit, Michigan; that the berries were in good condition when delivered to the defendant, but, through the negligence of its agents, servants and employees in failing to re-ice the car, the

berries were in a decayed condition when they reached their destination, to the damage of the plaintiff in the sum above named, for which it prayed judgment.

Summons was issued for the defendant, directed to the sheriff of Pulaski County, and was served by delivering a copy to defendant's agent designated for service in that county. The defendant moved to quash the service, setting up, in substance, that it was a corporation organized under the laws of the State of Delaware and operating as a common carrier, with a part of its line running through the States of Louisiana and Arkansas; that the shipment mentioned in the complaint was not transported by the defendant through any part of the State of Arkansas; that the contract of shipment was not made in the State of Arkansas and was not to be performed in the State of Arkansas; that the witnesses which the defendant must call and whose personal attendance at the trial defendant must have to properly defend the action, are residents of the States of Missouri and Michigan, and cannot be subpoenaed to appear in the courts of Arkansas; that the defendant cannot adequately develop the facts in evidence by taking the depositions of these witnesses; that, to take the depositions of the witnesses necessary to develop the defense, would interfere with the defendant's operations and business as an interstate carrier and would impose a heavy burden on interstate commerce; that the statutes of Arkansas, if construed to allow service of summons upon a foreign corporation engaged in interstate commerce under these circumstances, would be unconstitutional and void, being in contravention of the commerce and due process clauses of the Constitution of the United States.

The defendant alleged that the statute allowing service on foreign corporations was not intended to permit service upon them in causes arising from transactions foreign to the State of Arkansas, such as is involved herein.

At the hearing of the motion the undisputed testimony by the defendant was to the effect that the ship-

ment was as alleged in the complaint and the motion to quash the service, and that the defendant was a foreign corporation doing business in Arkansas, as therein alleged. The superintendent of the defendant, residing at Little Rock, testified that the defendant maintained an office and agent in the city of Van Buren, Arkansas, and his testimony tended to fully sustain the allegations of the motion to quash as to the inconvenience of procuring the personal attendance of the witnesses for the defendant at the trial if had at Van Buren, Arkansas; that the personal presence of such witnesses at the trial was essential to the defense, and, if such be required, "it will have quite an effect on defendant's interstate business." The witnesses for the defendant, when the shipment was made, were residents of the States from and through which the shipment moved. Some of these witnesses have left defendant's services.

On cross-examination the witness stated that the defendant had attorneys in the various States where the witnesses lived, who could look after the taking of depositions. Witness assumed that it would require as long a time to try the case in the other States as it would in Arkansas.

The court overruled the motion, and, in doing so, found that "the cause was a transitory action involving the alleged loss and damage to a carload shipment of strawberries from Sarcoxie, Missouri, to Detroit, Michigan, moving in interstate commerce; that the service had in said cause upon said designated agent is valid, legal and binding upon the defendant." The appellant duly excepted to the ruling of the court. The defendant answered, denying the material allegations of the complaint, and alleged that, if the berries were damaged as alleged, such damage resulted from inherent defects therein; that the same were heated, wet, rotten, and unfit for shipment; that the berries were negligently loaded by the shipper and negligently handled by the consignee at the place of destination.

The testimony adduced by the plaintiff tended to prove that it delivered a carload of strawberries at Sarcoxie, Missouri, for shipment to the Becker-Weil Company at Detroit, Michigan; that the berries were in good condition, and properly loaded for shipment; that they should have carried to Detroit in good condition; that, when they reached Detroit, they were in a decayed condition, resulting from lack of proper refrigeration.

The testimony on behalf of the defendant tended to prove that there were no defects in the car in which the berries were shipped; that it met all the tests required for properly carrying perishable goods, and that the car was properly iced at the point of origin and at the point of destination and at all intervening points necessary for the proper icing of the car. In other words, the testimony for the defendant tended to prove that the shipment was handled from the point of origin to the point of destination without negligence on the part of the carrier. The testimony, both on behalf of the plaintiff and the defendant, tending to prove their respective contentions as to negligence, is voluminous, and we deem it unnecessary to set it forth in detail.

At the conclusion of the testimony, over the objection of the defendant, the court granted prayers for instruction by the plaintiff to the effect that, if the jury found that the berries were delivered in a good condition to the defendant for shipment, and the same were in a damaged condition when they reached Detroit, the plaintiff had established a *prima facie* case of liability against the defendant, and the burden was upon the defendant to show that the damaged condition of the berries was due to no negligence on its part. The court also, over the objection of the defendant, gave other prayers of the plaintiff for instructions, which, in effect, told the jury that the defendant, in the absence of express stipulation to the contrary, was liable as the insurer against loss or damage, except such as was caused by inherent defects or weakness in the commodity shipped, and that it was the duty of the defendant to exercise ordinary care to

furnish means of transportation suitable for the shipment of perishable goods, and to exercise ordinary care to keep same properly iced to preserve such goods until the same were delivered at their destination. The court told the jury that ordinary care was such care as an ordinarily prudent person would use under like or similar circumstances, considering the fact that the shipment was of a perishable nature.

The court refused defendant's prayer for instruction No. 7, which, in effect, told the jury that, before the plaintiff could recover, it must show by a preponderance of the testimony that the berries were in a good condition for shipment at the time they were delivered to the defendant, and that the defendant failed to exercise ordinary care to ice the same in transit, and negligently failed to furnish proper transportation and to transport the same within a reasonable time, and that such alleged negligent acts were the proximate cause of damage to the plaintiff.

Defendant's prayer for instruction No. 11 would have told the jury that, if the defendant iced the car before the berries were loaded at Sarcoxie, Missouri, and that the car was again iced after the berries were loaded and during transit, then the plaintiff could not recover.

The court granted other prayers of the defendant for instructions which, in effect, told the jury that the burden was upon the plaintiff to prove that the berries were in good condition when they were delivered to the defendant at Sarcoxie, Missouri, and that the damage to such berries, if any, resulted while the same were in defendant's possession as a common carrier.

The court refused several prayers of the defendant for instructions directing the jury to return a verdict in favor of the defendant generally, as well as on the issue as to whether the car was properly iced, and as to whether or not the defendant was negligent in delaying transportation. The defendant duly excepted to the ruling of the court in granting and refusing prayers for instructions.

The jury returned a verdict in favor of the plaintiff

in the sum of $200. Judgment was rendered in plaintiff's favor for that sum, from which is this appeal.

1. The court did not err in overruling appellant's motion to quash the service of summons and in assuming and retaining jurisdiction of the cause of action. Section 1147, C. & M. Digest, provides, in part, that service of process may be had by service of summons upon the agent or agents of such corporations in the same manner that process may be served on railroad corporations existing under the laws of this State.

Section 1151 provides: "Where the defendant is a foreign corporation having an agent in this State, the service may be upon such agent."

Section 1826 provides, in part, that foreign railroad corporations shall file in the office of the Secretary of State a copy of its charter or articles of incorporation or association, and shall name an agent upon whom process may be served.

Section 1829 reads as follows: "Service of summons and other process upon the agent designated under the provisions of § 1826 at any place in this State shall be sufficient service to give jurisdiction over such corporation to any of the courts of this State, whether the service was had upon said agent within the county where the suit is brought or is pending or not."

The appellee is a domestic corporation, having its domicile and principal place of business at Van Buren, in Crawford County, Arkansas. The appellant is a Delaware corporation, doing a general express business throughout the United States. It operates, as a common carrier, a line of cars through the States of Missouri and Arkansas and through the city of Van Buren, Crawford County, in the latter State. The appellant has complied with our statutes, *supra,* in designating an agent in our State upon whom process may be served, and appellant transacts business in our State, but the shipment involved in this action began at Sarcoxie, Missouri, and ended at Detroit, Michigan, and did not pass through the State of Arkansas. Appellee instituted this action

against the appellant in the circuit court of Crawford County, Arkansas, sitting at Van Buren, where appellee had its domicile. It is conceded by the appellant that summons was served upon the agent of appellant duly designated under our statutes for receiving service of process in this State.

Learned counsel for the appellant contend that it would violate both the commerce and due process and equal protection clauses of the Constitution of the United States to construe our service statute above so as to enable appellee to maintain this action. To sustain their contention counsel rely upon the cases of *Davis* v. *Farmers' Cooperative Company,* 262 U. S. 312, 43 S. Ct. 556; *Atchison, Topeka & Santa Fe R. R. Co.* v. *Wells,* 265 U. S. 101, 44 S. Ct. 469; and *State of Missouri ex rel. St. Louis, B. & M. Ry. Co.* v. *Taylor,* 266 U. S. 200, 45 S. Ct. 47.

In the first case mentioned the facts, briefly stated, are substantially as follows: Minnesota has a statute allowing foreign corporations having an agent in the State to solicit freight and passenger traffic, or either, over its lines outside of the State, to be served with summons by delivering a copy thereof to such agent. The Atchison, Topeka & Santa Fe Railroad Company, a Kansas corporation engaged in interstate transportation, did not own or operate any railroad in Minnesota, but maintained an agent there for the solicitation of traffic. In April, 1920, suit was brought by another Kansas corporation in a court of Minnesota against the Director General of Railroads, as agent, on a cause of action arising under Federal control. Service was made pursuant to the Minnesota statute; the recovery sought was for loss of grain shipped under a bill of lading issued by the carrier in Kansas for transportation over its line from one point in that State to another. So far as it appeared, the transaction was in no way connected with the State of Minnesota or with the soliciting agency located there. The carrier's line of railroad did not touch Minnesota, and the plaintiff was not, and never had been, a resident of the

State of Minnesota. In the opinion the Supreme Court of the United States, among other things, said: "But orderly, effective administration of justice clearly does not require that a foreign carrier shall submit to a suit in a State in which the cause of action did not arise, in which the transaction giving rise to it was not entered upon, in which the carrier *neither owns nor operates a railroad, and in which the plaintiff does not reside.*" The facts of that case therefore differentiate it from the case at bar and we find nothing in the decision to support the appellant's contention.

In the second mentioned case above it was held, quoting syllabus No. 2: "A State statute permitting a citizen and resident of another State to prosecute a cause of action which arose elsewhere, against a railroad corporation of another State, which is engaged in interstate commerce *and neither owns nor operates a railroad, nor has consented to be sued,* in the State where the action is brought, is so far invalid." The facts in that case likewise were wholly unlike those of the case in hand.

In the third case mentioned, the facts are stated in the second syllabus as follows: "A Delaware corporation, having a usual place of business in Missouri, brought an action in a Missouri court against a Texas corporation which operated a railroad *in Texas only and had no place of business, nor had consented to be sued, in Missouri,* the cause of action being damage, done possibly in Missouri, to freight shipped to that State from Texas, over defendant's line, on a through bill of lading, and the basis of jurisdiction in Missouri being the garnishment of traffic balances due the defendant from a connecting interstate carrier having a place of business there." It will be observed that the facts of the last case cited are also wholly dissimilar to the facts of the case at bar.

Counsel for appellant argues that the principle underlying all of the above cases is what they term "balance of convenience," which forbids a resident of the State of Arkansas from placing a burden upon other

users of the appellant's express facilities in order to conserve his own convenience. Counsel contend that that principle applies here. But not so. This is a transitory action, and this court is thoroughly committed to the doctrine that a foreign corporation doing business in the State, and having designated an agent upon whom process may be served, may be sued on a transitory cause of action in any county in this State by serving summons on the designated agent outside the county in which it is brought. *Jacks* v. *Central Coal & Coke Co.*, 156 Ark. 211, 245 S. W. 483, and cases there cited. Moreover, we have early held that it is not against the public policy of this State to open her tribunals to foreign litigants where the controversy grows out of a transitory cause of action.

In *St. Louis & San Francisco Ry. Co.* v. *Brown*, 62 Ark. 254, at page 261, 35 S. W. 225, we said: "The common-law rule is that, where the right of action is transitory in its nature, courts everywhere, when the defendant may be lawfully summoned to appear therein, have jurisdiction; and, when the suit is governed by statute of the State in which the injury is committed, courts of another State having similar laws, or where it is not contrary to its public policy, will enforce such laws, by the rule of comity." Citing cases. See also *St. L. I. M. & S. Ry. Co.* v. *Brown*, 67 Ark. 295-299, 54 S. W. 865; *St. L. etc. Ry. Co.* v. *Hesterly*, 98 Ark. 240-256, 135 S. W. 874; *St. L. etc. Ry. Co.* v. *Haist*, 71 Ark. 258-264, 72 S. W. 893; *Kansas City So. Ry. Co.* v. *Ingram*, 80 Ark. 269-272, 97 S. W. 55; *American Ry. Express Co.* v. *Davis*, 152 Ark. 259-265, 238 S. W. 50.

In the recent case of *National Liberty Ins. Co.* v. *Trattner*, *ante* p. 480, we held that an action could not be maintained in this State by a plaintiff residing and doing business in a foreign State against a foreign corporation authorized to do business in this State where the plaintiff's cause of action arose out of the State, the contract of insurance being made out of the State and the loss occurring out of the State. In that case, among other things, we

said: "The State has no especial interest in enforcing the right of citizens and residents of other States on causes of action arising outside of its boundaries against foreign corporations doing business in the State, but is chiefly interested in administering justice, under the forms of law, to all persons entitled to seek remedies in its courts, for protection and enforcement of their rights, and for redress of injuries and wrongs, promptly and without delay." That case is not in conflict, in principle, with the above cases and the case at bar, for there the plaintiff was a nonresident of the State, and left the State of his residence and likewise the State in which the defendant was domiciled and doing business and came to Arkansas simply for the purpose of using our judicial forum to carry on his litigation concerning a matter in which our State had not the remotest interest. In that case it did not appear that the nonresident insurance company had any property in this State. In such a state of facts we held that the rule of comity does not require that our courts of justice be put to the inconvenience and our citizens be put to the expense and annoyance of maintaining court machinery for a litigation wholly between nonresidents in which the people of the State could have no possible interest.

In *National Liberty Insurance Co.* v. *Trattner, supra,* we held that such course, under the facts of that case, would be against public policy. But certainly it accords with the public policy of the State to conserve the rights of its own citizens and to enable them to maintain any causes of action they may have against foreign corporations in our own tribunals, if service can be had upon them in this State. The appellant was doing business in this State, as a common carrier *"having lines of road running through the State."* At any rate, it can readily be seen that courts of this State might, in their discretion, entertain or refuse to entertain jurisdiction of transitory causes of action arising out of acts of negligence in another State by a nonresident plaintiff against a nonresident defendant, and yet not be inconsistent if

they entertained jurisdiction of such causes of action in favor of *resident plaintiffs* against nonresident defendants. Refusing jurisdiction in such cases to nonresident plaintiffs against nonresident defendants is one thing; refusing jurisdiction to resident plaintiffs against nonresident defendants is altogether a different thing.

The Court of Appeals of New York, in *Gregonis* v. *Philadelphia & Reading Coal & Iron Co.*, 235 N. Y. 152, 139 N. E. 223, 32 A. L. R. 1, says:

"The courts of this State may entertain jurisdiction of a negligence case arising in another State, whether the plaintiff is a resident or nonresident of this State. As to nonresidents, the courts have many times refused to entertain jurisdiction in the exercise of their discretion. As to a resident, however, a different question arises and a different law is applicable. Can the Supreme Court refuse to hear a case against a foreign corporation, brought by one resident of this State, where the tort occurred outside the State, and entertain jurisdiction for another resident upon the same state of facts? If it has discretion to refuse jurisdiction in the one instance, it must have a like discretion to entertain it in the other. Discretion implies a power to make a choice. We do not think that, as to a *resident of this State,* the court has any such discretion." See same case, 32 A. L. R., page 1, with copious annotations on every phase of the subject, and especially page 29, subdiv. 3, "Jurisdiction cannot be declined."

2. The contract of shipment contains the following:

"Except where the loss, damage, or injury complained of is due to delay or damage while being loaded or unloaded, or damaged in transit by carelessness or negligence, as conditions precedent to recovery, claims must be made in writing, to the originating or delivering carrier, within four months after delivery of property."

Under the express terms of the contract, the provision requiring written notice of damages cannot avail the appellant, because the testimony tended to prove as a fact that the berries were damaged in transit through the

carelessness or negligence of appellant in not properly icing the car. The positive testimony on this issue was sufficient to carry the same to the jury, and the verdict of the jury in favor of the appellee is conclusive here.

The court, at the request of the appellant, correctly instructed the jury that the burden was on the appellee to prove that the berries were in good condition when delivered to the defendant for shipment at Sarcoxie, Missouri, and that the damage to such berries, if any, resulted while the same were in defendant's possession as a common carrier. The court instructed the jury, at the instance of the appellee, that, if the berries were delivered to the appellant in good condition for shipment, and the same were in a decayed and damaged condition when they reached Detroit, the appellee had established a *prima facie* case of liability against the appellant, and that the burden was then on the appellant to show that the damaged condition of the berries was due to no negligence on its part. We believe the instructions were not in conflict, because the trial court did not, in effect, as a matter of law, tell the jury that the appellant, under the evidence, was guilty of negligence. The charge, taken as a whole, left the issue to the jury under the evidence, and, as we view it, instructed the jury that the burden on that issue was with the appellee on the whole case to establish negligence. It did not shift the burden on this issue to the appellant. If this is the correct view of the charge as a whole, it could not have misled the jury, was not prejudicial to the appellant, and was in conformity with the law as announced by this court in *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. Ry. Co.* v. *Wellborn & Watts,* 170 Ark. 469, 280 S. W. 18, and cases there cited. Nor is the charge, as we thus construe it, in conflict with the decisions of the Supreme Court of the United States in *So. Ry. Co.* v. *Prescott,* 240 U. S. 632-640, 36 S. Ct. 469, and *C. & O. Ry. Co.* v. *Thompson Mfg. Co.,* 270 U. S. 416, 46 S. Ct. 318. In the last case the Supreme Court of the United States said:

"The respondent therefore had the burden of proving the carrier's negligence as one of the facts essential to recovery. When he introduced evidence to show delivery of the shipment to the carrier in good condition and its delivery to the consignee in bad condition, the petitioner (carrier) became subject to the rule applicable to all bailees, that such evidence makes out a *prima facie* case of negligence. The effect of the respondent's evidence was, we think, to make a *prima facie* case for the jury. But, even if this *prima facie* case be regarded as sufficient, in the absence of rebutting evidence, to entitle the plaintiff to a verdict, the trial court erred here in deciding the issue of negligence in favor of the plaintiff as a matter of law."

The trial court in the case at bar made no such mistake as that, but submitted the issue of negligence to the jury under the evidence, and, as we have said, placed the burden in the whole case on that issue upon the appellee.

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

STOUT LUMBER COMPANY *v.* GREEN.

Opinion delivered April 25, 1927.

1. JUDGMENT—EFFECT AS TO STRANGERS.—Judgments establishing laborers' liens on lumber are not binding on a purchaser of lumber not a party to such suits, who sued in replevin to recover possession of the lumber from a constable holding it under attachments.
2. LOGS AND LOGGING—RIGHT TO LABORERS' LIEN.—Under Crawford & Moses' Dig., § 6848, a laborer's lien on lumber can be acquired only by persons performing services in its manufacture.
3. LOGS AND LOGGING—LABORER'S LIEN—LIEN FOR PURCHASE PRICE.—Under Crawford & Moses' Dig., § 6848, the seller of logs has no lien on lumber produced for the purchase price or for services of others in hauling logs paid for by him.
4. LOGS AND LOGGING—INNOCENT PURCHASER—JURY QUESTION.—In an action to replevy logs from a constable holding under attachments, the question whether plaintiff was an innocent purchaser *held* properly submitted to the jury.

Appeal from Ouachita Circuit Court, Second Division; *W. A. Speer,* Judge; reversed.

Gaughan & Sifford, for appellant.

Haynie, Parks & Westfall, for appellee.

SMITH, J. J. H. Willson and three other parties brought separate suits in the court of a justice of the peace to enforce laborers' liens against a certain car of lumber as the property of M. L. Allen. These suits were begun on September 9, 1925, and attachments were issued and levied upon the lumber the same day. Two days later the Stout Lumber Company brought suit in replevin in the circuit court to recover possession of the lumber.

It was alleged in the complaint filed in the replevin suit, and testimony was offered tending to show, that, on February 6, 1925, the plaintiff lumber company, hereinafter referred to as plaintiff, entered into a contract whereby the plaintiff bought from Allen all the pine lumber which he should manufacture at his mill up to the first of September, 1925. The contract provided that Allen should cut and stack the lumber on his yard, and the plaintiff would have the lumber checked up by its inspector and would advance to Allen $10 per thousand feet, and that, upon this advance being made, plaintiff should become the owner of the lumber. Allen was to haul the lumber, after the advance was made, and load it in the cars for shipment to plaintiff, and, when the lumber was received by plaintiff on its yards, it was there scaled and the balance of the purchase money, if any, was then credited to Allen.

The testimony shows that plaintiff had advanced Allen $10 per thousand feet on all the lumber on Allen's yard up to August 8, and that the mill was destroyed by fire some time during that month, and that, at the time the car in question was loaded, Allen was indebted to the plaintiff in the sum of $28.

Judgments were rendered in favor of the plaintiffs in the justice court, on October 3, and laborers' liens in their favor were declared, and these plaintiffs thereafter intervened in the replevin suit in the circuit court, and, in

their interventions, set up the judgments rendered in their favor. The plaintiff lumber company was not made a party to the justice suits, and these suits were pending and undecided at the time the sheriff took possession of the car of lumber under the order of delivery which was issued in the replevin suit.

In the trial of the replevin suit in the circuit court plaintiff offered testimony tending to show that the plaintiffs in the attachment cases, hereinafter referred to as interveners, were not entitled to liens on the lumber attached. This testimony was to the effect that the lumber attached had been taken up and advanced upon before the labor was performed for the nonpayment of which the interveners sued, and, in the case of Willson, the testimony of plaintiff was to the effect that Willson had performed no labor whatever, but had only sold logs to Allen at $6 per thousand feet stumpage.

It was shown by interveners that, on the day of the trial in the justice court, an attorney representing the plaintiff was present and attempted, without success, to effect a settlement of these cases. Plaintiff contends there was no other testimony tending to show notice of the demands of the interveners at the time of its purchase of the lumber, if such claim were existent at that time, except the testimony of Willson to the effect that, about the middle of June, he told E. C. Holmes, the inspector of the plaintiff, that he had a claim for hauling against Allen which was at the time unpaid.

Upon the trial of all the issues in the replevin suit in the circuit court the jury returned verdicts in favor of each of the interveners for the several sums claimed by them for which judgments had been rendered in the justice court, aggregating $107.82, and from the judgment accordingly is this appeal.

Plaintiff sought to have submitted the question whether the interveners were entitled to liens, and to this end requested an instruction numbered 5, which was to the effect that the judgments recovered in the justice court

by interveners were not binding on the plaintiff lumber company, and that said judgments should not be considered as establishing a lien upon the lumber in controversy. An exception was saved to the refusal of the court to give this instruction.

We think it was error to refuse this instruction numbered 5. The interveners knew, before the trial of the cases in the justice court, that the plaintiff lumber company claimed title to the lumber attached, and, if they wished to foreclose this claim, they could and should have made it a party to that suit. This they did not do, and, as the plaintiff was not made a party to those suits, it is not bound by the judgments rendered therein, and the court should have so declared the law.

In the case of *Beiderman* v. *Parker*, 105 Ark. 86, 150 S. W. 397, it was said: "It is well settled that a judgment is only conclusive between the parties or their privies. (Citing cases). As we have already seen, the Robinson Lumber Company was not a party to the attachment suit before the justice of the peace, and it is well settled in this State that a judgment is evidence of nothing in a subsequent action between different parties, except that it had been rendered." (Citing cases).

The court should therefore have submitted to the jury the question whether the interveners did, in fact, have liens, and, to this end, instruction numbered 5 should have been given.

As the cause must be remanded, we take occasion to say that interveners are not entitled to liens unless services were performed by them in the manufacture of the lumber attached, and, if this lumber was inspected and taken up before their services were performed, as plaintiff contends, they have no liens on that lumber. As to the claim of Willson for a lien, it may be said that he has no laborers' lien for any part of the purchase price of the logs, nor has he a lien for services performed by others in hauling the logs, although he paid for that labor. The statute does not so provide. Sec-

tion 6848, C. & M. Digest. An instruction so declaring the law should have been given.

It is insisted by interveners that the court erred in submitting to the jury, in instruction numbered 7, given at plaintiff's request, the question whether plaintiff was an innocent purchaser of the lumber. This instruction reads as follows: "You are instructed that if, at the time the car of lumber was purchased by the Stout Lumber Company by virtue of its having checked the lumber and advanced $10 per thousand feet, and you find that the Stout Lumber Company had no notice of the claim for lien on the part of interveners at the time title passed to plaintiff, you will find for the plaintiff."

In support of this contention the case of *Bard* v. *Van Etten,* 72 Ark. 494, 82 S. W. 836, is cited. In that case it was held that "one who purchases property subject to a laborer's lien cannot claim to be a *bona fide* purchaser if he paid the entire purchase money by crediting the vendor with the same on his previous indebtedness to himself." But such, according to plaintiff's contention, are not the facts here. The contract between the plaintiff and Allen required advances to be made upon inspection, these advances being partial payments of the purchase price. The contract provides that the title shall pass upon these advances being made, such being the necessary effect and construction of the contract, and to evidence that fact it was provided that marks or symbols might be placed on the stacks of lumber inspected and advanced upon for purpose of identification. *Lee Wilson Co.* v. *Crittenden County Bank & Trust Co.,* 98 Ark. 379, 135 S. W. 885.

It was proper therefore to submit the question whether the plaintiff was an innocent purchaser. *Clark* v. *Wilson,* 171 Ark. 323, 284 S. W. 23.

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

TANDY v. SMITH.

Opinion delivered April 25, 1927.

1. CURTESY—VESTED ESTATE.—A husband's curtesy in his deceased wife's land vests upon her death.
2. DESCENT AND DISTRIBUTION—FATHER AS HEIR OF SON DYING CHILDLESS.—Where a son died leaving lands as a new acquisition and no children or creditors, his father, as next kin, and his widow each took a half interest therein in fee, under Crawford & Moses' Dig., §§ 3480, 3536.
3. FAMILY SETTLEMENT—VALIDITY.—Where a widow and her father-in-law each had vested interests in her deceased husband's real estate, a family settlement whereby each of them executed a quitclaim to the other of an interest in such estate was binding, being supported by mutual consideration.
4. DOWER—CONVEYANCE BY WIDOW BEFORE ASSIGNMENT.—Conveyance by a widow of a dower right in her husband's property before assignment of dower, though unenforceable at law, is enforceable in equity.
5. DEEDS—RECITAL OF CONSIDERATION.—Where a deed recited the payment of a consideration, the grantor will not be heard to question the validity of the deed for want of a consideration.

Appeal from Mississippi Chancery Court, Osceola District; *J. M. Futrell,* Chancellor; affirmed.

Gladish & Taylor, for appellant.

A. F. Barham, for appellee.

SMITH, J. Harry Tandy, who died November 30, 1918, owned, at the time of his death, two small tracts of land and two lots in the town of Osceola. He inherited the lands from his mother, but he had bought the town lots. The lots were adjacent, but had been purchased at different times. The first lot purchased had been paid for, but most of the purchase money for the second lot was unpaid at the time of Harry Tandy's death, and was evidenced by two notes payable to his grantor for $164 each. Harry Tandy left no children, but was survived by his father, M. C. Tandy, and his wife, Rosie Tandy, who continued to live on the town lots, which comprised her husband's homestead at the time of his death.

Rosie Tandy and M. C. Tandy conceived the idea of dividing the estate of Harry Tandy, and they evidenced

the agreement reached to that effect by executing deeds to each other. The deed from Rosie Tandy to M. C. Tandy, in addition to a consideration of one dollar, recited the fact that it was executed for the purpose of effecting a division of the estate of Harry Tandy between his widow and his father, and conveyed to M. C. Tandy the following property, to-wit: A tract of land known as the Harry Tandy woodsland, in the south half of the northeast quarter of section 6, township 12 north, range 10 east. The deed from M. C. Tandy to Rosie Tandy also recited a consideration of one dollar paid, and that it was "executed for the purpose of dividing the estate of Harry Tandy between M. C. Tandy, father of Harry Tandy, and Rosie Tandy, widow of Harry Tandy," and that, in consideration of the execution of the deed to M. C. Tandy for the land in section 6, he thereby conveyed to Rosie Tandy a fourteen-acre tract of land in the southeast quarter of the southwest quarter of section 5, township 12 north, range 10 east, known as the Harry Tandy cleared land, and also the Harry Tandy homestead, consisting of the two lots in Osceola. These deeds were executed and delivered on November 1, 1919.

Harry Tandy appears to have owed no debts at the time of his death, except the unpaid purchase money due on one of the town lots, and, after the execution of the deeds described above, Rosie Tandy paid this indebtedness and discharged the lien reserved in the deed to the lots to secure this purchase money.

Rosie Tandy died testate March 13, 1925, and, by her last will and testament, devised all of her property to her sister, Marie Smith. M. C. Tandy brought this suit against Marie Smith to cancel the deed executed by him to Rosie Tandy and to have partition of the property, and, as grounds therefor, alleged that the execution of the deed from him had been procured by fraud, and that he had no interest in the property conveyed at the time of the execution of the deed. The complaint was dismissed as being without equity, and this appeal is from that decree. But little testimony was offered in support of the

allegation of fraud, and the court below found the fact to be that there was no fraud, and that allegation is not here relied upon. But it is insisted, upon behalf of appellant, that his deed conveyed nothing, for the reason that he had no interest subject to conveyance, that he had a mere contingent remainder interest, which did not pass as an after-acquired title under his deed when this contingent remainder vested upon the death of the widow of his son.

The deeds were quitclaim deeds, and appellant cites cases in which it was held that, where one executes a quitclaim deed, he conveys only such interest as he then owns, and that another title subsequently acquired does not pass as an after-acquired title, under § 1498, C. & M. Digest. This section provides: "If any person shall convey any real estate by deed, purporting to convey the same in fee simple absolute, or any less estate, and shall not at the time of such conveyance have the legal estate in such lands, but shall afterwards acquire the same, the legal or equitable estate afterwards acquired shall immediately pass to the grantee, and such conveyance shall be as valid as if such legal or equitable estate had been in the grantor at the time of the conveyance."

The contention that appellant had no interest which he could convey may be disposed of by saying that appellant mistakes the interest which he owned in the property conveyed. No debts were probated against the estate of Harry Tandy, and the only debt he owed was paid by his widow. He had no children. Harry Tandy owned land, which was an ancestral estate, and town lots, which were a new acquisition, and constituted his homestead and became the homestead of his wife after his death. Section 5523, C. & M. Digest. Appellant had an estate by the curtesy in the lands which Harry Tandy had inherited from his mother, appellant's wife. This estate was in no manner contingent. The town lots were a new acquisition, and, as there were no children or creditors, the widow was endowed of one-half of this property, under § 3536, C. & M. Digest. M. C. Tandy, as the heir

of his son, took a life estate to the other half of the lots, which, upon his death, descended in remainder to the collateral kindred of his son, Harry Tandy. Section 3480, C. & M. Digest. His right to the possession of this half as life tenant was subject to the homestead rights of Rosie Tandy, the widow, but this postponement of the right to possession did not make his interest a contingent remainder, as appellant contends. His rights were vested, and not contingent, although his right to occupy and enjoy was postponed by the widow's homestead right.

It is true that M. C. Tandy was much older than Rosie Tandy, and therefore had less expectancy of life, although he survived her, but this did not make his interest a contingent remainder. In the case of *McCarroll* v. *Falls,* 129 Ark. 245, 195 S. W. 387, we quoted with approval the following statement of the law from the case of *Archer* v. *Jacobs,* 125 Iowa 467, 101 N. W. 195:

"2. A remainder is contingent where the right of the remainderman to succeed to the possession and enjoyment of the estate depends upon some contingency which may never arise, or where the person who is entitled to succeed to the possession and enjoyment at the termination of the life tenancy is not, and may never be, ascertained, or is not in being. In general, it is the present capacity of taking in possession, if the possession becomes vacant, and not the certainty that the possession will become vacant before the estate limited in remainder determines, that distinguishes a vested from a contingent remainder."

Here only the life of Rosie Tandy stood between M. C. Tandy and his right to the possession and occupancy of a half interest in the lots for his life, and only the termination of the right of homestead was necessary to vest the right of possession and occupancy in him. He had this right when he executed the deed to Rosie Tandy. He did not inherit anything from her, nor did he acquire any estate upon her death which he did not previously own. He had a vested remainder during her life, and he cannot therefore be heard to say that he has now an estate

which he did not own when he executed his quitclaim deed and which did not pass by his deed to her.

It is true, as appellant contends, that no order of court had ever assigned dower to Rosie Tandy, and that a widow's right of dower in her husband's property cannot, before assignment to her in the manner provided by law, be conveyed by her to a stranger so as to confer on him rights capable of assertion in a court of law, but such a conveyance is enforceable in equity, and this is a suit in equity. *Flowers* v. *Flowers,* 84 Ark. 557, 106 S. W. 949; *Baum* v. *Ingraham,* 141 Ark. 243, 216 S. W. 704; *Arbaugh* v. *West,* 127 Ark. 98, 192 S. W. 191; *Griffin* v. *Dunn,* 79 Ark. 408, 96 S. W. 190; *Weaver* v. *Rush,* 62 Ark. 51, 34 S. W. 256.

The deeds exchanged between M. C. Tandy and Rosie Tandy are in the nature of a family settlement, and should be upheld as such. She conveyed and relinquished to him whatever interest she had in the woodslands, and, for this consideration, whatever its value may have been, he conveyed to her his interest in the remainder of his son's estate.

Appellant testified that the dollar recited as paid was not in fact paid, but he makes no showing that any fraud was practiced upon him in having the deeds recite, as herein shown, that they were executed to divide the estate of Harry Tandy between his widow and father.

In the case of *Hampton* v. *Haneline,* 125 Ark. 441, 180 S. W. 40, it was said:

"The grantor makes the deed. The presumption is that he had the real consideration recited therein, and, in the absence of testimony tending to show that the pecuniary consideration named in the deed was inserted therein by mutual mistake or by some fraud practiced upon the grantor at the time he signed the deed, neither the grantor nor those claiming under him can be permitted to question the consideration named in the deed for the purpose of invalidating the same. See *Davis* v. *Jernigan,* 71 Ark. 494, 76 S. W. 554; *Wallace* v. *Meeks,* 99 Ark. 350-354, 138 S. W. 638."

Appellant has here no after-acquired title which he did not own when he executed his deed to Rosie Tandy, and this suit, based upon the assumption that his deed was void and conveyed nothing, was therefore properly dismissed as being without equity. The decree appealed from is therefore affirmed.

DE WITT v. STEPHEN.

Opinion delivered April 25, 1927.

1. LICENSES—Crawford & Moses' Dig., § 7494, authorizing municipal corporations to publish such ordinances as are necessary to provide for the safety, preserve the health, and promote the prosperity and improve the morals, order, comfort and convenience of such corporations, *held* not to authorize the enacting of ordinances requiring resident owners of automobiles to pay license thereon.
2. LICENSES—AUTOMOBILE TAX.—Crawford & Moses' Dig., § 4006, giving municipal corporations control of streets and alleys, *held* not to give implied authority to enact an ordinance requiring resident owners of automobiles to pay license thereon.
3. FINES—CONSTRUCTION OF STATUTES.—Statutes authorizing the imposition of fines and penalties should be strictly and not liberally construed.
4. LICENSES—AUTOMOBILE TAX—INCORPORATED TOWNS.—Acts 1919, p. 227, § 1, as amended by Acts 1919 (Sp. Sess.) No. 54, § 1, authorizing cities of first and second class and incorporated towns to require residents of cities of first and second class to pay license on motor vehicles, *held* not to extend authority to "incorporated towns," despite use of the words "incorporated towns" in one place in section, where cities alone were named in other parts of the statute, and cities only were directed as to method of using the money collected.

Appeal from Arkansas Circuit Court, Southern District; *W. J. Waggoner,* Judge; affirmed.

J. M. Brice, for appellant.

C. E. Condray, for appellee.

HUMPHREYS, J. Appellee was tried, convicted, and fined in the mayor's court of the incorporated town of DeWitt, Arkansas, for refusing to pay his automobile

license, in violation of its ordinance No. 135. An appeal from the judgment of conviction was duly prosecuted to the circuit court of Arkansas County, Southern District, where, on trial *de novo* by the court sitting as a jury, ordinance No. 135 was adjudged to be void on the ground that the town of DeWitt had no power to require resident owners of automobiles to pay the license on them, and appellee was acquitted, from which is this appeal.

Appellant contends for a reversal of the judgment on the ground that the town of DeWitt had authority to pass the ordinance under § 7494 of Crawford & Moses' Digest, which is as follows:

"It is made the duty of the municipal corporation to publish such by-laws and ordinances as shall be necessary to secure such corporations and their inhabitants against injuries by fire, thieves, robbers, burglars, and other persons violating the public peace; for the suppression of riots, and gambling, and indecent and disorderly conduct; for the punishment of all lewd and lascivious behavior in the streets and other public places; and they shall have power to make and publish such by-laws and ordinances, not inconsistent with the laws of this State, as to them shall seem necessary to provide for the safety, preserve the health, promote the prosperity and improve the morals, order, comfort and convenience of such corporations and the inhabitants thereof."

The section referred to does not expressly authorize the imposition of such a tax, and we are unable to discover in the language used any implied authority to do so. The lawmakers held to such opinion, else the Legislature would not have conferred such authority on cities of the first and second class by act 289, passed at the regular session of the Legislature of 1919, as amended by act 54 of the special session held by the Legislature in September, 1919. Neither express nor implied authority was conferred upon the town of DeWitt to pass its automobile license ordinance No. 125 under § 7494.

Appellant also suggests that implied authority existed to pass such an ordinance under § 4006 of Craw-

ford & Moses' Digest, giving municipal corporations control and supervision of the streets and alleys. Statutes authorizing the imposition of fines and penalties should be strictly and not liberally construed. We do not think the language of the act referred to is broad enough to justify such an implication of power.

Appellant also contends for a reversal of the judgment upon the ground that the same authority conferred upon cities of the first and second class by said act 289, as amended by said act 54, to impose a tax not to exceed $5 per annum on resident owners of motor vehicles, also extended the same authority to incorporated towns. Section 1 of said act 289 is as follows:

"That cities of the first class are hereby authorized to require residents of said city, for the privilege of keeping and using motor vehicles, to pay a tax of not to exceed five dollars per annum for each motor vehicle defined in this act; said fund thus collected to be used exclusively by said cities in the construction, repair or maintenance of the streets, alleys or public ways of said cities."

Section 1 of said amendatory act No. 54 is as follows:

"Section 1. That cities of the first class and cities of the second class and incorporated towns are hereby authorized to require residents of said cities of the first class and cities of the second class, for the privilege of keeping and using motor vehicles, to pay a tax of not to exceed five dollars per annum for each motor vehicle defined in this act; said fund thus collected to be used exclusively by said cities in the construction, repair or maintenance of the streets, alleys or public ways of said cities."

In an effort to carry out the supposed intent of the Legislature the digesters of Crawford & Moses' Digest inserted the words "incorporated towns" after the word "class" in the fourth line of said act 54. This was done on the theory that the intent of the Legislature was to extend such authority to incorporated towns because the words "and incorporated towns" appeared in the second line of said amendatory act No. 54. In order to have made

a complete act on that theory the words "and incorporated towns" should also have been inserted after the word "cities" in the ninth and last lines of § 1 of the amendatory act. If the intent of the Legislature was to extend authority to incorporated towns to impose a tax on resident owners of motor vehicles, why did it require the cities of the first and second class to expend such tax on streets and alleys and not require incorporated towns to do so? The justification of such a tax at all grows out of the use of the streets and alleys with motor vehicles, and not on account of police regulation of traffic. The query propounded goes to show that the words "and incorporated towns" used by the Legislature in the second line of the amendatory act are not a definite criterion by which the intention of the Legislature may be determined. If the Legislature had intended to extend the authority to incorporated towns as well as cities to tax resident owners of automobiles, it could have inserted such words where necessary throughout § 1 of the amendatory act. If the failure to insert the words throughout the remaining parts of § 1 could be attributed with certainty to a clerical misprision, there might be force in the argument that the Legislature intended to confer the power upon incorporated towns to impose such a tax, but the insertion of the words in the second line may itself have been a clerical misprision, a mistake, or a piece of inadvertence. To insert the words throughout the act would amount to more than the correction of an obvious misprision or clerical error, which is permissible. It would amount to legislation by the court, which is never permissible. Endlich on the Interpretation of Statutes announced the rule to be that "the question for the interpreter is not what the Legislature meant, but what its language means." If the Legislature meant to extend authority to incorporated towns to impose a maximum tax of $5 on resident owners of motor vehicles, it failed to do so. The words "and incorporated towns" used in the second line of the amendatory act are meaningless. They

cannot be harmonized with the other language used and made to mean anything without interpolating them in three other places in said section.

No error appearing, the judgment is affirmed.

PILCHER v. PARKER.

Opinion delivered April 25, 1927.

1. CONSTITUTIONAL LAW—LABORERS' LIEN—DUE PROCESS.—Acts 1923, p. 430, providing for a lien in favor of employees working in drilling operations for oil and gas, is not unconstitutional as taking property without due process, as the act provides for its enforcement in the manner now provided for enforcement of laborers' liens, in which the owners of the property on which the lien is sought to be enforced are necessary parties.
2. MINES AND MINERALS—LABORERS' LIEN—OWNERSHIP OF PROPERTY.—Acts 1923, p. 430, provides for lien in favor of employees on equipment used in drilling or operating oil or gas wells, irrespective of who may be the owner.
3. CONSTITUTIONAL LAW—DUE PROCESS.—The fact that one man's property may be taken for another's debt does not render unconstitutional Acts 1923, p. 430, providing for a lien in favor of employees on equipment used in oil and gas drilling operations, since the owner in leasing his equipment voluntarily subjects his property to such liens as are given by the statute.
4. MINES AND MINERALS—LABORERS' LIEN—REPEAL OF STATUTE.—Acts 1923, p. 430, providing for a lien in favor of employees on the equipment in oil and gas drilling operations was not repealed by Acts 1923, p. 499.

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

H. E. Rouse and *John Marshall Shackleford*, for appellant.

William F. Denman, for appellee.

HUMPHREYS, J. This is a suit in replevin brought by appellant against appellee, the sheriff of the county, to recover the possession of an oil well rotary drilling rig complete, which had been seized by the sheriff under a writ of attachment issued in the case of L. M. Carter *et*

al. v. Prescott Oil Company, wherein judgment was rendered condemning said drilling rig to satisfy debts for labor performed in and about a certain oil test well being drilled with said rig, in favor of L. M. Carter *et al.* against the said Prescott Oil Company. Appellant alleged that he was the owner of the drilling rig and that he was entitled to the immediate possession thereof; that he had leased the drill for a monthly cash rental to the Prescott Oil Company, and was not interested in and had nothing whatever to do with drilling the well or employing laborers to drill same; that he was not a party to the suit in which the drill was attached and ordered sold to pay the Prescott Oil Company laborers, and was not bound by the seizure and judgment of condemnation; that the drill was seized under act 513 of the General Assembly of the State of Arkansas for the year 1923, which act is void for the reason that it violates the Constitution of the United States and the Constitution of the State of Arkansas inhibiting the deprivation of property without due process of law; that said act was repealed by act 615 passed by the same session of the Legislature.

Appellee filed an answer, admitting the seizure of the well drill under writ of attachment issued in a proceeding to enforce a lien for labor under said act 513, which was performed in and about the oil test well in question, but denying the unconstitutionality of the act or that same was repealed by said act 615.

The cause was submitted to the court, sitting as a jury, upon the pleadings and testimony, which resulted in a judgment against appellant and his bondsmen upon the replevin bond for the return of the drilling rig or its value, from which is this appeal.

The facts are undisputed, and, in substance, are as follows: Appellant was the owner of the drilling rig complete, having purchased same for $11,000 three years prior to leasing it to the Prescott Oil Company. On the 24th day of January, 1924, he leased same to the Prescott Oil Company for a monthly rental of $600 per month to drill oil wells in certain territory in Nevada County. After

executing the lease and delivering the drilling rig complete to the lessee he went to Florida, and did not return until about the time L. M. Carter and six other laborers attached the drill and shut down the well because they had not been paid their wages in the total sum of $1,726 for work which they performed in and about drilling a test well in said county. Appellant never had any connection whatever with the Prescott Oil Company and had nothing to do with the drilling of the well or hiring the labor. It is true that appellant was not made a party to the suit of L. M. Carter and the other laborers against the Prescott Oil Company, but, as we understand the record, the fact that Carter and the other laborers worked with and in and about the drill while the test well was being drilled, and that the Prescott Oil Company owed them $1,726 for labor so performed, is not questioned. In other words, the undisputed testimony discloses this to be the fact. Act No. 513 of the Acts of the General Assembly of 1923, under which the laborers claimed a lien upon the drilling rig complete, is as follows:

"Section 1. Any person or persons working in or about the drilling or operation of any oil or gas well, or any well being drilled for oil or gas, in this State, shall have a lien on the output and production of such oil or gas well for the amount due for such work, and in addition thereto his lien shall attach to all machinery, tools, equipment and implements used in such drilling or operation of such oil or gas wells, including all leases to oil or gas rights on the land and upon which such drilling or operations shall be performed. Such lien shall be superior or paramount to any and all other liens or claims of any kind whatsoever, and no contract, sale, transfer or other disposition of said property shall operate to defeat said lien, and said lien shall be enforced in the same manner now provided by law for the enforcement of laborers' liens.

"Section 2. This lien shall not be construed to be a lien upon the real estate of the employer or lessee, but shall be a lien upon the personal property used and con-

nected with said drilling and operations and the output or production of said oil or gas lease on said land."

The first question arising on this appeal is whether or not the act is unconstitutional on the alleged ground that its effect is to take the property of appellant and subject it to the payment of the debt of the Prescott Oil Company without due process of law.

First. The act does not provide for the enforcement of the lien against the machinery, tools, equipment and implements used in drilling an oil or gas well without making the owner of the property a party to the suit. The act provides that said lien shall be enforced in the same manner now provided by law for the enforcement of laborers' liens. In such proceedings the owners of the property are necessary parties. In the instant case, appellant, the owner of the drilling machinery, was not a party to the attachment proceeding to enforce the lien, and it follows as a matter of course that the judgment or order of sale of the property was not binding upon him. It was his privilege to allege and prove that Carter and the other laborers had not performed labor in and about the test well in which the machinery was used, or that they were not entitled to the amount claimed by them. As stated above, the undisputed testimony reflects that the well where the machinery was being used was shut down by the attachment proceeding brought by Carter and the other laborers to enforce a lien against the machinery, etc., for labor which they had performed in and about said well.

Second. Our construction of the act is that it gives a lien to laborers working in or about drilling operations of any oil or gas well on all machinery, tools, equipment and implements used in such drilling operations, irrespective of who may own the machinery. The fact that one man's property may be taken to pay the debt of another does not render the act unconstitutional. In the instant case, according to the undisputed testimony, appellant placed his property in the possession of the lessee, knowing the purpose for which it was to be used by him

and knowing that the statute quoted above gives a lien to laborers for services performed by them in and about the drilling operations, and he therefore voluntarily subjects his property to such liens as are given by the statute. He could have protected himself against the statutory lien in favor of laborers by requiring his lessee to give him a bond to pay the laborers' claims and to return it to him free from such incumbrances. A statute similar to act 513 was upheld as constitutional by the Supreme Court of California in the cases of *Church* v. *Garrison*, 75 Cal. 199, 16 P. 885, and *Lambert* v. *Davis*, 116 Cal. 292, 48 P. 123. Section 1 of the California statute provides that "every person performing work or labor of any kind in, with, about, or upon any threshing machines, the engine, horsepower, wagons, or appurtenances thereof, while engaged in threshing, shall have a lien upon same to the extent of the value of his services."

In the California cases the property had been leased by the owner, just as in the instant case, and the lessees had employed laborers and failed to pay them, and these laborers sought to enforce a lien under the California statute against the threshing machine, to collect the amounts due. It was said by the court that the act was "not unconstitutional, as authorizing a deprivation of the property of the owner without due process of law, because it gives a lien to one not employed by the actual owner." The California court further said: "That the actual ownership of the property was an immaterial circumstance —the obvious theory, and, as we deem it, the correct one, being that the one lawfully holding from the actual owner the possession and the right to operate the machine is to be deemed, for the purposes of the statute, the owner of the property."

The next and last question arising on appeal is whether said act 513, approved March 21, 1923, was repealed by act 615, approved March 23, 1923. The latter act contained the following section:

"Section 6. Remedy Cumulative. The provisions of this act shall not be construed to deprive or abridge

materialmen, artisans, laborers or mechanics of any rights and remedies now given them by law, and the provisions of this act shall be cumulative of the present lien laws of this State, except as herein repealed or modified."

We have examined the latter act and find nothing in its provisions specifically repealing or modifying the provisions of act 513. On the contrary, the later act was clearly intended to strengthen and aid act No. 513.

No error appearing, the judgment is affirmed.

FAGAN v. GRAVES.

Opinion delivered April 25, 1927.

1. REFORMATION OF INSTRUMENTS—SUFFICIENCY OF EVIDENCE.—In order to justify reformation of a deed or written instrument on the ground of fraud or mistake, the evidence of such fraud or mistake must be clear, unequivocal and decisive.
2. REFORMATION OF INSTRUMENTS—MISTAKE AS TO BOUNDARY.—Where plaintiff executed a deed to an adjacent proprietor in settlement of a boundary dispute, the fact that he made a mistake in measurement of his lot did not show a mutual mistake or warrant a reformation of the deed.

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

STATEMENT BY THE COURT.

This suit was brought to correct the description, alleged to have been made by mutual mistake, in two certain deeds, one from M. Fagan and wife to Jane Fagan and the other from Jane Fagan to Mollie Graves, her daughter, made to effect and carry out a compromise settlement between M. Fagan and his mother, Jane Fagan.

M. Fagan purchased, in 1904, lots 1 and 2, of Moore and Shultice Subdivision of lot 1, block 8, city of Hot Springs, taking the title in his own name. In January, 1924, Jane Fagan, his mother, sued him in the Garland Chancery Court to divest the title out of him and invest

it in her, alleging that she had furnished the money to purchase the lots, which should have been conveyed to her, but that he had fraudulently taken the title in his own name, contrary to the instructions given him.

After Jane Fagan's deposition had been taken in the suit, a family conference was held, at which Peter Ganter and R. C. Barrow were present, and a compromise of the case agreed upon, under the terms of which appellant was to convey to his mother, Jane Fagan, 6 feet off the east side of lot 2 and all of said lot 1, except 6 feet off the northeast side thereof, fronting on Crescent Avenue; and appellant executed to Jane Fagan a deed to said lot 1 and 6 feet off lot 2, she in turn conveying it to her daughter, Mollie Graves.

Appellant contends in this suit that the description of the lot in the deed should be so corrected as to allow him a small store-room located in the southeast corner of said lot 1, it being the intention of the parties, at the time of the compromise settlement, that he should retain the land upon which the store was situated. The deeds were drawn up by Ganter and Barrow, or one of them—Barrow, in fact—to carry out the terms of the compromise, and were submitted to Jane Fagan's attorney, A. B. Belding, who corrected, by interlineation and erasure, the description in one of the deeds, making it read correctly, lot 1, etc., of Moore and Shultice's Subdivision of lot 1, block 8, of the Hot Springs Reservation, instead of lot 1, etc., block 8, of the Moore and Shultice Subdivision, block 1, of the Hot Springs Reservation. Witness said he made no other corrections in the deeds, and the deed from Jane Fagan to Mollie Graves appears to have been executed with the erasures and any interlineations just as he made them to correct the descriptions, and the deed had been recorded and was made an exhibit to his deposition. The deed from M. Fagan and his wife to Jane Fagan contained identically the same description as the deed made an exhibit to his deposition, showing that the same changes had been made therein as he made in correcting the other deed. As he remembered it, the

deeds were executed after the interlineations and erasures were made, without new ones being written.

Several witnesses testified, and all understood that the deeds were to be executed conveying the lots so that Jane Fagan would get a 6-foot strip off the east side of lot 2, and all of lot 1 except 6 feet off the northeast side of said lot fronting on Crescent Avenue, and the deeds were made accordingly. Some of the witnesses testified, as did appellant, that it was the intention that he should have the land upon which the store building was located in the southeast corner of lot 1, the 6 feet around the storehouse. He stated he was to have the land on which the storehouse was located and six feet around the store.

One of the arbiters or referees, Peter Ganter, testified that it was the intention at the time, and so expressed by Jane Fagan, his mother, since deceased, in the conference that "Bud," M. Fagan, should have the storehouse. He stated, however, that he and M. Fagan had gone out and stepped the lots off, and understood that the 6 feet retained on the east side of lot 1 would leave the storehouse upon M. Fagan's division of the lots.

The other arbiter, Barrow, said: "After some controversy it was agreed that M. Fagan was to transfer to his mother lot 1, and he was to accept six feet on the side of this place where he said the store stood on, and he was to give six feet from lot 2 for that, for the six feet the store stood on; it seems like he said he and Ganter had been down there and stepped this off and he found out it would take six feet to get this store."

The chancellor found that the testimony did not show a mutual mistake of fact made in the conveyances effecting the compromise settlement, and dismissed both the complaint and the cross-complaint for want of equity, and the appeal is prosecuted from the decree dismissing the complaint.

C. T. Cotham, for appellant.

Murphy & Wood, for appellee.

KIRBY, J., (after stating the facts). The rule of evidence is different, requiring more proof than the

establishment of the contention by a preponderance of the testimony in order to justify the reformation of a deed or written instrument on the ground of mistake. In *Eureka Stone Co.* v. *Roach,* 120 Ark. 326, 179 S. W. 499, the court said: "It is the settled rule of this court that, to justify or authorize the reformation of a written instrument on the ground of fraud or mistake, the evidence of such fraud or mistake must be clear, unequivocal and decisive." See also *Cain* v. *Collier,* 135 Ark. 293, 205 S. W. 651; *Welch* v. *Welch,* 132 Ark. 227, 200 S. W. 139; *McGuigan* v. *Gaines,* 71 Ark. 614, 77 S. W. 52; *Johnson* v. *Stuart,* 97 Ark. 635, 135 S. W. 354; *Waddell* v. *Bowdre,* 151 Ark. 474, 236 S. W. 599; *Norsworthy* v. *Hicks,* 170 Ark. 877, 281 S. W. 660.

The undisputed testimony shows that a settlement between the parties was agreed upon for the division of the lots and the conveyance made in completion of it, and the argument that appellant owed no duty to his mother to make such settlement is of no moment. The recitals of the deeds do not purport to show the terms of such settlement, however, nor any intention that the land to be retained by appellant should include that upon which the storehouse was situated.

Several witnesses testified that it was understood that appellant should keep the land upon which the storehouse was situated, and it was the intention to effect this by the description in the conveyance.

The other testimony tended to show, however, that the description was made in accordance with the agreement of settlement, and that appellant and one of the arbiters had gone out and stepped or measured the lots off before the deeds were written and had given the description as written to the draftsmen, thinking at the time that the land retained included the storehouse.

If he made a mistake in his estimate or measurement, not knowing the boundaries of his lots and the streets as laid out, his inclosure not conforming thereto, and the description was written in accordance with his direction,

it cannot be said such mistake was mutual or warranted a reformation of the deed.

The evidence of any such mistake as would entitle the plaintiff to the relief sought is not clear, decisive and unequivocal, as the law requires.

We find no error in the record, and the judgment is affirmed.

JONES v. GREEN.

Opinion delivered April 25, 1927.

1. BILLS AND NOTES—NEGOTIABLE INSTRUMENT.—A note reciting a promise to pay to the order of a designated person a certain sum of money at a named bank on a certain day *held* a negotiable instrument, under Crawford & Moses' Dig., §§ 7762 to 7769, though providing that tolls collected under a lease of a cotton press to the makers should be credited on the face of the note.
2. BILLS AND NOTES—INNOCENT PURCHASER.—One to whom a note, complete on its face, was transferred for value without recourse, without notice of dishonor, before it was due, or of any infirmity or defect, was an innocent holder entitled to recover thereon, though the makers received no value.
3. BILLS AND NOTES—SUFFICIENCY OF CONSIDERATION.—The consideration of a note need not exist at the time it is made, as the promise becomes obligatory when the promisee incurs any loss, expense or liability in consequence of the promise and in reliance thereon.
4. BILLS AND NOTES—VALUABLE CONSIDERATION.—A promise to perform acts in the future is a valuable consideration for a promissory note.
5. BILLS AND NOTES—SUFFICIENCY OF CONSIDERATION.—The sale or lease of an article to be delivered in the future is sufficient consideration for a promissory note.

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

Kincannon & Kincannon and *Hays, Priddy & Rorex*, for appellant.

Evans & Evans, for appellee.

MEHAFFY, J. On February 17, 1922, one J. F. Taft, representing himself as the president of the Ginners'

Compress Trust of Milwaukee, Wisconsin, leased to the Magazine Gin Company, which was a partnership composed of J. T. Jones and C. J. Gorham, a round-bale cotton press for baling cotton into cylinder bales, and appellants executed and delivered to said Ginners' Compress Trust the following note:

"$1200. Booneville, Ark., Feb. 17, 1922.

"October 17, 1922, after date, for value received, I, we, or either of us, promise to pay to the order of Ginners' Compress Trust, of Milwaukee, Wis., twelve hundred dollars ($1,200) at the Citizens' Bank, Booneville, Arkansas, with interest at the rate of ten per cent. per annum from date until paid. All interest to be paid annually, and if not paid annually to become part of the principal and draw interest at the same rate. The makers and indorsers of this note hereby severally waive presentment of payment, notice of nonpayment and protest, and authorize extension of time by payment of interest. The tolls collected under lease dated February 17, 1922, will be credited on the face of this note until paid.

"Magazine Gin Company,
"C. J. Gorham,
"Mrs. T. J. Jones."

Indorsed on back as follows: "Booneville, 2-17-22. Pay to the order of Bank of Booneville. Ginners' Compress Trust, by J. F. Taft, Pres."

The lease was as follows:

"This agreement, made and entered into this 17th day of February, 1922, by and between the Ginners' Compress Trust of Milwaukee, Wisconsin, hereinafter called the lessor, and the Magazine Gin Co., Magazine, Arkansas, herein called the lessee.

"Witnesseth: Whereas the lessor has this day agreed to and does hereby lease and deliver to lessee and installed ready for operation, on or before the beginning of the ginning season of 1922, upon the conditions herein set forth, the following personal property, to wit: One complete system for baling cotton into cylinder bales, as per specifications and drawings shown in pamphlet called

'Prodigy on Baling Cotton.' The lessee does hereby agree to receive said property and operate same at their gin plant, a public toll gin, baling cotton into cylinder bales, at the option of the cotton grower.

"Whereas the lessee, as a guaranty of good faith, does give his promissory note for twelve hundred ($1,200) dollars to lessor. The lessee agrees to operate this system for a term of not less than three years, and to use their best energy to make it a success and to accommodate the public. Said lessee further agrees to pay the lessor a rental of 20 cents per hundred pounds for all cotton baled in said system, which the lessee is to charge and collect as a toll for compressing the cotton at the gin, and deposit the same at the end of each month to the order of the lessor, less the amount hereinafter stipulated.

"It is further agreed by the lessee that he will keep a correct account of all cotton baled on said system, giving the number of bales and weight of same. A settlement of all amounts due under this lease during any one year shall be computed on or before the first day of January of each year while this lease is in effect. The lessee to deduct all the tolls collected up to twelve hundred dollars, as the return of his money advanced on installing the system. This amount to be credited on the twelve-hundred-dollar note until paid.

"It is understood that the title of the above described property shall remain in the name of the lessor, who is the owner.

"This agreement in no way transfers or incumbers the title other than herein set forth, and the lessor shall have the right to enter the premises of the lessee at any time and take possession and remove, without cost to lessee, said system from his premises, provided if any term of this lease is or shall be violated. The lessee is not to interfere or in any way hinder the removal of the machine, nor is the lessor to be held responsible for any damage from same.

"Further, the lessor reserves the right to remove the system between ginning seasons, provided said system

does not return two thousand bales, under ordinary season conditions, without expense to lessee. The lessee is to do all necessary carpenter work at his own expense.

"The lessor guarantees the system to make a perfect, merchantable bale of cotton and a continuous operation, and guarantees to keep said machine in good repair.

"The lessor also guarantees a market for the product of all cotton out-turned, bidding for same in the open market at the usual premium of round over square, and will furnish the lessee, or whom he may designate, with a limit each day for the purpose of all cotton out-turned offered for sale.

"The lessor guarantees not to install another system where it will directly interfere with the patronage of the lessee system for a period of seven years, provided the lessee meets the demands of the ginning public.

"Witness our hands this the 17th day of February, 1922."

The indorsement on the notes shows that it was first assigned to the Bank of Booneville, and afterwards transferred to appellee, J. F. Green, without recourse.

Appellants never received the round-bale compress, and they refused to pay the note. Suit was instituted by J. F. Green on December 22, 1923, in the Logan Circuit Court.

The appellants filed answer, alleging that the note was given for a patented article, and did not show on its face that it was executed in consideration thereof, and was therefore void.

The circuit court held that the note was void, and the case was appealed to this court, where it was held that there was not a sale but a lease, and, for that reason, the statute did not apply. *Green* v. *Jones,* 168 Ark. 423, 270 S. W. 515.

After the case was reversed by the Supreme Court there was a retrial in the circuit court, and the appellants contended, first, that the note was not negotiable; second, that appellee was not an innocent holder in due course; and third, that the consideration having wholly failed, appellants were not liable.

"Our uniform negotiable instrument act states that an instrument, to be negotiable, must conform to the following requirements:

"1 It must be in writing and signed by the maker or drawer; 2, must contain an unconditional promise or order to pay a sum certain in money; 3, must be payable on demand, or at a fixed or determinable future time; 4, must be payable to order or to bearer; and, 5, where the instrument is addressed to a drawee, he must be named or indicated therein with a reasonable certainty." Crawford & Moses' Digest, § 7767.

The note sued on in this case is a negotiable instrument as defined by above statute. This court has said:

"In order to render the making of instruments negotiable, they must contain a written promise to pay money to another unconditionally, absolutely, and at all events. If the sum promised to be paid is only payable out of a special fund which may prove inadequate to meet the demand in full, the instrument is not negotiable. The reason of the rule is that such an instrument does not carry the general personal credit of the maker thereto, which is one of the essentials of negotiability." *Rector* v. *Strauss,* 134 Ark. 374.

It has been said: "The true test in every case under the negotiable instruments law, as well as at common law, is whether the general credit of the maker or drawee accompanies the instrument. If it does, the instrument is negotiable, otherwise it is not. * * * Inasmuch as as individual promises are always payable from the separate estate of the maker, it follows that the expression of this fact does not state a particular fund. Lastly, it is to be borne in mind that the negotiability of bills and notes is favored in law, and, whenever the promise can be held unconditional without doing violence to the ordinary meaning of the language used, it will be so held.

Although the amount of an instrument is to be paid out of a particular fund, yet, if the fund is mentioned merely as directory to the drawee, as being a means to

reimburse himself, the rule of the law merchant is that the instrument is negotiable." 3 R. C. L. 885-886.

Then our statute provides that "an unqualified order or promise to pay is unconditional within the meaning of this act, though coupled with: 1, an indication of a particular fund out of which reimbursement is to be made, or a particular account to be debited with the amount; or, 2, statement of the transaction which gives rise to the instrument. But an order or promise to pay out of a particular fund is not unconditional." Crawford & Moses' Digest, § 7769.

We think the instrument sued on contains all the essential requirements of the uniform negotiable law, and that it is therefore a negotiable instrument.

Appellant's next contention is that the appellee is not an innocent holder. The testimony in this case shows that it was the understanding of the makers of the note at the time it was made that it was to be sold, negotiated. The instrument was complete upon its face. Appellee became the holder before it was overdue, without any notice that it had been dishonored, and took it in good faith and for value. At the time he purchased the note he had no notice of any infirmity or defect. The clause in the note that the tolls were to be credited on the face of the note is not an infirmity and does not render the note non-negotiable. The fact that appellee is seeking to recover, although he knows that the appellant never got any value, is immaterial. It is true that the appellant did not receive any value.

It is not necessary that the consideration should exist at the time of making the instrument, for, if the person to whom a promise is made should incur any loss, expense or liability in consequence of the promise, and relying upon it, the promise thereupon becomes obligatory. * * * A promise to perform acts in the future is a valuable consideration for a promissory note. Thus, an executory contract of sale is therefore sufficient consideration at the time when it is given." 3 R. C. L. 936.

It is therefore immaterial, so far as the appellee is concerned, whether the contract was ever performed or not. As we have seen, the sale or lease of the article, the promise to deliver in the future, was a sufficient consideration for the promissory note. It is unnecessary for us to determine on whom the burden of proof rests, because, as we view this case, there was nothing to submit to the jury. The facts are undisputed, and the court therefore did not err in directing the verdict. The judgment is therefore affirmed.

NEAL v. ARKANSAS LUMBER COMPANY.

Opinion delivered April 25, 1927.

LOGS AND LOGGING—EXPEDITIOUS REMOVAL OF TIMBER.—Lumber company acquiring deeds to timber in 1913 and 1917 *held* to have proceeded expeditiously, though cutting was delayed until 1923, where owner's original deed, executed in 1902, required removal in 25 years, and company had other timber to remove in vicinity.

Appeal from Bradley Chancery Court; *E. G. Hammock,* Chancellor; affirmed.

Wilson & Martin and *Compere & Compere,* for appellant.

Fred L. Purcell and *Williamson & Williamson,* for appellee.

McHANEY, J. On June 9, 1902, appellant, O. F. Neal, being the owner of a 320-acre tract of land in Bradley County, Arkansas, west of the Lagles, executed and delivered a deed conveying all the pine timber on said land 12 inches and over in diameter to the Bradley Lumber Company, its successors and assigns, for a valuable consideration. This deed contained an expeditious clause as follows:

"The party of the second part shall cut and remove said timber as expeditiously as possible, and it is agreed that, unless it shall have removed all the same within a period of twenty-five years from the date hereof, it shall be responsible for and pay to the first party the full

amount of taxes assessed against said lands after the expiration of said period of 25 years from this date until such time as said timber is removed and said possession returned to said first party."

At that time, and now, there were three large lumber companies in Warren, the Bradley, the Arkansas and the Southern, each actively competing with the other in the acquisition of vast areas of valuable pine timber with which Bradley County was richly blessed. Each of said companies had spent large sums of money in the establishment of mammoth lumber manufacturing plants, and immediately set about the business of acquiring sufficient timber from the owners thereof to supply and operate their respective plants for many years to come. Each of said companies employed agents to buy timber for them, and appellant was so employed from 1900 to 1904, during which time he purchased 5,000 acres or more of timber for his principal, the Bradley Lumber Company. Buying was more or less indiscriminate as to location, and the result was that each of said companies acquired valuable tracts of timber scattered over the county, or, to use the language of the learned chancellor, "checkerboarded to a considerable extent all over Bradley County." Appellant wrote the deeds, or many of them, for timber purchased for his principal, and all deeds had the same or similar expeditious clause as above set out, with probably some variation as to the time given to cut and remove. Early in their operations these companies had not matured plans for logging operations, and had inadequate transportation facilities for the bringing of the logs to the mills. But, as time passed, plans were matured, large bodies of timber lands were blocked together, and logging roads were constructed in such a way as to reach their respective timber areas with spur tracks branching off to reach more distant tracts. The Arkansas and Southern so constructed their facilities to reach timber owned by them west of the Lagles, while the Bradley's log-road ran south, east of the Lagles. The Bradley Lumber Company has never had any facilities

for bringing its timber on the Neal tract into Warren, but the Arkansas did have, so these companies began the system of exchanging tracts for the purpose of the expeditious removal of the timber therefrom. On May 1, 1911, this court decided the case of *Earl* v. *Harris,* 99 Ark. 112, 137 S. W. 806, in which a similar clause was construed, and this decision caused some apprehension in the minds of the holders of similar timber deeds as to the time in which the timber must be removed. Therefore, on August 10, 1912, the Bradley Lumber Company secured from appellant another deed to the same tract of timber, with a like expeditious clause, except the time limit was 15 years instead of 25 years, and the words, "when cut," were inserted in the deed, so as to convey all the pine timber over 12 inches in diameter when cut. This deed recited a consideration of $480, written in a blank space with pen and ink, as was also the fifteen years in which to cut and remove.

Appellant says that this was not the real consideration, and that he did not execute the deed with that consideration in it, nor was the word "fifteen" written in the blank space at the time he signed it, and in this respect it is his contention that the deed is a forgery in that it was altered after its execution, without his knowledge or consent.

On March 22, 1913, the Bradley Lumber Company conveyed three forties, or 120 acres, of this timber to the appellee, Arkansas Lumber Company, and on the 8th day of February, 1917, it conveyed to appellee the other five forties, or 200 acres of said timber. Thereafter, in 1923, appellee, in accordance with its plans for the cutting and removal of timber owned by it, began the extension of its logging road into the territory covered by these deeds, and was preparing to construct its road across this particular land when appellant served notice upon it that it could not construct its road across his land, or cut and remove the timber therefrom. Appellee thereupon brought suit in the Bradley Chancery Court to enjoin appellant from interfering in any way with the construction of its log-road, or from interfering with it in the cut-

ting and removal of said timber. A temporary restraining order was issued against appellant, a hearing was had on a motion to dissolve the temporary restraining order, which was denied, and the order continued. He thereupon filed a demurrer, answer and cross-complaint, in which he sought to enjoin appellee from cutting said timber. Thereafter both parties took voluminous testimony, and, on a final hearing, the court overruled the demurrer to the complaint, dismissed the cross-complaint of appellant for want of equity, made the temporary injunction permanent, and, in the meantime, the timber having been cut from said land, decreed title to the timber in appellee and sustained appellee's right to cut and remove the same at the time it was done in 1923 and 1924. Appellant excepted, prayed and was granted an appeal to this court.

Appellant makes several contentions regarding the deed of 1912, the purposes of its execution, and questions the validity of said deed, in that it was materially altered after it was executed; also that the Arkansas Lumber Company, conceding the validity of the deed in 1912, has not complied with the expeditious clause therein. We do not agree with appellant in any of these contentions, and, in our view of the case, the deed of 1912 from appellant to the Bradley Lumber Company is unimportant, as we are of the opinion that the deed executed in 1902 was still effective, and that the Bradley Lumber Company had the title to said timber under said deed at the time it conveyed to appellee in 1913 and 1917. Under this view of the case, as above stated, the timber deed of 1912 is unimportant. But, even conceding the invalidity of the deed of 1902, we are convinced that the findings of the chancellor, with reference to the effectiveness and validity of the deed of 1912, is supported by the preponderance of the evidence, at least we cannot say that the findings are against the clear preponderance of the evidence.

This case falls within the facts and is ruled by the principles announced in the cases of *Burbridge* v. *Arkan-*

sas Lumber Co., 118 Ark. 94, 178 S. W. 304, and *Orr* v. *Southern Lumber Co.*, 170 Ark. 361, 279 S. W. 1013. Under these decisions we hold that the Arkansas Lumber Company proceeded expeditiously, after it acquired same under the deeds of 1913 and 1917, to cut and remove the timber therefrom. As stated by the chancellor, "true, this timber seems to have been the last removed by the Arkansas Lumber Company in the vicinity," but, as he again stated, "in the nature of things there had to be a last cutting of timber, and, in view of the apparent ill feeling that existed between the parties, it is unfortunate that this timber should be the Neal timber."

In this view of the case it becomes unnecessary to discuss the amount of timber cut and removed from said lands, or its value. The decree of the chancery court is right, and it is accordingly affirmed.

NABERDING *v.* KARRAZ.

Opinion delivered April 25, 1927.

1. CONTRACTS—UNDUE INFLUENCE—EQUITY.—A conveyance or contract will be set aside whenever it has been obtained through influence over persons greatly in the power of another if there is no consideration or inadequacy of consideration, or a clear ground of inference that confidence has been abused or an advantage has been taken of weakness of understanding, or clouded or enfeebled faculties.
2. BILLS AND NOTES—VALIDITY.—Where an old woman, eighty-two years old, unlettered and unlearned, of weak intellect, was induced to give defendant notes and certificates of deposit without consideration, defendant acquired no title, and plaintiff was entitled to the money collected by defendant and for possession of notes.
3. BILLS AND NOTES—INNOCENT HOLDER.—In action to recover possession of notes, evidence *held* to show that the holder of the notes who purchased them from one who had got them from the plaintiff without consideration, and who owed the holder a debt, was not an innocent holder.

Appeal from Monroe Chancery Court; *A. L. Hutchins,* Chancellor; reversed.

C. F. Greenlee, for appellant.

Bogle & Sharp and *C. W. Norton*, for appellee.

McHANEY, J. Appellant is an old woman, eighty-two years old, unlettered and unlearned, of weak intellect. George Naberding, her son, was killed in France. The United States Government paid to the appellant, his mother, a sum of money on account of the insurance, and has, since that time, been paying her monthly the sum of $48.75 on account of the death of her son. Some of her money she deposited in the Bank of Brinkley, for which time certificates of deposit were issued to her. On December 20, 1922, she loaned $800 of her money to H. Henard at 8 per cent. from date until paid, evidenced by four promissory notes of $200 each, one due December 21, 1923, and one on the 21st day of December for the years 1924, 1925 and 1926. The interest on all notes was payable annually, and, if not paid when due, was to become a part of the principal and bear interest thereafter at 8 per cent. These notes were secured by a chattel mortgage on certain personal property of H. Henard. On December 23, 1922, at the instance of Karraz and Mahfouz, appellant indorsed and surrendered a certificate of deposit to the Bank of Brinkley for $467.12, which was cashed by the bank and deposited to the credit of the Fargo Cash Store in the name of Karraz. The indorsement on the back of the certificate by appellant was made by Mahfouz by her mark. This certificate had interest due on it in the sum of $18 or $19, which was also collected by Karraz. About the same time, or later, she turned over all of the above-mentioned notes to Karraz, which she indorsed by Mahfouz writing her name on the back, she touching the pencil, and he witnessing the indorsement, as he did in the case of certificate of deposit. Karraz tried to get his attorneys to indorse the notes for the old lady, and they declined to do so, but again his friend, Mahfouz, performed the service for him.

When the first note became due, Karraz had Mahfouz collect it and the interest on all the notes, amounting to

$264 in all, which Mahfouz brought back to him. He says that he tried to sell all the notes to Henard for $350; that, later, he sold them to his friend, Namey, for $400, $200 of which was a debt he owed Namey, and $200 was paid to him in cash, and that he sold them to Namey before the suit was brought. He testified that the old lady gave the notes to him because she didn't want them —that she would rather he had them than the members of her family; that, if she had wanted the notes back, he would have given them to her, or, if she wanted the money, he could get the money and pay her; that, if she needs any money and will come to him, he will help her—that is, that he would do the best he could to help her. He admitted that he had no money, had spent all that he had got from her, but that, if she needed money, so long as he was in good health, he could make it and help her.

Mrs. Naberding testified that she did not give him the notes to be kept by him, but that he was to put them in the bank for her, and stated positively that they were not his property. Appellant is corroborated in her testimony by her daughter, Susie Cash, who stated that her mother gave Karraz the notes to be put in the bank, as also two bank notes, evidently meaning two certificates of deposit.

Namey testified that he purchased the notes for the consideration stated by Karraz. He was asked this question:

"Q. You do not know, of your own knowledge, in what capacity Karraz was to collect these notes? A. I asked him where he got that note, and he said 'She gave it to me,' and I asked him, 'How I know she gave it to him,' and he says, 'P. A. Mahfouz was there and signed it,' also she gave him some money. That is all I know."

Karraz, Mahfouz and Namey are Syrians, and are all intimate friends and acquaintances.

This action was brought to recover against Mahfouz and Karraz for the total amount of money converted by them, and against Namey to recover possession of the notes. After hearing the evidence, the chancellor dis-

missed the complaint for want of equity, from which comes this appeal.

The record in this case shows that the appellant was a very old woman; that she was weak in mind; that there was no consideration; that, while there is little evidence of persuasion, it is shown by the testimony of H. H. Britton, husband of appellant's granddaughter, and her next friend in this action, that there was persuasion. He testified, in substance, as follows: I know the reason why grandmother transferred the notes to Isaac Karraz. He petted her up just like she was a child. He gave her a few little candies, called her sweetheart, and that just made a fool of her. Again he testified that Karraz tried to persuade his grandmother away from his home; that Karraz came to witness' house during the month of February, 1924, and said to her, "Sweetheart, what's the matter? Ain't you going back home with me?" She replied that she was sick.

Under such circumstances, a court of equity will inquire very closely into the transaction, and will cancel the transfer or conveyance on slight evidence of bad faith and unconscionable acts resulting in the conveyance or transfer of property. No principle is better established, in courts of equity, than that a conveyance or contract will be set aside whenever it has been obtained through undue influence over a person greatly in the power of another, if there is no consideration, or inadequacy of consideration, or clear ground of inference that a confidence reposed has been abused, or an advantage has been taken of incompetency, weakness of understanding or clouded or enfeebled faculties.

"If there is reason to believe that influence has been acquired over a person of weak mind, the transaction will be carefully scrutinized in equity. And whenever, as a result of age, sickness, or other cause, there is a great weakness of mind, not amounting to total incapacity, in a person executing a conveyance, and it appears that there was either no consideration therefor or a grossly inadequate one, the conveyance may be set aside by a

court of equity upon a proper and seasonable application made either by the injured party or his representatives or heirs." 13 Cyc. 586.

One of the leading cases in our own court on this subject is that of *Hightower* v. *Nuber,* 26 Ark. 604, written by Mr. Justice GREGG, in which the court said: "And in a court of equity, where bad faith and unconscionable acts can have no allowance or favor, the strength of mental capacity of the parties, the circumstances surrounding them, their relationship, etc., make up the grounds upon which the court can find the real influences that produced the conveyance. And when it is discovered that the party in whose favor the conveyance is made possessed an undue advantage over the grantor, and, in person or by agent, exercised an improper influence over such one, and to the advantage of the grantee, it is an act against conscience and within the cognizance of a court of equity."

We do not believe, from the record in this case, that Mrs. Naberding intended to deliver the notes to Karraz as a gift, but, even though it may be said she did so intend the transfer, yet, under the circumstances of this particular case, it would be unconscionable and inequitable to permit the conveyance to stand. Mr. Henard states that he refused to borrow the money from her until he had consulted with her daughter, Mrs. Cash. He says that she was old, childish, feeble-minded, and there is no contention at all that there was any consideration whatsoever for either the money or the notes.

We are therefore of the opinion that the chancellor erred in dismissing the complaint for want of equity, and that Karraz acquired no title either to the money or the notes.

The next question to be considered is whether Namey is an innocent purchaser of said notes. We have carefully considered the evidence as to whether Namey was an innocent purchaser, and have reached the conclusion that he was not. He testified himself that Karraz told him the old lady had given him the notes, and, as evi-

dence of the fact, he showed him where Mahfouz had signed the old lady's name to the notes. He therefore knew that Karraz had acquired the notes without any consideration having been paid therefor. Namey was asked this question:

"Q. But you knew the note didn't cost him anything—he told you he just got it from Mrs. Naberding if he would take care of her in the future? A. That is what he told me, that he would take care of that woman—if he didn't, she wouldn't give it to him."

Then there are other circumstances connected with the transfer of these notes that are, to say the least, very suspicious. He testified that Karraz owed him $200, that Karraz had owed him $200 since 1921, which he had loaned Karraz without taking any note or any security therefor. He was living at Forrest City and Karraz at Fargo; that Karraz had no money, and that he had never tried to collect the debt from him. Under these circumstances we are of the opinion that Namey took the notes from Karraz with whatever infirmities attached to them in the hands of Karraz, and that therefore Namey is not an innocent holder of said notes.

With reference to Mahfouz' connection with this case, it may be briefly stated that, whenever there was any collecting to be done, or the signing of the old lady's name to any paper necessary to transfer it, he was present and participating therein.

The decree of the chancery court will therefore be reversed, and the cause remanded with directions to enter a decree against Karraz and Mahfouz for the amount of money collected by them, or either of them, from the appellant, and ordering and directing the appellee, Namey, to surrender and deliver up the notes in his possession, or, if he has parted with the possession thereof, to enter a judgment against him, Karraz and Mahfouz for the amount of said notes, and the interest thereon, and such other orders or decrees as may be necessary to enforce the rights of appellant according to the principles of equity and not inconsistent with this opinion.

VALLEY PLANTING COMPANY v. CURRIE.

Opinion delivered April 25, 1927.

1. ACCOUNT STATED—EFFECT OF SETTLEMENTS.—An action by the former manager of defendant corporation to recover one-third of an income tax refund, under a contract to pay him one-third of the net earnings for his services, was not barred by reason of annual settlements in which the income taxes were deducted from the gross earnings, nor by final settlement, since the taxes were paid under the erroneous belief that the amount was due, and hence they were not considered in such settlements.
2. LIMITATION OF ACTIONS—RECOVERY OF SHARE OF TAX REFUND.—The statutes of limitation did not run against a former manager's right of action for share of an income tax refund until such refund was made, so that an action brought within the statutory period, after demanding his share immediately on learning of refund, was not barred.
3. TRIAL—TRANSFER OF CAUSE.—Where a cross-complaint for review of long and complicated accounts running for many years, between defendant corporation and its former manager, suing for his share of an income tax refund, was not filed until over four years after his last connection with defendant, the court did not err in sustaining a demurrer thereto and refusing to transfer the case to equity, as the matters charged would have been barred by the statute, either on plea or demurrer in the court of equity.
4. ESTOPPEL—CONDUCT OF PLAINTIFF.—A corporation's former manager was not estopped to share in a refund of income taxes by a disclaimer of interest when the government made claim against the corporation for additional taxes, where the possibility of a refund was not considered by either party when his stock was sold, and the fact that a refund was made which resulted in additional assessment against him personally first brought the matter to his attention.

Appeal from Jefferson Circuit Court; *T. G. Parham,* Judge; affirmed.

Williamson & Williamson, for appellant.

Coleman & Gantt, for appellee.

McHANEY, J. Appellant, Valley Planting Company, is an Arkansas corporation, and, from the time of its organization to December 31, 1921, and for some time thereafter, it had only three stockholders. When originally organized the stockholders were J. M. Taylor, J.

G. Taylor and Andrew Nunn, each owning a one-third interest in the capital stock of $15,000. In 1904 J. M. Taylor died, and his stock passed to his daughter, Henrietta Taylor. On March 1, 1901, appellee, J. D. Currie, purchased the capital stock owned by Andrew Nunn, and from that time on to December 31, 1921, he continued to be the owner of a one-third interest therein, and was the general manager of the corporation. J. M. and J. G. Taylor, as well as other members of the Taylor family, owned valuable farming lands in Drew, Desha and Lincoln counties, and this corporation was organized for the purpose of operating these farms or plantations, doing a plantation supply business, operating gins and other business pertaining thereto. In 1909 the appellant and appellee entered into the following written contract:

"State of Arkansas, County of Jefferson.

"This contract between the Valley Planting Company, a corporation, John D. Currie, and J. M. and J. G. Taylor (a firm composed of J. G. Taylor and Henrietta Taylor) witnesseth:

"That said Valley Planting Company has employed said J. D. Currie to manage the business of the corporation, and has rented from said J. M. and J. G. Taylor their lands in Drew, Desha and Lincoln counties. Said corporation is to pay out of its gross earnings the current expenses (other than the salary of the said Currie and the rent of said lands) and is to reserve four thousand five hundred dollars of its net earnings to pay annual dividends. The said Currie is to have for his services as manager one-third of the remaining net earnings, and said J. M. and J. G. Taylor is to have the other two-thirds of the net earnings for the rent of their lands. This contract is for the year 1909 and from year to year thereafter, subject to be terminated at the end of any year by notice from either party.

"This the 28th day of June, 1909."

The parties continued to operate under this contract from that time until the appellee sold his stock, December

31, 1921, to Mr. Dillard Saunders, who thereafter succeeded to the management of the corporation in the place of the appellee. The business of the corporation was conducted apparently without consultation with Miss Henrietta Taylor, Mr. J. G. Taylor and appellee consulting together regarding the company's operations when they deemed it proper to do so, J. G. Taylor being president, Miss Henrietta Taylor vice president, and the appellee general manager. No stockholders' or directors' meetings were held, and the business of the company was conducted more as a partnership than that of a corporation. At the end of each year the business done for that year was audited, the books closed, and each of the stockholders credited with one-third of the profits, after deducting all expenses, including income and excess profits taxes. The record shows the company was very successful, especially for the years 1917, 1918 and 1919, when it paid for each of those years a large amount of income and excess profits taxes to the Government. In September, 1921, appellee wrote Mr. J. G. Taylor, and, among other things, mentioned in the letter was that he had heard that two revenue men were after Pickens for $60,000 on 1917, 1918 and 1919, and said: "We have had two communications from the revenue men for 1918 and 1919, that are holding for you; hope you will not have to give up anything now." He further expressed the hope, in this letter, that Mr. Taylor would be able to buy all his interest in the Valley Planting Company. In the sale of his stock to Saunders, appellee said nothing about the probability of the Government demanding any additional tax of the corporation. In December, 1922, or in January, 1923, Mr. David A. Gates was employed by the Valley Planting Company in the matter of the adjustment of the income and profit taxes between it and the Government for the years 1917, 1918 and 1919, and, as a result of his employment, he secured from the Government for those years a total refund of $13,374.33, for which he charged a fee of $2,500, leaving a net amount of refund in the sum of $10,874.33. This

readjustment was made by the Government in the fall of 1923, but, because of error in the issuing of the first checks, final vouchers were not delivered until in the spring of 1924. At the time of his employment, the Government was asserting a claim for an additional income tax against the corporation for those years, amounting to between $20,000 and $30,000, but, as above stated, the Government not only abandoned its claim against the corporation, but made a refund to it in the sum stated. But the obtaining of the refund for the Valley Planting Company resulted in a large increase of the personal tax against the appellee and the Taylors, as individuals. When Mr. Currie was notified of the increase of his personal tax, and that the corporation had been given a refund, he immediately demanded of Mr. Taylor that his additional tax be paid out of this money, or that the corporation pay it. Mr. Taylor declined to do this, and he thereafter, on February 7, 1925, instituted this action against the Valley Planting Company to recover one-third of the total amount of refund. Appellant demurred to the complaint, which was overruled, and it filed an answer and cross-complaint, the answer denying material allegations of the complaint, and the cross-complaint charging certain irregularities on the part of appellee and his son, who was the bookkeeper, in the keeping of the accounts, and that a restatement of the account would result in the indebtedness of appellee to the Planting Company, and praying that the cause be transferred to equity. Demurrer was sustained to the cross-complaint, and, at the conclusion of the testimony, the substance of which has been heretofore stated, the court instructed the jury to return a verdict for the appellee in the sum of $3,624.74, with interest at six per cent. per annum from May 1, 1924. The jury returned a verdict for $3,991.45, which included the interest on the amount given the jury by the court, and on which judgment was entered, from which comes this appeal.

Appellant first insists that the action of appellee was barred because of the annual settlements made at the end

of each year of the years involved, when the net profits of the corporation were ascertained and distributed, and also when the final settlement between them was made at the time he sold his stock and severed his connection with the company, which, as appellant contends, resulted in an account stated. We do not agree with this contention. It is undisputed that the amount of income and excess profits taxes was deducted from the gross earnings for the years involved, and, but for the payment of these taxes, appellee would have received his one-third thereof under his contract with the company. It was necessarily a part of his compensation under his contract, under the system the parties had adopted of handling the company's business, and paying the appellee for his splendid management of the company's affairs. It is furthermore undisputed that this money was paid out by the company erroneously under the belief that this amount was due the Government, and it was not therefore taken into consideration in the annual settlements, or in the final settlement when he sold his stock.

Appellant's next contention is that the action is barred by the statute of limitations, but we do not agree with this contention. The refund was made by the Government in May of 1924, and the statute did not begin to run until that time. The cases cited by appellant, to the effect that mere ignorance of the existence of a cause of action does not prevent the running of the statute of limitations, are correct declarations of law, but this is not a case of that kind. In the very nature of things appellee could not have maintained an action against appellant for the recovery of his interest in this refund until the refund had been made by the Government. He therefore had no cause of action until this sum of money, which had been erroneously paid to the Government, was allowed and paid back to the corporation by the Government. He very shortly thereafter learned of this fact, because he received a notice of an increase of his personal taxes, and advising him of the readjustment of

the corporation's taxes, resulting in the assessment of an additional tax against him. He immediately demanded his share of this refund, and thereafter, within the period of the statute, brought this action to recover same. We therefore hold that the statute began to run against his right of action from the date of the payment of the refund to it by the Government.

It is next suggested that the court erred in refusing to transfer the case to equity. There was no error in the court's action in this regard, as, even though the case had been transferred to equity, the matters set up and charged in the cross-complaint would have been barred by the statute of limitations, either on a plea thereto or by way of demurrer. *Cunningham* v. *Dellmon,* 151 Ark. 409, 237 S. W. 450. The cross-complaint of appellant is lengthy, and was largely based on long and complicated accounts between it and appellee, running for many years, and it contained the allegation that "the Valley Planting Company did not undertake to recheck the accounts of the said J. D. Currie until the filing of the present suit," and "it now develops, on an examination of the books, as kept under the supervision and direction of the said J. D. Currie," that he allowed certain irregularities to exist. The cross-complaint was filed April 3, 1925, and the last connection appellee had with the company, as manager and in charge of the accounts, was December 31, 1921. It will therefore be seen that appellant waited too long to have the accounts reviewed, either in a court of law or equity. There was therefore no error either in sustaining the demurrer to the cross-complaint or in the refusal of the court to transfer to equity.

The final contention of appellant is that appellee is estopped on the ground set out in his requested instruction number 7, to the effect that, if the jury should find that the Government made a claim against appellant for additional taxes for the years mentioned, and that appellee "assumed by his conduct that he had no interest in this trouble of the Valley Planting Company, and that he

had severed his connection with the company and was not responsible for its indebtedness, then this disclaimer of 'interest' on his part estops him from sharing in the refund." But there is no evidence on which to base an estoppel, as suggested in the requested instruction. True, he had sold his stock, but the matter of the probable indebtedness to the Government for additional taxes, or the matter of a refund in the event the company had paid more taxes than it was justly due, was not taken into consideration by either of the parties at the time the stock was sold. The fact that the refund was made, which resulted in an additional assessment against appellee, personally, brought the matter to his attention, and we can find nothing in the evidence that he had done prior to that time to estop him from claiming his share of the profits he was thus entitled to. We find no error in the record, and the judgment is therefore affirmed.

TAYLOR v. ARKANSAS LIGHT & POWER COMPANY.

Opinion delivered May 2, 1927.

MASTER AND SERVANT—INDEPENDENT CONTRACTOR.—Where a contract of employment of State convicts provided that they should be guarded and worked under the direction of a warden employed by the State, the defendant having no control over the person of the convicts, but only the right to designate what work was to be done, the relation of master and servant did not exist between defendant and a convict who was injured while employed in clearing land on defendant's property, and defendant is not liable for injuries sustained by such convict when a tree fell on him while engaged in such work.

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

STATEMENT OF FACTS.

Sidney S. Taylor, as administrator of the estate of R. L. McKinnon, deceased, instituted this action against the Arkansas Light & Power Company to recover dam-

ages because of the negligent act of the defendant in allowing a tree to fall upon said R. L. McKinnon while he was engaged in clearing land for it. The defendant denied that the relation of master and servant existed between it and R. L. McKinnon at the time he was killed, or that it was guilty of any negligent act in the premises.

The record shows that, during the year 1923, the Arkansas Penitentiary Commission made a contract with the Arkansas Light & Power Company to furnish it fifty convicts at a dollar and one-half per day, with which to clear ground to be used as a reservoir in connection with its water-power dam, which was being constructed by it in Hot Spring County, Arkansas. Under the terms of the contract the Penitentiary Commission was to furnish all board, including food and the preparation thereof, for the men supplied, and all bedding needed and used by them. It was further agreed that the Penitentiary Commission should supply, at its own expense and upon its own responsibility, all guards and other help needed for the care of said convicts, without any responsibility upon the part of said company.

R. L. McKinnon was one of the convicts so furnished, and was put to work clearing land, with his fellow-convicts, for said company. A warden was over the men and directed them which trees to cut down. McKinnon and other convicts had sawed down a tree, which lodged against another tree. The convicts were then directed to saw down the second tree in order that the lodged tree might fall to the ground. While they were sawing the second tree, the first tree began to fall, and, as McKinnon started to run and get from under the tree, it fell upon him and injured him so severely that he died. One of the men hollered, "Look out!" just as the tree began to fall. There was some brush where McKinnon ran, and this prevented him from getting out of the reach of the falling tree.

The circuit court granted a motion of the defendant for a peremptory verdict on the ground that the relation of master and servant did exist between the parties, and

that, if such relation did exist, there was no evidence to show that the defendant was guilty of negligence. The case is here on appeal.

Martin, Wootton & Martin and *Sydney S. Taylor,* for appellant.

Robinson, House & Moses, for appellee.

HART, C. J., (after stating the facts). The circuit court was right in directing a verdict for the defendant. The case is controlled by the principles of law announced in *St. Louis, Iron Mountain & Southern Ry. Co.* v. *Boyle,* 83 Ark. 302, 103 S. W. 744. In that case it was held that, under Kirby's Digest, § 5856, reserving the control in the State of convicts hired out, a railroad company is not liable for the tortious act of a State convict in injuring an employee of the railroad company. In that case the court recognized that the relation of master and servant rests upon a contract of service between the parties, the essential elements of which are that the master shall have control of the employee and the right to direct the manner in which the service shall be performed.

The same statute was in force at the time McKinnon was hurt in the case at bar. The contract of employment expressly provided that the convicts should be guarded and worked under the direction of a warden employed by the State. The State clothed, fed and guarded the convicts and directed their movements while they were at work. The servants of the defendant would point out to the warden what ground was to be cleared, and the warden directed the movements of the convicts in cutting down the trees. The defendant had no control over the persons of the convicts, and they worked under the State's own officers, who were there to guard and care for the men in the performance of their labor. The defendant only had the right to designate what work was to be done, but the warden in charge of the convicts had the exclusive right to guard and direct the convicts in the performance of their work. Hence, under the principles of law laid down in the case above cited, the relation of master and servant did not exist between the defendant

and McKinnon at the time the tree fell upon him and caused his death.

It is not like the case where the proprietor of a mill or a mine, where convicts have been sent to work, fails to use ordinary care to keep the instrumentalities and the place of work in safe condition. Here they had only a *prima facie* right to designate the work to be done, and the State warden directed the convicts in the performance of their work.

But it is urged that the principles of law in that case are changed because, under § 9694 of Crawford & Moses' Digest, it is provided that the Penitentiary Commission shall not hire out or lease, or permit any person to hire out or lease, any of the convicts of this State to any person or persons whomsoever. In *Green* v. *Jones,* 164 Ark. 118, 261 S. W. 43, it was held that a contract leasing convicts to a corporation to construct the dam in question was in violation of this section of the statute, although the physical control and custody of the convicts were under the supervision and control of guards and wardens appointed by the Penitentiary Commission. It was said that the public policy of the State was to prevent the leasing of convicts to persons or corporations to be worked by them for private gain. We are not able to see, however, how the holding in this case could in any wise change the principles decided in the case first cited. There was no right or duty of control in the defendant in the present case, and there was no negligence in failing to provide safe instrumentalities or a safe place in which to work. The defendant simply told the State warden what trees were to be cut down, and the State warden had exclusive control of the convicts in directing their methods of work.

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

NEWSUM AUTO TIRE VULCANIZING COMPANY v. SHOEMAKER.

Opinion delivered May 2, 1927.

1. RELEASE—FRAUDULENT REPRESENTATIONS.—In a suit by a creditor to set aside an instrument whereby the debtor was released from account and a mortgage was taken from a third party as security, evidence *held* to show that the release was obtained by fraudulent representations.
2. CONTRACTS—RESCISSION FOR FRAUD.—Contracts secured by false representations and fraud may be rescinded in equity.
3. CONTRACTS—RESCISSION—LACHES.—One who seeks to have a contract rescinded on ground of fraud must proceed with promptness to assert right, unnecessary delay being fatal, especially where the property involved has a speculative value or is likely to deteriorate greatly in value.
4. RELEASE—RESCISSION—DELAY IN ASKING RELIEF.—A creditor giving a release of indebtedness in return for chattel was not entitled to have the release canceled, though procured by false and fraudulent representations, where he acquiesced therein, knowing the circumstances, for a period of over two years, and instituted proceedings for cancellation only after litigation under the mortgage had failed to pay the indebtedness.

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

Rogers, Barber & Henry and *J. A. Tellier,* for appellant.

John W. Newman, for appellee.

HART, C. J. Appellant brought this suit in equity to set aside a release for $1,416.72 on the ground that it had been obtained by fraudulent representations, and judgment was asked for said sum, alleged to be the balance due for automobile supplies furnished by appellant to appellee, L. F. Shoemaker. The case is here on appeal from a decree of the chancery court dismissing the complaint for want of equity.

The record shows that L. F. Shoemaker owed appellant $1,416.72 for automobile supplies sold him between November 29, 1922, and March 30, 1923. On the 17th day of April, 1923, appellant signed an instrument releasing L. F. Shoemaker from the payment of said account and accepting in lieu thereof, as its debtor, the Yellow Bus

Interurban Company. On the same day the appellant took a mortgage on nine cars from said Yellow Bus Interurban Company, and the mortgage was duly acknowledged and filed for record.

According to the evidence for appellant, it was induced to sign the release to L. F. Shoemaker and to accept the mortgage on the automobiles from the Yellow Cab Company on the representations made by Shoemaker that said automobiles were free from all liens and incumbrances except for a small amount, which was stated. The automobiles had mortgages and other incumbrances on them to an amount in nearly half their full value, and the mortgage thus given turned out to be a worthless security.

Evidence was introduced by appellees tending to show that the release of L. F. Shoemaker and the substitution of the chattel mortgage as security for his indebtedness was not obtained by fraud. Without reviewing the testimony on this branch of the case, it may be said that we have read and considered the evidence carefully and are of the opinion that a preponderance of the evidence shows that the release of L. F. Shoemaker was secured by false and fraudulent representations made to appellant.

It is well settled in this State that a contract secured by misrepresentation and fraud may be rescinded in equity. *Cady* v. *Rainwater,* 129 Ark. 498, 196 S. W. 125, and cases cited.

It is equally well settled that, where a party desires to rescind upon the ground of fraud, he must, upon discovery of the fact, proceed with promptness to have the contract rescinded. If he be silent and said contract is still in force, he will be held to have waived the fraud and will be bound by the contract. He must not play fast and loose, and unnecessary delay is fatal to his right to rescind. This is especially true where the property involved has a speculative value or is likely to greatly deteriorate in value. *Fleming* v. *Harris,* 142 Ark. 533, 219 S. W. 33; *LaVasque* v. *Beeson,* 164 Ark. 95, 261 S. W. 49.

Tested by this rule we do not think that appellant is entitled to the relief asked. The release was signed on the 17th day of April, 1923, and the mortgage on the automobiles to secure the account was taken on the same day. In a month thereafter the company which gave the mortgage had become insolvent, and insolvency proceedings were instituted against it. In August, 1923, appellant filed an intervention in the insolvency proceedings, asserting its rights to the automobiles under the mortgage above referred to. It also brought a suit in the circuit court based on its rights under the mortgage, which was subsequently dismissed. The circumstances were such that the appellant was bound to know at that time that the release to Shoemaker had been secured by false representations. The present suit was not instituted until August 1, 1925. This was nearly two years after the fraud was discovered. Appellant waited until it found out that it could not recover anything under the mortgage. Appellant could not test out its right in the insolvency proceedings to make its debt out of the mortgaged property and, after it had lost out in that case, bring a suit to rescind the contract of release. Good faith and due diligence in the matter should have prompted appellant to act sooner. It could not wait to see whether or not the mortgage transaction might not turn out well after all. Acquiescence for a period of two years was a condonation of the fraud; and the chancery court was right in dismissing the complaint of the appellant for want of equity.

Therefore the decree will be affirmed.

STANDARD MOTORS FINANCE COMPANY v. MITCHELL AUTO COMPANY.

Opinion delivered May 2, 1927.

1. PRINCIPAL AND AGENT—EFFECT OF NOTICE TO AGENT.—Where a salesman was the agent of an automobile company to sell second-hand automobiles, the company was chargeable with knowledge acquired by him while acting in discharge of his agency.
2. SALES—FALSE REPRESENTATION—RESCISSION.—Where a note for the price of a second-hand automobile affirmatively recited that 40 per cent. of the sales price had been collected, the falsity thereof afforded ground for rescission of the sale of a note sold to a finance company without recourse, where the payee was chargeable with knowledge of its agent that such cash payment had not been made.
3. USURY—SALES OF ARTICLES.—Charging a price more than 10 per cent. greater for an article sold on credit than for cash does not constitute usury.
4. USURY—WHO MAY DEFEND.—The usury law is for the protection of the borrower, and he alone can make that defense.
5. SALES—RIGHT TO RESCIND.—Where a material representation in a note that 40 per cent. of the sales price for an automobile had been collected was false, the fact that the finance company which purchased the note from the payee was allowed thirty days for investigation to determine whether it would purchase the note *held* not to deprive it of the right to rescind.

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

Saxon, Wade & Warren, for appellant.

McKay & Smith, for appellee.

SMITH, J. Appellant is a corporation residing in and operating out of New Orleans, and is engaged in the business of buying notes given in partial payment of used automobiles. It deals with authorized sales agents of automobiles who take used cars as part payment of new ones, and its plan of operation is as follows: It furnishes to the dealer a blank sales contract, which contains questions to be answered by the dealer and certain other questions to be answered by the purchaser of a used car from the dealer. This contract requires the

dealer to add a certain per cent. of the cash price to the sales price when the car is sold on credit, and a statement is furnished the dealer by appellant showing what this amount shall be. This addition to the dealer's cash selling price is referred to as a "service charge." Identical contracts are used in all cases, and the contract signed by Daniel Sherman, who bought a used car from appellees, will show the system employed. The cash price of the car bought by Sherman was $224, and to this the dealer added $26, making a credit sales price of $250. The purchaser was required to pay 40 per cent. of the credit sales price, which in Sherman's case amounted to $100. The balance of $150 due by him was divided into monthly payments, and the title to the car was reserved until all payments were made.

The questions which the purchaser was required to answer gave information as to the purchaser's age, present and previous employment, property owned and incumbrances thereon, earnings, and from what sources, and references, with addresses. Attached to these question blanks was a promissory note, reserving title to the car sold, and providing that the installments should bear interest after their maturity at the highest lawful rate.

It was the theory of appellant that, if the purchaser paid 40 per cent. of the credit selling price of the car, the interest therein thus acquired would be sufficient to induce him to make the monthly payments of the balance of the purchase money as they matured.

When these blanks had been properly filled and the note signed by the purchaser, the contract and the note would be sent to appellant, which was given thirty days in each case to determine whether it would purchase the note offered, and, if accepted within that time, appellant remitted to the dealer the balance due on the note, less the "service charge." Appellant's profit in the transaction was represented by the service charge, which, as we have said, was the difference between the dealer's cash selling price and the credit price. Appellant was

allowed the thirty days for such investigation as it cared to make, including inquiry concerning the purchaser.

Appellant's managing officers testified that its uniform and invariable rule was not to buy any note unless it was affirmatively shown that the purchaser had made a cash payment of 40 per cent. of the purchase price, and that all dealers, including appellees, were so advised.

Appellees, who are brothers, doing business as the Mitchell Auto Company, in making sales of new cars trade in used cars, which they sell for the best price obtainable. W. A. Taylor had charge for appellees of the sale of these used cars, and he was allowed a commission of 40 per cent. of the price received, and Taylor was required by appellees to collect as much as 40 per cent. of the purchase price of the cars sold by him, and appellees charged Taylor's account with 40 per cent. of the used car which Taylor sold.

The contract and note of Sherman, together with other similar notes and contracts of other purchasers of used cars from appellees, were sent to and accepted by appellant, who remitted to appellees the amount of all the notes, less the total of the service charges. Only a few payments were made on any of these notes, whereupon appellant sent a representative to Stephens, the place of appellees' business, to collect the notes. This representative interviewed the makers of these notes, and found that none of them had paid 40 per cent., as recited in the sales contract, in cash. For instance, it was shown in the Sherman contract that Sherman had actually paid only $10 in money, but had agreed to pay Taylor the balance of $90, which the sales contract recited as paid. Appellees testified that they knew nothing about the arrangement between Sherman and Taylor, or between the other purchasers and Taylor, and supposed that the $100 cash had been paid to Taylor by Sherman, and that the 40 per cent. had been paid by all of the other purchasers, and that these were cash transactions so far as they were concerned, as they charged Taylor's account with that amount of money. Taylor testified that he

did not report to appellees that Sherman and the other purchasers of cars had not paid him the 40 per cent. cash payment; that he did not consider it necessary to do this, as he was selling the cars on commission, and the transaction was, as between him and appellees, a cash transaction, as he was charged in each instance with the cash reported by him as having been collected from the purchasers.

Taylor was the agent of appellees, and they are charged with any knowledge acquired by him while acting in the discharge of his agency. He knew that appellant bought these notes on the assumption that 40 per cent. of the sales price had been paid, and that the representation to that effect contained in the sales contract was false. Upon discovering the falsity of this representation appellant demanded a cancellation of the sale of the notes, and tendered them to appellees, and, when this demand was refused, immediately brought this suit to enforce rescission, judgment being prayed in the alternative for the amount paid appellees for the notes, less the collections made thereon. The complaint was dismissed as being without equity, and this appeal is from that decree.

We think a case for rescission was made. Appellees may not have personally known that the purchasers had not made the 40 per cent. cash payment, but Taylor, their agent, knew this, and they are charged with his knowledge. The note which they tendered appellant contained the affirmative recital that 40 per cent. of the sales price had been collected, and this statement was false. This representation was highly material in inducing the purchase of the notes, and its falsity affords ground for rescission.

In 12 R. C. L., at page 345, § 100, of the chapter on "Fraud and Deceit," it is said:

"False representations which are made with knowledge of their falsity, and with a fraudulent intent, are, of course, ground for relief in equity as well as at law. As a general rule, however, courts of equity will grant

relief in such cases by way of rescission or otherwise, even though no fraudulent intent on the part of the person making the representations is shown, and though he made them innocently, as a result of misapprehension or mistake. All that need be shown under such circumstances is that the representations were false and actually misled the person to whom they were made."

Appellees insist that the decree should be affirmed for the reason that appellant does not come into court with clean hands, it being alleged that the transaction in its inception was usurious and void on that account, for the reason that the service charge exceeded 10 per cent. per annum on the money advanced by appellant.

Two answers may be made to this contention. The first is that appellant did not loan appellees any sum of money. The transaction was a purchase of notes. It is true that the "service charge" exceeded 10 per cent. of the sum paid, but this consisted in an addition to the cash price, which the purchasers—and not appellees—agreed to pay. Charging a price more than 10 per cent. greater for an article sold on credit than would have been charged had the sale been for cash does not constitute usury. *Edwards* v. *Wiley,* 150 Ark. 480, 235 S. W. 54; *Smith* v. *Kaufman,* 145 Ark. 548, 224 S. W. 978; *Blake Bros.* v. *Askew & Brummett,* 112 Ark. 514, 106 S. W. 965. The second answer is that the usury law is for the protection of the borrower, and he alone can make that defense. *Ford* v. *Hancock,* 36 Ark. 248. The notes in question were indorsed by appellees without recourse on them, and the makers of these notes are not parties to this litigation.

The fact that appellant was allowed to take thirty days for investigation to determine whether it would purchase a note tendered does not deprive it of its right to a rescission. It relied, and had the right to rely, on the representation made that a payment of 40 per cent. had been made, and the right to investigate the responsibility of the purchaser did not render this representation less material, because that representation was assumed as

true, and appellant's investigation was to determine whether, even then, it would buy the notes. *Matlock* v. *Reppy,* 47 Ark. 148, 14 S. W. 546. The notes would not have been bought, notwithstanding appellant's investigation, if reliance had not been placed on the representation that a 40 per cent. cash payment had been made. This representation was false, was material, and was relied upon, and induced the purchase of the notes, and the relief prayed should have been granted, and the decree of the court below will therefore be reversed, and the cause remanded with directions to enter a decree conforming to this opinion.

HARVEY v. MARR.

Opinion delivered May 2, 1927.

1. MINES AND MINERALS—CONTRACT TO DRILL—CONSIDERATION.—Where a lease was in proved territory, and there was already a producing well on the lease, a contract for drilling a well whereby the driller was to be paid out of the other parties' interest in the first oil produced, and was to share in oil produced according to the amount the well produced, the contract was not void for want of consideration.
2. MINES AND MINERALS—LIABILITY CONTRACT.—The purchaser of an interest in an oil lease, who collected oil as provided for in the contract and received the benefits thereof, became liable according to its provisions.
3. MINES AND MINERALS—WAIVER OF PROVISION OF CONTRACT.—Where the requirement as to standardization was waived by consent of the parties to a contract for drilling an oil well, and a compressor was installed in lieu thereof, the cost to be shared equally by the parties, the cost of standardization should not have been charged against the purchaser of the driller's interest in the lease.
4. MINES AND MINERALS—BREACH OF CONTRACT.—The purchaser of a driller's interest in an oil lease, who failed to drill a second well as required by the contract, should be charged with the entire cost of a well drilled by the receiver appointed by the court, less the amount to which he would have been entitled under the contract had he drilled the well himself.

Appeal from Union Chancery Court, Second Division; *George M. LeCroy,* Chancellor; modified.

Haynie, Parks & Westfall, for appellant.

Gaughan & Sifford and *Streett & Streett,* for appellee.

SMITH, J. In November, 1925, a contract in writing was entered into between J. E. Marr, as party of the first part, and Bray-Hawthorne Company, a corporation, as party of the second part, concerning a ten-acre oil lease in Union County and a standard rig complete, and the tools, appliances and equipment to drill oil wells then located on the lease. The lease was in oil-producing territory, which was called a "high-powered production," and there was a small well on the lease producing about 100 barrels per day. This well had only been drilled to the shallow sand.

The party of the second part agreed to drill a well to the second sand and to standardize it at its own expense for the sum of $2,000 to be paid out of the first party's interest in the first oil produced on the lease. The contract provided that, if the well should produce more than 100 barrels of oil per day, the parties should share the production equally, and should also share the expense of operation equally, but, if the well produced only 100 barrels or less, the second party should receive three-fourths of the oil and the party of the second part the remaining one-fourth.

The contract further provided that, if the well should produce more than 100 barrels per day, the second party should drill a second well and equip it with a standard rig at its own expense, the production to be distributed as in the case of the first well. It was further provided that, if the first well should produce 500 barrels or more per day, the party of the second part should have, in addition, the first 1,700 barrels produced; but the well does not appear to have produced that quantity of oil.

As a further consideration the party of the first part agreed to pay the party of the second part the sum

of $1,500 upon the completion of the second well, payment to be made out of the first oil produced.

At the time this contract was made Marr, the party of the first part, owned only an undivided half interest in the lease. The other half was owned by the Continental Supply Company, but Marr had control of this half interest, and it could only be acquired through him or with his consent, and he testified that, if he had not made this contract with the Bray-Hawthorne Company, he could have made a similar contract with some other party, as there was no question about the oil being under the land.

After the execution of the contract an abstract of the title was submitted, from which it appeared that Marr owned only an undivided half interest, but he advised the Bray-Hawthorne Company that the other half could be purchased for $7,500, but, when an offer to buy was made, the owner demanded $8,500, and that sum was paid by the Bray-Hawthorne Company, which elected to proceed under its contract with Marr, although he owned only a half interest, and the other half could not be purchased for $7,500, as Marr represented it could be. The Bray Company drilled the first well, as the contract required it to do, and it produced more than 100 barrels per day. Each party was therefore entitled to one-half of the production.

The Bray Company sold their interest in the lease to E. J. Harvey, as trustee, who collected the $2,000 in oil as provided in the contract between Marr and the Bray Company, but Harvey declined to drill a second well. Another company which owned adjoining land drilled a well within 700 feet of the boundary line of the lease, from which a large quantity of oil was produced, and Marr again demanded the drilling of a second well on the lease as an offset well, and, when Harvey again declined to drill the well, Marr applied for and secured the appointment of a receiver, who, under the direction of the court, drilled a second well, which also produced more than 100 barrels of oil per day. Thereafter Marr

prayed partition of the lease and that the rights of the parties therein be adjusted in accordance with the provisions of the contract between Marr and the Bray Company.

The court found that Harvey, although not a party to the contract between Marr and the Bray Company, was aware of its provisions and had accepted its benefits and thereby became estopped to deny his responsibility and obligations thereunder, and granted the relief prayed. A finding was made that partition could be effected only by a sale, and the receiver was ordered to sell for that purpose. The court found that Harvey was chargeable with the cost of standardizing the first well and was liable for the cost of drilling the second well, and, not having paid same, his interest therein should be charged with the cost of standardization, which the court found to be $4,000, and the cost of drilling the second well, which was found to be $14,000. Upon this finding the receiver was directed to pay Marr one-half the proceeds of the sale and to deduct and pay Marr $18,000 out of the remaining half. To these findings exceptions were saved, and this appeal is prosecuted to reverse the decree based on those findings.

It is not questioned that Harvey proceeded under the contract and that he collected the $2,000 which the contract allowed the Bray Company to collect upon the completion of the first well. But it is insisted that the contract is void as being without consideration, and that the court erroneously adjudged the rights and obligations of the parties thereunder.

The contract is not void for the want of a consideration to support it. The lease was in proved territory, and no doubt was entertained that oil would be produced; in fact there was already a small producing well on the lease when the contract was made. It was not known, however, what quantity of oil would be produced if the deeper sands were reached. If only 100 barrels or less were produced, the Bray Company would have been entitled under the contract to three-fourths of the pro-

duction for the life of the well, which was estimated at seven years, although it owned only a half interest in the lease, and so also with the second well which it agreed to drill. The contract may have been improvident, but there was a valuable consideration for it, and it was therefore valid, and, when Harvey adopted it and acted upon it and received the benefits thereof, he became liable according to its provisions.

Appellant claims that appellee failed to pay his part of the operating expenses of the lease after the deep sand well was brought in, as the contract required him to do, and insists that this failure was a breach of the contract which absolved him from the obligation to drill the second well. The testimony, however, does not sustain this contention.

Harvey failed to put a standard rig upon the first well drilled, this being what is meant by standardizing it, and it was for this failure that the court charged the $4,000 cost of standardization against the interest of Harvey.

It appears, however, that, by consent, the parties waived the requirement as to standardization, and, in lieu thereof, installed an air compressor, the cost of which, as we understand, was shared equally by the parties. The court should not therefore have charged appellant with the $4,000 item representing the cost of standardization, and the decree will be modified by striking out that item.

The court directed the receiver, after selling the property and paying certain costs and expenses, to pay Marr one-half of the proceeds of the sale, and further ordered the receiver, out of the remaining half, to pay Marr $18,000, of which $4,000 was the cost of standardization, the remaining $14,000 being the cost of the well which the receiver had drilled. We have said the court should not have charged the $4,000 item against Harvey, and we do not understand the theory upon which the charge of $14,000 for drilling the well was made.

It appears that, under the directions of the court, the receiver had drilled the well which Harvey was obligated to drill, but, as the receiver has not made his final report, it is not clear whether this well has been paid for by him, and, if so, how.

The order of the court in this behalf authorized the receiver, in conjunction with Marr, to enter into a contract for drilling the well and to appropriate to the payment thereof the proceeds of the sale of oil which the receiver had collected, and to pledge the future production of oil, and, if necessary, to issue receiver's certificates therefor in payment of the expense of drilling the well. The regularity of this proceeding is not before us, and we are only adjusting the rights of the parties, that action having been taken. *Harvey* v. *Marr, ante,* p. 80.

Under the contract set out above Harvey should be charged with the entire cost of the well drilled by the receiver, but he should also be allowed credit for the $1,500 to which he would have been entitled under the contract had he drilled the well himself.

The decree of the court below ordering the sale of the lease and the machinery and equipment incident thereto will be affirmed, and the receiver will make the sale pursuant to the directions of the court, if he has not already done so, but the cause will be remanded with directions to the court to make a final statement of the account between the parties, as herein directed.

KELLER v. WHITE.

Opinion delivered May 2, 1927.

1. NEGLIGENCE—CONTRIBUTORY NEGLIGENCE AS QUESTION FOR JURY. —In an action for the death of a passenger in an automobile, resulting from overturning of the car when it came to a curve, where the evidence showed that the driver selected by deceased was somewhat drunk, and conflicted as to whether deceased prevented another passenger from stopping the car on several occasions, and as to whether he urged the driver from time to time to drive faster, deceased's contributory negligence *held* a question for the jury.

2. NEGLIGENCE—JURY QUESTION.—Unless the acts complained of are negligent *per se* or unless all reasonable minds must agree that the acts were necessarily negligent, the existence of negligence is always a question for the jury.

3. MASTER AND SERVANT—SCOPE OF AUTHORITY.—Where an agent in charge of a distributing station of an oil and gas company took several companions into his car, part of whom were drinking, and drove towards his home town to have a fish supper, and on the way the automobile overturned, *held* that the agent was not acting within the scope of his authority, as agent of the company, or in performance of his duties for it.

Appeal from Chicot Circuit Court; *Turner Butler*, Judge; reversed as to White; affirmed as to Pierce Petroleum Corporation.

Cook & Trice and *W. W. Grubbs*, for appellant.

J. R. Parker for White, appellee.

Gannaway & Gannaway, Roscoe R. Lynn, O. C. Burnside and *W. Garland Streett*, for Pierce Petroleum Corporation.

HUMPHREYS, J. Appellant, as administrator of the estate of H. T. Keller, brought suit against appellees jointly for the benefit of the estate, the widow and minor children, for killing Keller through the alleged unlawful negligence of Graham White in driving the automobile in which they were riding at a high and reckless rate of speed, and in disregard of the warnings of deceased and others in the car. The appellee, Pierce Petroleum Corporation, was made a party defendant upon the theory that, at the time of the tragedy, Graham White was the agent of said company, and that, in making the trip by automobile from Eudora to Lake Village, with the deceased in the car, White was acting within the scope of his authority and performing duties for said corporation and its benefit.

Appellees filed separate answers, each denying the material allegations in the complaint, and interposing the further defense that deceased was guilty of contributory negligence which was the proximate cause of the injury complained of.

The cause was submitted upon the pleadings and testimony adduced by the respective parties, which resulted in a verdict and judgment in favor of appellees, from which is this appeal.

The tragedy occurred a short time after dark on the evening of April 21, 1925, between Eudora and Lake Village. The occupants of the automobile were Graham White, H. T. Keller, C. E. Buchanan, Ike Scott and Frank Keller, Jr. Graham White ran a distributing plant for the exclusive products of the Pierce Petroleum Corporation at Lake Village. The Eudora Motor Company at Euroda, owned and operated by H. T. Keller and his brother, J. J. Keller, was a customer of White. C. C. Buchanan was a traveling auditor for the Pierce Petroleum Corporation; Ed Scott was a truck driver for White; Frank Keller was a nephew of H. T. Keller. Graham White went fishing with a number of friends on the morning of the 21st, and during the outing they consumed a quart of moonshine whiskey. After his return to Lake Village, during the afternoon, he and Buchanan drove from Lake Village down the river for the purpose of interviewing the trade, purchased a quantity of moonshine whiskey on the trip, and returned by way of Eudora, and called on Keller Brothers at their garage, arriving at about 5 o'clock. After talking over business matters generally and taking several drinks, they decided to go to Lake Village in White's car and have a fish supper. They had been drinking at the garage. Buchanan was quite drunk, and White and Keller were somewhat intoxicated. Scott and Frank Keller were sober, and remained so. When they started to Lake Village it was suggested that Scott drive the car, but Buchanan objected, and H. T. Keller prevailed upon Scott to allow White to drive. Before reaching a sharp curve in the road, two stops had been made for H. T. Keller, White and Buchanan to take an additional drink, and on both occasions Scott attempted to drive the car, but was prevented from doing so by Buchanan and H. T. Keller. There is a conflict in

the testimony of Ike Scott and Frank Keller, Jr., as to whether H. T. Keller prevented Scott from stopping the car on several occasions and whether Keller urged White, from time to time, to drive faster. When the curve was reached the speed was not reduced, and the car turned over, severely injuring White, Buchanan and H. T. Keller. H. T. Keller died the next day as a result of the injuries.

At the conclusion of the testimony appellees asked for a peremptory instruction, which the court refused to give, but, before the case was sent to the jury, the court gave, at appellee's request, instruction No. 15, which was in effect a peremptory instruction under the undisputed facts revealed by the testimony. Instruction No. 15 is as follows:

"It was the duty of H. T. Keller, on the trip which resulted in the fatal accident, to at all times use ordinary care for his safety, and, if he failed to do so, and such failure in any way contributed to his injury, the plaintiff cannot recover, no matter how negligent the conduct of White might have been. If, at the time he entered the car of White, he discovered, or, by using ordinary care, might have discovered, that White was in an intoxicated condition to the extent as to make it apparent that he was in no condition to operate same with safety, or if, while at any time upon said trip, he did or might have discovered White's condition, and could have a reasonable opportunity to leave the car and failed to do so, or if he in any way encouraged White in the dangerous operation of said car, or if he assented to the encouragement of White by others to drive at a reckless rate of speed, or if he, by any conduct on his part, prevented any other person from restraining or controlling White, then he failed to use ordinary care for his own safety, and his negligence in any of these particulars would bar his recovery, and the jury should find for the defendants. By the use of the term 'negligence' in these instructions is meant the want of ordinary care. And any 'ordinary' care in this case is meant the conduct of ordinarily care-

ful and prudent persons under similar circumstances."

Appellees conceded in their arguments that this instruction, requested by them and given by the court, was a peremptory instruction on the issue of contributory negligence. We do not think any of the facts detailed by the witnesses constituted within themselves contributory negligence under the law. The existence of negligence is always a question for the jury, unless the acts complained of are declared by law to be negligent *per se,* or unless all reasonable minds must conclude that the acts were necessarily negligent. Instruction 15 therefore invaded the province of the jury, and was erroneous. *Rector* v. *Robins,* 82 Ark. 424, 102 S. W. 209; *Reed* v. *State,* 54 Ark. 621, 16 S. W. 819; *Blankenship* v. *State,* 55 Ark. 244, 18 S. W. 54.

Our analysis of the testimony has convinced us, however, that the court should have given a peremptory instruction in favor of the Pierce Petroleum Corporation, because the undisputed evidence showed that the trip from Eudora to Lake Village was not taken in performance of White's duties for said corporation or for its benefit, even if there were sufficient evidence to make the issue of his agency one for the jury. It is quite clear that White, Buchanan and H. T. Keller were on a trip to satisfy their own appetites rather than upon a mission for the benefit of the corporation in a business way. White was not acting within the scope of his authority as agent of the company or in the performanec of his duties for it and for its benefit. *Wells Fargo & Company Express* v. *Alexander,* 146 Ark. 104, 225 S. W. 597; *Chicago Mill & Lumber Co.* v. *Bryeans,* 137 Ark. 341, 209 S. W. 69; *Bryeans* v. *Chicago Mill & Lumber Co.,* 132 Ark. 282, 200 S. W. 1004.

The judgment is therefore affirmed in favor of the Pierce Petroleum Corporation and reversed and remanded for a new trial as to Graham White, on account of the error in giving a peremptory instruction upon the issue of contributory negligence on the part of deceased.

MIDDLETON v. STATE.

Opinion delivered May 2, 1927.

HOMICIDE—DYING DECLARATIONS.—In a murder case, statements concerning the shooting made by deceased, after being told by the attending physician that he could not live, and after he had requested his father to take him upstairs where he could have a comfortable bed to lie on until he died, were admissible as dying declarations.

Appeal from Poinsett Circuit Court; *W. W. Bandy,* Judge; affirmed.

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

HUMPHREYS, J. Appellant was indicted for murder in the first degree in the circuit court of Poinsett County for killing Johnnie Cox, and, upon trial under said indictment, was convicted of murder in the second degree, and was adjudged to serve a term of twelve years in the State Penitentiary as a punishment therefor, from which is this appeal. The admission in evidence of the dying declarations of Johnnie Cox, undertaking to detail the alleged facts concerning the difficulty culminating in the tragedy, is the only assignment of error by the trial court contained in appellant's motion for a new trial, and is therefore the only question before us on appeal for determination.

The substance of Johnnie Cox's statement was that he was en route home on horseback along the river road, when appellant stepped from behind a tree with a drawn revolver and demanded that he return his whiskey, which he had theretofore accused him of taking; that, when he denied taking the whiskey, appellant demanded his pistol, and, upon his refusal to comply with the demand, appellant raised his pistol to a shooting position and fired two shots at him before he succeeded in drawing his pistol and firing at appellant; that the first shot fired by appellant missed him, but the second took effect; that, when he fired at appellant, his horse whirled and ran up to a house, where he was permitted to go in and lie down until his father arrived.

The admissibility of the statement depended upon whether it was made by Johnnie Cox *in extremis*. The rule announced by this court admitting the admission of dying declarations is as follows:

"The declarations of a person who has been wounded, respecting the circumstances under which the wound was inflicted, are admissible in prosecutions for the killing of such persons, if made at a time when he did not expect to survive the injury and all hope of recovery has been supplanted by the conviction that he would certainly die. The time when made need not be when the declarant apprehended immediate dissolution. But they are admissible if made at any time when he believed that death was impending and certain." *Evans* v. *State,* 58 Ark. 47, 22 S. W. 1026; *Freels* v. *State,* 130 Ark. 189, 196 S. W. 913; *Neal* v. *State,* 156 Ark. 419, 246 S. W. 470; *Alford* v. *State,* 161 Ark. 256, 255 S. W. 884.

According to the testimony, the dying declarations were made after deceased had been informed by his physician that he could not live more than two hours, and after he had said that he only had one time to die, and after requesting his father to take him upstairs where he could have a comfortable bed to lie on until he died.

This testimony was sufficient to show that, when the statement was made, deceased had abandoned all hope of recovery and that he believed death was impending.

No error appearing, the judgment is affirmed.

PARK v. RURAL SPECIAL SCHOOL DISTRICT No. 26.

Opinion delivered May 2, 1927.

1. SCHOOLS AND SCHOOL DISTRICTS—DISSOLUTION OF SPECIAL SCHOOL DISTRICT.—Refusal to enjoin the issuance of bonds by rural special school district created by Acts 1925, p. 876, until petition to the county board of education for dissolution should be determined, *held* not error, since the board had no authority to dissolve a special school district formed by act of the Legislature.
2. SCHOOLS AND SCHOOL DISTRICTS—DISSOLUTION OF SPECIAL SCHOOL DISTRICT.—The county board of education has no authority to dissolve a special school district formed by act of the Legislature.
3. SCHOOLS AND SCHOOL DISTRICTS—ISSUANCE OF BONDS FOR SCHOOL BUILDING.—The board of directors of a rural special school district *held* impowered to issue bonds for a school building after an election had been held as prescribed by Crawford & Moses' Dig., § 8840.
4. SCHOOLS AND SCHOOL DISTRICTS—BONDS FOR SCHOOL BUILDING.—Where bonds for school building are issued without authority of the electors in the rural special school district, created by Acts 1925, p. 876, such bonds are absolutely void.
5. SCHOOLS AND SCHOOL DISTRICTS—VALIDITY OF SALE OF SCHOOL BONDS.—The contract for the sale of bonds issued for a school building in a rural special school district *held* not to violate the statute prohibiting the sale for less than par value, because it provided for payment of a brokerage fee.

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

STATEMENT BY THE COURT.

Appellant brought this suit for himself and on behalf of the majority of electors within the boundaries of appellee school district to restrain the issuance and sale of bonds by the said district. The complaint alleged that he with 123 other electors of the district, constituting a majority, had filed before the county board of education a petition for the dissolution of said district and given notice thereof as required by law. That the matter could not be reached and heard by said board before September 12, 1925; that, pending same, the said board was preparing to issue and sell bonds for the erection of the school building in said district; that said bonds were to be issued

for less than par, in violation of law; and that they were to be issued without authority, the question not having been submitted to the electors as provided for by law.

Demurrer was filed but not passed on, and the answer denied the allegations of the complaint.

The testimony shows that, after the petition for the dissolution of the district had been duly filed with the county board of education as alleged, an election was regularly held, on the date for holding the annual school elections, in Rural Special School District No. 26, Lonoke County, created by act 291 of the Acts of 1925; the 15 days' notice required by law first having been duly given, the place for holding the election being designated, the purpose of said election being stated in the notice as for electing a board of directors, etc., voting an annual school tax for said district and fixing the amount thereof, and "(3) for the purpose of voting a building fund for said district, and fixing the amount thereof."

The ballots printed by the board of directors of said district and furnished the electors, after the names of the candidates for school director and the terms, had printed thereon:

"For school tax for general purposes, 8 mills

Against school tax

For building fund, 4 mills

Against building fund."

The majority of the electors voting voted "For building fund, 4 mills," only three voting "Against building fund" the vote being 26 "For building fund" and 3 "Against building fund."

The result was duly certified, the board having made an order showing the result.

The board agreed to sell the bonds, $8,000 6 per cent. legally issued school bonds, for $8,000 cash upon delivery. The board made an agreement for the sale of the bonds to the American Southern Trust Company as follows:

"AGREEMENT.

"Little Rock, Arkansas July 24, 1925.

"To the Board of Directors, Rural Special School District No. 26, Lonoke County, Arkansas.

"Gentlemen: For your $8,000 6 per cent. legally issued school bonds, dated August 1, 1927, '29, '31, '33, '34, '35, '36, '37, '38, '39, '40, '41, '42, '43, '44, '45, being sixteen (16) bonds of $500 each, we will pay you on delivery at the American Southern Trust Company of Little Rock, Arkansas, $8,000 in cash. Interest on the bonds to be payable semi-annually on the 1st day of February and August in each year, at the office of the American Southern Trust Company, who will act as trustee.

"In making this proposal to accept the above bonds at par for 6's we are to be allowed a fee of $400 for brokerage and selling them.

"Your board will furnish the abstract of title to the property to be mortgaged, showing good title to the property in the district.

"Respectfully submitted,

"R. G. Helbron
"By R. G. Helbron."

"The above proposition is this, the 25th day of July, 1925, accepted as to all of its conditions by the board of directors of Rural Special School District No. 26, Lonoke County, Arkansas.

"By C. C. Rice, President,
"By J. C. Clements, Secretary.

"Jesse B. Shelton,
B. C. Finch,
S. A. Brown,
J. H. Robertson."

A copy of the deed of trust showing the sum of the bonds to be issued was indorsed by stipulation.

The chancellor denied the relief prayed, dismissed the complaint, and from this decree the appeal is prosecuted.

Reed & Beard, for appellant.

Chas. A. Walls, for appellee.

KIRBY, J., (after stating the facts). Appellant contends, first, that the court should have enjoined the issuance of the bonds by the school district until the petition to the county board of education for dissolution of the district was finally determined. This contention is without merit, since that board had no authority to dissolve a special school district formed by an act of the Legislature. *School District No. 25* v. *Pyatt Special School Dist.,* 172 Ark. 602.

It is next contended that the board was without power to issue bonds, not having been given authority to do so by the election held. Section 3 of act 291 of the acts of 1925 provides:

"Said Rural Special School District No. 26 of Lonoke County, Arkansas, shall be governed by all the general laws of the State relative to rural special school districts and shall have all the rights, powers and duties now conferred upon rural special school districts to borrow money, to issue bonds and negotiable evidences of debt, to acquire a site for a school building or school buildings, and to carry on the general business of said district, and the said board shall possess all other rights now exercised or possessed by rural special districts under the general law governing said districts; provided, however, that, if the board of directors of said Rural Special School District No. 26 of Lonoke County shall deem it necessary and to the best interest of said district to issue bonds or other negotiable evidences of indebtedness, prior to the annual school election to be held in May, 1925, it shall have power and authority to issue said bonds or negotiable evidence of indebtedness in such sum as it finds necessary in order to properly construct and equip a school building in said district, without submitting the question to the electors in said district, and said board shall have full authority to pledge such part of the annual school tax as may be necessary for that purpose. Any bonds or other negotiable evidences of indebt-

edness issued under authority of this act otherwise shall be governed by the general laws of the State relating to rural special school districts."

By the terms of this act the board of directors is given authority to issue bonds or other negotiable evidences of indebtedness, to borrow money for the construction of school buildings for the district, if done before the date of the annual school election to be held in May, 1925, without submitting the question to the electors of the district, and to pledge such part of the annual school tax as might be necessary for that purpose. If the bonds were not issued before that date, however, the board could only acquire authority to issue them by an election held under the general laws relating to rural special school districts, as provided in the last sentence of said § 3. Bonds issued without authority of the electors are absolutely void, of course. *Rural Special School Dist. No. 30* v. *Pine Bluff*, 142 Ark. 279, 218 S. W. 661; *Robertson* v. *Rural Spl. Sch. Dist. No. 9*, 155 Ark. 161, 244 S. W. 15.

Section 8840, C. & M. Digest, provides that rural special school districts shall have the power to borrow money for building purposes if authorized by a vote of a majority of the electors of the district. "Such vote may be 'For building fund' or 'Against building fund,' and shall state the amount of the building fund tax which the voter desires levied. * * * If a majority of the votes cast are 'For building fund' it shall be equivalent to voting a building tax of the amount or rate as determined by this section for each succeeding year until the money borrowed by the board of directors pursuant to such vote, together with all the interest thereon, shall have been fully paid. When a building fund has been specially voted for, as provided in this section, the board of directors may borrow money and mortgage the real property of the district as security therefor, under such conditions and regulations as to amount, time and manner of payment as the board of directors shall determine, and may, from time to time, renew or extend any evidence of indebtedness or mortgage issued or executed hereunder." * * *

This section also provided a form of a certificate to be issued by the board of directors to the lender of the money, showing the result of the election and the amount of the money borrowed, the terms of the loan, with the rate of interest, and that it is to be paid from funds arising from the amount of tax voted therefor, to be levied annually upon the property of the district.

This certificate is required to be executed in triplicate, signed by a majority of the board, which retains one copy, delivers another to the lender, and must file the third with the clerk of the county court, which court is required to levy, each succeeding year, a building tax of the rate voted for against the property in the district until the amount borrowed, with interest thereon, has been fully paid. Section 8841, C. & M. Digest.

This certificate is not the "bond or other evidences of indebtedness" authorized to be given for the money borrowed under said § 3 of act 291, already set out. Even if it could be held to be the form of bond or evidences of indebtedness intended to be required executed for money authorized to be borrowed by the election held under said section, which we do not think is the case, and is not necessary to decide, since the said act provides for the issuance of "bonds or other negotiable evidences of indebtedness" for the money borrowed upon the election held authorizing it to be done.

These bonds would ordinarily be issued in commercial form, as usual in the regular course of business, in accordance with the agreement between the parties, secured by the mortgage authorized to be executed, and the lender's copy of the said certificate required to be issued would necessarily be transferred to the holder of the bonds, as additional security and identification of the owner of the bonds, since the county treasurer is authorized to pay the money collected into the treasury from the tax levied for the building fund to the holder of the certificate upon demand.

It is finally contended that the contract for sale of the bonds is in violation of the statute authorizing the

money to be borrowed and the bonds issued, since it provides for the payment of a brokerage fee of $400 for sale of the bonds, which, appellant insists, amounts to a sale for less than par value and is an evasion of the law.

The statute gives the board of directors the power to issue and sell the bonds at not less than their par value, with interest thereon at 6 per cent., the prescribed rate, which carries with it the implied authority to pay a broker to sell the bonds or to assist the commissioners in doing so, when regarded necessary, and the payment of a reasonable commission is incidental to the express authority to sell coming fairly within the scope of the power granted, and does not constitute a sale at a discount, within the meaning of the law. *Arkansas Foundry Co.* v. *Stanley,* 150 Ark. 127, 233 S. W. 922.

We find no prejudicial error in the record, and the decree is affirmed.

DUNAWAY v. RUSSELL.

Opinion delivered May 2, 1927.

1. VENUE—DESTRUCTION OF BUILDING.—Under Crawford & Moses' Dig., § 1164, providing that actions for injury to real property must be brought in the county in which the subject of the action is situated, a circuit court was without jurisdiction of an action to recover damages for negligent injury and destruction of the building situated in another county.
2. JUDGMENT—RES JUDICATA.—A judgment for the defendants in an action in one county for damages to personal property alleged to have been caused by the negligent injury and destruction of a building situated in another county barred a subsequent action in the latter county between the same parties for damages for destruction of the building, notwithstanding Crawford & Moses' Dig., § 1164, provides that actions for injury to real property must be brought in the county in which the subject of the action is situated, since the same fact was in issue and had been determined against plaintiff.
3. APPEAL AND ERROR—PRESUMPTION FROM ABSENCE OF BILL OF EXCEPTIONS.—Where a judgment recites that documentary proof in support of a special plea was heard, the appellate court will,

in the absence of a bill of exceptions, presume that there was sufficient evidence to sustain the trial court's finding.

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

STATEMENT BY THE COURT.

This is an action by appellant, the owner of a one-story brick building situated on the south half of lot 8, block 1, Tyler's Addition to Conway, Arkansas, containing a printing office and equipment for the publication of a newspaper, against appellees, Theodore Smith, doing business as the Smith Auto Company, and the other defendants, architects and contractors, for damages for the destruction of said building and equipment alleged to have been caused by defendants' negligence in digging a ditch or excavation on the property line adjacent to the wall of appellant's building, removing the lateral supports thereof without putting in any supports or braces, so weakening his foundation that it collapsed, destroying the building completely, to his damage in the sum of $5,000. Prayed judgment against defendants and each of them for that sum.

The defendants, W. A. Russell and Howard James, the contractors, filed a separate answer, denying the allegations of the complaint, appellant's ownership of the building alleged to have been destroyed, the value thereof, and any negligence in making the excavation that caused or contributed to the damage and destruction of said building. Separate answers were filed by the other defendants, containing like denials of the allegations of the complaint. Russell & Company filed a supplemental answer, pleading a former judgment rendered in their favor in the Garland Circuit Court on October 2, 1925, in appellant's suit against them and the other defendants therein, as *res judicata* and by way of estoppel of appellant's right of action herein.

The answer alleged: "That the plaintiff, L. S. Dunaway, did file his cause of action and prosecute the same to final judgment in the circuit court of Garland County,

Arkansas, on October 2, 1925, in which action he sought to recover against the same identical defendants named in this suit for damages to the personal property of the plaintiff situated in the building alleged in the complaint herein to have collapsed, and in said action in the circuit court of Garland County, Arkansas, the plaintiff set up, as the basis of his right to recover, the same acts of negligence complained of in this action. Defendants say that, if plaintiff sustained any damage as a result of any of said alleged negligent acts of these defendants, his damage to both real and personal property constituted but a single cause of action, and that plaintiff, in electing to try said cause of action in the circuit court of Garland County, Arkansas, for damage to the personal property alone, thereby waived his right to any other damage alleged to have been sustained by him as a result of said alleged negligent acts of these defendants; and as a result of said trial and judgment in the circuit court of Garland County, the matters set out in the complaint herein are *res judicata.*

"Defendants further state that, in said action in the circuit court of Garland County, Arkansas, the plaintiff alleged the same acts of negligence on the part of the defendants as are set out in the complaint herein, and evidence was introduced upon trial of said cause tending to establish said negligence; that the defendants answered in said causes, denying said alleged negligence, and introduced evidence to support their answer; that the issue as to whether or not the defendants were guilty of negligence in making the excavation set out in the complaint herein and whether or not said building collapsed as a result of any negligent act of these defendants, was submitted to the trial court in said action in the circuit court of Garland County, and a verdict was returned in favor of the defendants, whereupon a judgment in favor of the defendants was made and entered by the court, and the said verdict and judgment have not been reversed, set aside, or in any way modified. Defendants say that, as a result of said verdict and judgment, the plaintiff is

estopped to deny the findings of said jury and of said judgment that these defendants were not guilty of any negligence."

A certified transcript of the complaint, the demurrer thereto, the answer of the defendants, the order sustaining the demurrer in part, and final judgment in the Garland County action, was attached to the answer. The other defendants adopted the supplemental answer of Russell & Company, filed on the 30th day of December, 1925.

Appellant filed a general demurrer and response to the answer, alleging it did not set up sufficient facts or averments to constitute a plea in bar to this cause, and denied that the judgment rendered by the Garland Circuit Court was a final judgment; denied that it waived his right to try this cause of action by electing to try the personalty feature of the cause in the Garland Circuit Court, and alleged that the judgment of that court might have been predicated upon an issue not material to this, and immaterial, irrelevant and incompetent testimony, and stated that the issue of the damage to real property was not tried in that court, could not have been an issue, and was not adjudicated; denies that the issues and facts in the Garland Circuit Court were the same as those joined in this cause.

The court overruled the demurrer to the special pleas signed by the defendants, and the order recites further: "This cause coming on to be heard upon the complaint, the answer and special pleas hereto, together with the response to said special pleas, and documentary proof in support of said special pleas, and being well and sufficiently advised, the court finds that the said special pleas filed by the said defendants to the complaint of the plaintiff herein should be sustained, and complaint of the plaintiff should be dismissed." From the order dismissing the complaint this appeal is prosecuted.

C. A. Holland, Murphy, McHaney & Dunaway, for appellant.

J. C. & Wm. J. Clark, R. G. Bruce, R. W. Robins and *Will G. Akers,* for appellee.

KIRBY, J., (after stating the facts). It is earnestly urged by appellant that the trial court erred in overruling his demurrer to the special plea of *res judicata* and estoppel and dismissing his complaint.

No bill of exceptions appears in the record. Our statutes provide that actions for injury to real property must be brought in the county in which the subject of the action is situated. Section 1164, C. & M. Digest.

Appellant's cause of action for damages was alleged to have grown out of the negligent destruction of his building in Conway, Faulkner County, by the defendants in making the excavation along the foundation thereof, and the damage to the personal property contained in the building was but an incident to its destruction. Certainly the circuit court of Garland County was without jurisdiction of the plaintiff's action to recover damages for the negligent injury and destruction of his building situated in Faulkner County, and assuming, without deciding, that he could proceed in his action in Garland County, where defendants were summoned, to recover the damages for the injury to his personal property contained in the building destroyed resulting from the negligent destruction thereof, without waiving his right to recover for injury to the real property, the building itself, it was still necessary to prove the same act of negligence alleged to have caused the injury to the building, since there could have been no recovery of damages to personal property contained therein injured by the collapse of the building unless there was liability for the destruction of the building itself.

The parties to the action were the same and the allegations of the plea in bar, conceded by the demurrer, shows this fact to have been put in issue in that suit and directly determined against appellant as a ground of recovery, and, such being the case, the same fact cannot be put in issue in this subsequent suit between the same parties, since it was conclusively established in the judgment in the former suit, which remains effective, not having been modified or appealed from. *National Surety*

Company v. *Coats,* 83 Ark. 545, 104 S. W. 219; *Morgan* v. *Kendricks,* 91 Ark. 394, 121 S. W. 298; *Gosnell School District* v. *Baggett,* 172 Ark. 681, 290 S. W. 577; 15 R. C. L. § 450, page 974; § 439, page 964.

There is no bill of exceptions in the record, as already stated, and the judgment of the court recites that documentary proof in support of said special plea was heard, and this court would indulge the presumption that there was sufficient evidence to sustain the lower court's finding even if it had not been otherwise shown by the pleading and exhibit to be correct. *Coleman* v. *Mitchell,* 172 Ark. 619, 290 S. W. 64.

No error was committed by the lower court in overruling the appellant's demurrer to the special plea of *res judicata* and estoppel, nor in returning a judgment thereon for the defendants. The judgment is accordingly affirmed.

McHANEY, J., not participating.

WOOD and HUMPHREYS, JJ., dissenting.

SOUTHERN LIFE INSURANCE COMPANY *v.* ROBERTS.

Opinion delivered May 2, 1927.

1. INSURANCE—BURDEN TO SHOW RELEASE.—In an action on a life insurance policy, the burden of proof was on the defendant to show a valid release by the beneficiary.
2. APPEAL AND ERROR—CONCLUSIVENESS OF VERDICT.—In an action on a life insurance policy, in which the defendant pleaded a compromise and settlement, the verdict for the plaintiff on correct instructions, and supported by a substantial testimony, will not be disturbed.
3. TRIAL—SPECIAL FINDING—DISCRETION OF COURT.—Whether a jury shall be required to make a requested special finding is within the sound discretion of the trial court.

Appeal from Van Buren Circuit Court; *J. M. Shinn,* Judge; affirmed.

John L. Crank, for appellant.

Opie Rogers, for appellee.

KIRBY, J. Appellee, the beneficiary, brought this suit upon a $1,000 policy, No. 496, Circle B, issued by the appellant company, insuring the life of her husband, Thomas I. Roberts, and prayed judgment in the amount of the policy, and damages and attorney's fees. The insurance company answered, denying any indebtedness upon the policy, alleging that it was voided because of misrepresentations and warranties made in the application about the insured's health, that only about $400 was due under its terms in any event, and pleaded a compromise and settlement for $100, exhibiting the release therefor.

The jury returned a verdict for $391.73, the amount conceded to be due under the policy, if valid, and from the judgment this appeal is prosecuted.

The testimony tended to show that the insurance adjuster, after proof of the death was sent in, came to see the appellee and told her that he had been sent by the company to take up the papers, which he claimed were worthless, as Mr. Roberts had misrepresented the condition of his health in the application for the policy, denying that he had had epilepsy, when the proof of death showed that he had died from that disease. He told her that the policy was void on that account, and the company did not owe her anything, but that it would pay her $100 in settlement to avoid a lawsuit about it.

The appellee insisted that her husband was in good health at the time the application was made, had never had any fits or spells before that time, and that the condition had developed afterward from blood poison. She stated the adjuster told her that the company had made a thorough investigation and had found out that the insured was in bad health at the time he took it out, and that the company did not owe her anything on the policy; and further, "You said" (the adjuster who had made the settlement was the attorney examining the witness) "they told you in black and white there not to give me anything; you said it would take one hundred dollars to

fight it out in a lawsuit, and you would rather give me the one hundred dollars than to fight it out."

Witness was much distressed mentally, and did not know what to do, and the adjuster fixed up the papers, which she did not read, took the policy, threw a check or draft into her lap, and went away. The check was never cashed.

Several witnesses, two physicians, one the family physician of the deceased, testified that he had had no spells indicating epilepsy until after 1919, the application for the insurance having been taken out before that time, when he suffered a severe attack of blood poisoning.

The appellee stated that insured had never had any attack of any kind at all before the insurance was taken out, nor until after the blood poisoning; that thereafter he had mild spells, which increased in severity until he finally died with epilepsy, as shown in the proof of death.

The etiology of this disease is that it is hereditary, and that a great majority of the cases (perhaps 80 per cent.) develop in childhood.

No complaint is made of the court's instructions to the jury, and, since the burden of proof was on the appellant company to show a valid release, and the jury had found against it upon correct instructions, the verdict will not be disturbed, since it is supported by some substantial testimony.

No error was committed in not requiring the jury to make the special finding of facts requested. This was a matter within the sound discretion of the trial court, and it alone could properly judge of the expediency of it, and nothing in the record indicates an abuse of such discretion. *Little Rock & Ft. Smith Ry. Co.* v. *Pankhurst*, 36 Ark. 371.

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

WOODWARD v. STATE.

Opinion delivered May 2, 1927.

1. DISTURBANCE OF PUBLIC ASSEMBLAGE—EVIDENCE HELD INSUFFICIENT TO TAKE THE CASE TO THE JURY IN PROSECUTION FOR DISTURBING RELIGIOUS WORSHIP.—Evidence *held* insufficient to take the case to the jury in the prosecution of a mayor for disturbing religious worship, where he stopped a street meeting conducted in violation of city ordinance, after requesting that it be held on the courthouse grounds instead.
2. DISTURBANCE OF PUBLIC ASSEMBLAGE—SUFFICIENCY OF EVIDENCE.—To sustain a conviction for disturbing religious worship, it is necessary to show that defendant maliciously or contemptuously acted in a way to disturb and disquiet the congregation assembled for religious worship, in view of Crawford & Moses' Dig., § 2766.

Appeal from Independence Circuit Court; *S. M. Bone,* Judge; reversed.

W. K. Ruddell and *Coleman & Reeder,* for appellant.

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

KIRBY, J. The appellant, Dr. Woodward, the mayor of the city of Batesville, brings this appeal from a judgment of conviction for disturbing religious worship, upon information filed before a justice of the peace and later upon appeal to the circuit court.

The city of Batesville has an ordinance prohibiting the holding of any kind of meetings for publicly expressing or promulgating any social, political or religious teaching, belief or doctrine, on the streets or sidewalks of the city, without first procuring a written permit from the mayor.

A man claiming to be a representative of the Salvation Army applied to the mayor for a permit to preach on the streets and sidewalks, which was refused on account of the crowded condition of the town, the mayor suggesting that the meeting be held in the courthouse yard, the usual place for such meetings, and where it would not obstruct streets and sidewalks.

The preacher, notwithstanding a permit was denied him, afterwards held the meeting complained about,

speaking from the wall of the courthouse yard, and described by one witness as follows: "This was on the busiest corner in Batesville, on Main and Broad Streets, right on the courthouse corner. People were thronging there that day, passing along the streets and sidewalks and through the crowd all the time; cars, trucks and wagons along the streets all the time, sounding their horns and keeping up a constant noise and confusion."

The mayor, in the absence of the marshal, was called on the telephone by a lawyer, from his offices in the Fitzhugh Building opposite the meeting, and informed that the preacher was disturbing everybody in that part of town, and asked that it be stopped. Dr. Woodward walked down the street, and found the preacher standing on the courthouse wall, "right at the corner of Broad and Main Streets, two of the busiest streets in the town, and the crowd was blockading both streets." He touched the speaker, and, with low voice and in a polite manner, suggested that he had asked him not to use the streets and sidewalks for meetings, and told him that he would have to get back on the courthouse grounds or quit, as he was blockading the sidewalks. He passed on, and, returning after a few minutes, and seeing the preacher continuing and the condition as before, walked up to speaker, took him by the arm and told him he would have to quit. The preacher stepped down from the wall, took up his grip, and they walked into the courthouse, where the mayor told him that it would not do to block the streets and sidewalks, that the business men near by were complaining, and it must be stopped. That he could fine him for it, but he was not going to. The Doctor also stated that he was a member of the church, had great admiration for the work of the Salvation Army, and had been a contributor to it for many years; that the other Salvation Army officers who came to the city used the courthouse yard for their services, which he considered a better place, not being subject to so much disturbance from the crowds passing by and only a little further

from Broad Street. He said he was not mad at the time and used no rough language.

The lawyer who called the mayor's attention to the disturbance stated that the Salvation Army man was on the courthouse wall holloring and talking awful loud, and could be heard all over that part of town. That his office was just across Broad Street from where the preacher was standing, and "There was so much noise and confusion I could not hear anything else; it interfered with my work; I just couldn't do anything; couldn't hear anything over the phone, he was making so much racket." Witness told the mayor that it was disturbing everybody, and that "he would like to have it stopped."

A physician, with offices in the same building, said he was sitting in his window overlooking the large crowd in the street and on the sidewalk and the preacher on the wall haranguing them; that the mayor came out of the courthouse, touched the preacher on the arm, beckoned or motioned to him, and he reached down and got his little grip, and they went into the courthouse together. Witness said the preacher was not praying at the time, and stopped talking, got his grip, and left with the mayor; that he had only been watching about five minutes, and had before been looking out occasionally, and did not see the mayor the first time he spoke to the preacher.

Other witnesses testified that the mayor jerked the man's coat and one said he jerked him down off the wall.

The court refused to instruct a verdict for the defendant and refused his requested instruction to find him not guilty for the reason that the undisputed proof shows that defendant was the mayor of the city and had a right to stop the violation in his presence of the city ordinance. From the judgment on the verdict finding him guilty, this appeal is prosecuted.

The court erred in not directing the verdict as requested. It was necessary to show in this case that appellant maliciously or contemptuously acted in a way to disturb and disquiet the congregation assembled for religious worship. Section 2766, C. & M. Digest; *Walker*

v. *State,* 103 Ark. 336, 146 S. W. 862. The information is not specific, and did not charge the committing of any violence of any kind upon any of the persons so assembled, but the conviction was doubtless had because of the testimony of some of the witnesses, indicating that the preacher was rudely seized and made to stop talking. The undisputed testimony shows, however, that appellant, mayor of the city, in the absence of the marshal, was only attempting, as it was his duty to do, to prevent disturbance to the citizens, some of whom had complained of the meeting in violation of the ordinance, and asked that it be stopped.

Even though some of the witnesses did not approve of the mayor's action and seemed to think that he had used more force than was necessary for the accomplishment of the purpose, it cannot be held, although he intended to do what was done, that it was done maliciously or contemptuously to disturb and disquiet the congregation or any member thereof.

According to his own statement and that of several witnesses, the mayor was very considerate in the matter, first quietly suggesting to the preacher that the meeting had been complained about, and that he would have to take the congregation into the courthouse yard or quit, leaving it to his discretion to move the crowd or bring the meeting to an orderly close. He later, returning, found the condition unchanged, and used no more force than seemed necessary to accomplish the purpose, explaining to the preacher that he was not going to fine him, as could be done, for the violation of the city ordidance, and was only preventing unlawful obstruction of the streets and sidewalks as his duty required him to do.

The court erred in not directing a verdict of not guilty as requested, and the judgment is reversed and the cause dismissed.

MORGAN v. COCKRELL.

Opinion delivered May 2, 1927.

1. ELECTRICITY—CARE AS TO HIGH VOLTAGE WIRES—INSTRUCTION.—In an action against a lighting company for the death of a workman, when an iron rod he was using came in contact with a high voltage wire, an instruction that defendant owed a high degree of care to keep high voltage wires properly insulated and suspended, so as not to endanger the lives of others, *held* error, in view of an instruction that defendant was required only to exercise ordinary care for his own safety.

2. ELECTRICITY—DUTY TO EXERCISE ORDINARY CARE.—Electric companies in stringing and maintaining wires in the street for service to the public are bound to exercise only ordinary care for the protection of those having the right to use the streets, such care varying with the circumstances of each case, and having in view the danger to be avoided and the likelihood of injury therefrom.

3. ELECTRICITY—INSTRUCTION AS TO DANGER NOT ANTICIPATED.—In an action for death resulting from the contact of an iron rod with uninsulated high voltage wire in the street, refusal of defendant's instruction, that, if decedent's death could not have been anticipated by defendant as a result of the erection and maintenance of its wires, the verdict should be for defendant, *held* error.

4. ELECTRICITY—INSURANCE AGAINST INJURY—INSTRUCTION.—In an action for death resulting from contact of an iron rod with an uninsulated high-tension wire in the street, where no instruction was given defining the term "proximate cause," it was error to refuse to instruct that defendant was not an insurer of the safety of persons in the streets where the wires were located, and could only be held for negligence, and that, if it used ordinary care in maintenance of its wires, it was not guilty of negligence.

5. NEGLIGENCE—INSTRUCTION AS TO PROXIMATE CAUSE.—In an action for death resulting from contact of an iron rod with an uninsulated high-tension wire in the street, an instruction that, if the injury could not have been reasonably anticipated by a person of ordinary prudence as the probable result of negligence, negligence would not be actionable, *held* incorrect, and its refusal not error.

6. ELECTRICITY—INSTRUCTION AS TO ACCIDENT.—In an action for death resulting from contact of an iron rod with an uninsulated high-tension wire in the street, refusal of an instruction that, if plaintiff's injury was due solely to accident, the verdict should be for defendant, *held* error.

7. ELECTRICITY—JURY QUESTION.—In an action for death resulting from contact of an iron rod with an uninsulated high-tension wire in the street, the question whether the injury would have occurred whether the wire was uninsulated or not, *held* for the jury.

Appeal from Miller Circuit Court; *J. H. McCollum*, Judge; reversed.

STATEMENT BY THE COURT.

This suit is from a judgment for damages recovered by the widow and next of kin against the appellant operating a light company, for the death of the husband and father of plaintiffs, alleged to have been caused by the negligence of the light company in using wires without insulation or from which the insulation had worn off for carrying a high voltage of electricity, and in stringing or maintaining the wire not sufficiently high from the surface of the street.

The testimony tends to show that the deceased was working at the Home Gin Company, on Daugherty Avenue, in Ashdown, when he was killed. The boiler room where deceased was at work extended out over the sidewalk, and the door of the room was about five feet distant from where the wires were strung on poles about 15 feet above the street level. The deceased had been working there 10 days, and before had worked in another plant, where he had charge of the dynamos generating electricity. He went out of the boiler-room and picked up an iron rod 18 feet long, leaning against the side of the room, with which to swab out the furnace of the boiler, and, in returning, struck the end of the rod against the light wire, and was instantly killed.

The primary wire, carrying 2,300 volts of electricity, was 15½ feet above the street at the place where the iron rod came in contact with it, and was bare, the insulation having been worn off for some time—two or three weeks. The secondary wires were 20 inches lower than the high voltage wire, and only carried 110 volts of electricity, which was not enough to seriously injure a person coming in contact with it. The wires were carried on

this street on 25-foot poles, imbedded about 5 feet in the ground, the primary wire being nearer the top of the pole and about 20 inches above the secondary or low voltage wires. There were no other houses in this block on the same side of the street with the gin-house, and had never been, and one end of the street was closed by the railroad station. The nearest pole to the boiler room was about 15 feet distant, and it could easily be seen that there was no insulation on the wire for 5 or 6 feet at the point of contact with the iron rod, and it was apparent that the insulation had been off for a long time. The deceased had been working there for two weeks, repairing around the gin. The swab, before the injury, was kept on the outside of the gin and had been for 12 months, but is now kept on the inside of the boiler-room.

The deceased was known to have worked at the United Oil Mills, as oiler, oiling the generator and motors and switching on and off the electricity. The man working with him at the time of the injury knew that wires and poles were there in the street, and, while he did not know the voltage carried by the wire, knew that they were dangerous.

No one saw the occurrence of the rod coming in contact with the wire, and this witness supposed that Cockrell was pulling or lifting the rod and walking backwards when it struck the wire. The rod was found leaning against the bare wire after Cockrell was heard to fall. Witness measured the distance at the point where the rod was on the wire, and found it 13 feet above the ground. The testimony is undisputed, however, that the high voltage wire was 20 inches or so above the secondary wire.

Deceased was 24 years old at the time of his death, leaving a widow and one child 6 years old, and was earning on an average about $100 per month, all of which was consumed in supporting his family.

The court instructed the jury, giving instruction No. 1 over appellant's objection, and amended other instruc-

tions over like objection, and refused to give its requested instructions Nos. 5, 7, 8 and 10, as follows:

"No. 1. You are instructed that one using electric wires carrying a dangerous voltage or current of electricity and placing the same on poles in the streets, owes the public a high degree of care to keep said wires properly insulated and suspended as not to endanger the lives of others lawfully within the vicinity of said wires; and in this case you are instructed that, if you find from a preponderance of the evidence that the defendant's electric wires about which the witnesses have testified carried a dangerous voltage or current of electricity, and you further find that the defendant negligently failed to exercise a high degree of care in the construction or maintenance of said wires by negligently failing either to keep said wires properly insulated or properly suspended, so as not to endanger the lives of others lawfully within the vicinity thereof, and you further find that, by reason or because of the defendant's said negligence, if any, the deceased, Louis Cockrell, while in the exercise of ordinary care for his own safety, was injured, then it will be your duty to find for the plantff."

"No. 5. If you find that the plaintiff's injury was due solely to an accident, your verdict will be for the defendant."

"No. 7. In order for you to hold that the negligence, if any, of the defendant was the proximate cause of the injury, the plaintiff must show by a preponderance of the evidence that the injury was the natural and probable consequence of the alleged negligence; in other words, the proximate result must be the natural and probable consequence which ought to have been foreseen, or reasonably anticipated in the light of the attendant circumstances; hence it follows that, if the injury in this case could not have been reasonably anticipated by a person of ordinary prudence and intelligence as the probable result of the acts of negligence complained of, then you are instructed that the negligence, if any, of the defendant is not actionable, and your verdict must be for defendant.

"No. 8. If the injury and death of the decedent could not have been reasonably anticipated by the defendant as a result of the erection and maintenance of its wires, as they were in fact erected and maintained at the point of the injury, then you are instructed that the defendant is not liable, and your verdict must be for the defendant."

"No. 10. You are instructed that the defendant was not an insurer of the safety of the persons in or in the vicinity of the streets where its wires and poles were located, and can only be held, if held at all, for negligence on his part. In this connection you are advised that the defendant was not required to anticipate every possible danger and provide against the same, but was only required to use ordinary care to that end, and, if it used ordinary care in the erection and maintenance of its wires and poles, it was not guilty of negligence, and your verdict must be for the defendant."

The jury returned a verdict, assessing damages at $15,000, and from the judgment thereon this appeal is prosecuted.

Will Steel and *James D. Head,* for appellant.

Pratt P. Bacon, June R. Morrell and *Feazel & Steel,* for appellee.

KIRBY, J., (after stating the facts). The trial court appears to have had an erroneous view of the degree of care required of appellant in the maintenance and operation of its light wires for giving service to the city, as shown in instruction No. 1, which stated that it "owed the public a high degree of care," and that, if the defendant "failed to exercise a high degree of care," etc., and the deceased was injured "while in the exercise of ordinary care for his own safety," plaintiff should recover, apparently requiring the use of a higher degree of care of the appellant than ordinary care, as required under the law.

In *City Electric Street Railway Co.* v. *Conery,* 61 Ark. 381, 33 S. W. 426, 31 L. R. A. 570, 54 Am. St. Rep. 262, the court said:

"All persons have the right to use the streets in or over which the wires were suspended, as public highways. Subjecting the dangerous element of electricity to their control, and using it for their own purposes, by means of wires suspended over the streets, it is their duty to maintain it in such a manner as to protect such persons against injury by it to the extent they can do so by the exercise of reasonable care and diligence. This duty is not limited to keeping their own wires out of the streets, or other public highways, but extends to the prevention of the escape of the dangerous force in their service through any wires brought in contact with their own, and of its transmission thereby to any one using the streets." *** "Electric companies are bound to use 'reasonable care in the construction and maintenance of their lines and apparatus—that is, such care as a reasonable man would use under the circumstances—and will be responsible for any conduct falling short of this standard. This care varies with the danger which will be incurred by negligence. In cases where the wires carry a strong and dangerous current of electricity, and the result of negligence might be exposure to death, or most serious accidents, the highest degree of care is required."

In *Texarkana Telephone Co.* v. *Pemberton,* 86 Ark. 329, 11 S. W. 257, the court quoted approvingly from 2 Joyce on Electric Law, as follows:

"Electrical companies, in the maintenance of their wires, owe to their employees, as well as to others who may of right, either for pleasure or work, be in the vicinity of such wires, the duty of exercising reasonable care, that is, such care as a reasonably prudent man would exercise under the same circumstances. We have already stated that reasonable care or ordinary care is a degree of care varying with the circumstances of each case, and which, in the case of electrical wires carrying a dangerous current of electricity, requires the exercise of a high degree of care to keep them properly insulated and so suspended as not to endanger lives."

In *Southwestern Tel. & Tel. Co.* v. *Bruce,* 89 Ark. 581, 117 S. W. 564, a case of an injury resulting from wires strung across vacant lots, the court held that the company owed the duty to plaintiff and those accustomed to going on or across the lots to exercise "due and reasonable care" in maintaining its wires, saying:

"This electric company owed the duty to plaintiff to use ordinary care to prevent injury by the transmission through its wires, suspended over the streets and these vacant lots, of electricity escaping from any other wires that might come in contact with them."

In *Southwestern Tel. & Tel. Co.* v. *Abeles,* 94 Ark. 254, 126 S. W. 724, the court quoted from the Texas Court of Civil Appeals relative to the duty resting upon telephone companies to adopt precautions for preventing atmospheric electricity from entering buildings over their wires, approving the rule as stated by the Supreme Court of Vermont: "Having undertaken to place and maintain the instrument in the house and connect it with its telephone line for the use of the deceased, in so doing it was under the duty to exercise the care of a prudent man under like circumstances."

In *Pine Bluff Company* v. *Bobbitt,* 168 Ark. 1019, 273 S. W. 1, where the negligence consisted in the failure to discover and remove a foreign wire from an uninsulated section of high tension wire of the company, carrying 2,300 volts of electricity, permitting the heavy current to pass through the lower part of the guy wire and injure a child playing and gathering flowers by the wayside, coming in contact with it; the court held that the company was only bound to the exercise "of ordinary care" to discover the dangerous condition caused by the connecting wires, saying: "This requirement was correct and conformed to the rule announced by Joyce on Electric Law," quoted approvingly in *Texarkana Telephone Co.* v. *Pemberton, supra,* as already stated herein.

It will be seen from these decisions that it has long been the settled law in this State that electric companies, in the stringing and maintaining of their wires in the

streets of the cities to give service to the public, are only bound to the exercise of ordinary and reasonable care for the protection of all who have right to the use of the streets, such reasonable and ordinary care varying with the circumstances of each case, having in view the dangers to be avoided and the likelihood of injury therefrom, which may require a high or the highest degree of care under the particular circumstances. The court erred in disregarding this rule in giving said instruction No. 1, in telling the jury that a high degree of care was required to be exercised by the appellant in maintaining and operating its wires, and refusing to give any instruction requiring the exercise of ordinary care only, and defining it, by the appellant; and this error was accentuated by telling the jury that only the exercise of ordinary care was required by the deceased for his own safety.

It is next contended that the court erred in refusing to give each of appellant's requested instructions Nos. 7, 8, and 10, submitting to the jury the question of whether the negligence, if established, was the proximate cause of the injury to decedent.

No instruction was given defining the term "proximate cause" nor submitting the question to the jury, the court only mentioning it in instruction No. 6, given, saying it was necessary for the plaintiff to show that the defendant was negligent in some particular matter alleged in the complaint, and also "that the negligence, if any, so shown was the direct and proximate cause of the injury to plaintiff's decedent."

In *Pulaski Gas Light Co.* v. *McClintock,* 97 Ark. 576, 134 S. W. 1189, 32 L. R. A. N. S. 825, the court, answering the question, "What was the proximate cause of the injury?" said:

"This is not a question of science or knowledge, and is a question ordinarily for the jury, to be determined as a fact from the particular situation, in view of the facts and circumstances surrounding it. The primary cause may be the proximate cause of disaster, though it may operate through successive instruments. *Milwaukee, etc.*

Ry. Co. v. *Kellogg,* 94 U. S. 476, 24 L. ed. 256; *Waters-Pierce Oil Co.* v. *Deselms,* 212 U. S. 177, 53 L. ed. 463."

"But it is generally held that, in order to warrant a finding that negligence, or an act not amounting to wanton wrong, is the proximate cause of an injury, it must appear that the injury was the natural and probable consequence of the negligence or wrongful act, and that it ought to have been foreseen in the light of the attending circumstances." *Milwaukee, etc., Ry. Co.* v. *Kellogg, supra.*"

The court there also quoted from our decisions, *Gage* v. *Harvey,* 66 Ark. 68, 48 S. W. 898, 74 Am. St. Rep. 70:

"In determining whether an act of a defendant is the proximate cause of an injury, the rule is that the injury must be the natural and probable consequence of the act—such a consequence, under the surrounding circumstances of the case, as might and ought to have been foreseen by the defendant as likely to flow from his act."

And *St. L. I. M. & S. Ry. Co.* v. *Bragg,* 69 Ark. 402, 64 S. W. 226, 86 Am. St. Rep. 206:

"It is a fundamental rule of law that, to recover damages on account of the unintentional negligence of another, it must appear that the injury was the natural and probable consequence thereof, and that it ought to have been foreseen in the light of the attending circumstances."

The court should have given appellant's requested instructions Nos. 8 and 10, and erred in not doing so.

The first clause of instruction No. 7 is a correct declaration of law, but the second clause, declaring that, if the particular injury could not have been reasonably anticipated by a person of ordinary prudence and intelligence as the probable result of the act of negligence complained of, then the negligence was not actionable, and the verdict should be for the defendant, is not a correct declaration of law and the court did not err in refusing to give the instruction as requested.

"It is not necessary that the particular injury should have been foreseen," as said in *Pulaski Gas Light Co.* v. *McClintock, supra,* where the court quoted approvingly from *Foster* v. *Chicago, R. I. & P. Ry. Co.,* 4 Am. & Eng. Ann. Cas. 150, 127 Iowa 84, 102 N. W. 422, as follows:

"Doubtless the particular situation might not have been foreseen, but this was not essential to making out a charge of negligence. Accidents as they occur are seldom foreshadowed; otherwise many would be avoided. If the act or omission is of itself negligent and likely to result in injury to others, then the person guilty thereof is liable for the natural consequences which occurred, whether he might have foreseen it or not. In other words, if the act or omission is one which the party ought, in the exercise of ordinary care, to have anticipated was likely to result in injury to others, then he is liable for any injury proximately resulting therefrom, although he might not have foreseen the particular injury which did happen."

Also from *Baltimore & O. Rd. Co.* v. *Slaughter,* 7 L. R. A. (N. S.) 597, 167 Ind. 330, 79 N. E. 186:

"To entitle one to a trial of the question of another's negligence which resulted in injury, it is not necessary that the effect of the act or omission complained of in all cases, or even ordinarily, be to produce the consequences which followed; but it is sufficient if it is reasonably to be apprehended that such an injury might thereby occur to another while exercising his legal right in a careful manner."

The court also should have given appellant's instruction No. 5, as requested, without amendment.

The appellant was also entitled to have the question of whether the injury would not have occurred from the iron rod, in the hands of decedent, coming in contact with the primary wire, carrying the high voltage of electricity, regardless of whether same was insulated or not. The undisputed testimony showed that the insulation wears or comes off of such wires and that it is not practical to have them reinsulated, and that it is not done in the operation of such plants.

Appellant's testimony tends to show that the current would have come through such insulation as wires of this kind carry when new, anyway, and caused the injury upon contact with the rod, but it was not undisputed, and appellant had the right to have the question submitted to the jury.

It is urgently insisted that, in view of the location of the gin on a little used street, the public and its customers not passing by the door of the boiler-room ordinarily, defendant could not reasonably have anticipated, in the exercise of ordinary care, the use by the gin company of an 18-foot iron swab for cleaning its boiler flues, and that any injury would likely result at this place on its lines, either by reason of the uninsulated wire or by the height of same from the ground, and that the failure to foresee and anticipate any such event cannot be held to establish negligence.

It is doubtful if there is any negligence shown warranting recovery in this case, but the court will leave that to the determination of the jury under proper instructions.

The law does not compel electric companies to insulate their wires everywhere, but only at places where people may be reasonably expected to go for work, business or pleasure. "The duty to insulate does not extend to the entire system or to parts on the line where no one could reasonably be expected to come in contact with it." 20 C. J. 356.

This court has recognized the true rule in *Hines* v. *Consumers' Ice Co.*, 168 Ark. 914, 272 S. W. 59, where it was said:

"There is involved here no question about the duty of the electric light company to insulate all its wires. The authorities appear to be unanimous in holding that there is no such duty, but the cases do hold, as we understand them, that this duty must be performed, or other sufficient safety methods employed to prevent contact with wires conveying the current at such places as danger of

contact may reasonably be anticipated." See also 9 R. C. L., "Electricity," § 21, page 1213.

From the street where the bare or exposed wire was strung is a distance of about 16 feet, which must have been at least 10 feet above the heads of men of ordinary height passing along the street, and there were no means or instrumentalities by which passersby, upon the street or sidewalk, could come in contact with the wire. The wires were not more than 5 feet from the front door of the boiler-room along Daugherty Avenue, however, upon which the boiler room fronted, and it may be that, in hauling and unloading coal, and unloading cotton at the gin and reloading baled cotton with wagons and trucks, some one engaged in such work might reasonably be expected to come in contact with the bare wire and be injured, and we therefore do not hold as a matter of law that there was no negligence.

For the errors designated the judgment is reversed, and the cause remanded for a new trial.

MODERN WOODMEN OF AMERICA v. WHITAKER.

Opinion delivered May 2, 1927.

1. EVIDENCE—OPINION OF NONEXPERT.—In an action by the beneficiary to recover on a life insurance policy, nonexpert witnesses may state their opinions as to the physical condition of deceased on the day when he took fraternal insurance certificate and stated that his health was good.
2. INSURANCE—STATEMENT AS REPRESENTATION.—A written statement of the insured when he received a benefit certificate that he was in good health, *held* to be a representation, and not a warranty, though the word "warranty" was used, and the court properly instructed the jury that plaintiff must prove that insured made no misrepresentations to secure the policy.
3. APPEAL AND ERROR—CONCLUSIVENESS OF VERDICT.—In an action by the beneficiary to recover on a life insurance policy, the jury's finding that deceased was in good health when he received the policy and stated that his health was good, *held* conclusive, in view of the evidence, where the issue was submitted on instruc-

tions that plaintiff must prove that no misrepresentation was made, and that defendant must prove that deceased was sick when he received the policy.

Appeal from Boone Circuit Court; *J. M. Shinn,* Judge; affirmed.

Truman Plantz, Geo. G. Perrin, F. M. McDavid and *Shouse & Rowland,* for appellant.

Woods & Greenhaw and *E. G. Mitchell,* for appellee.

MEHAFFY, J. Thomas W. Whitaker, on the 2d day of February, 1925, made application for membership and benefits in the Modern Woodmen of America, a fraternal benefit society, with its local Camp No. 13665, at Harrison, Arkansas, and executed the usual application form. On February 11, 1925, his application was acted on and certificate issued and forwarded to the clerk at Harrison, Arkansas, where it remained until the 6th day of April, 1925, when it was delivered to the insured by Cleve Coffman, clerk of the Modern Woodmen at the local camp at Harrison, Arkansas.

The application signed by the insured stated that the answers were adopted as his own, and that he warranted that they were full, complete, and literally true, and that he agreed that the exact, literal truth of each should be a condition precedent to any binding contract issued upon the faith of said answers and statements.

We deem it unnecessary to set the application out in full, because there is no controversy about the insured's condition of health at that time. The benefit certificate issued to him was as follows:

"BENEFIT CERTIFICATE MODERN WOODMEN OF AMERICA.

"No. 3201343 Amount, $1000

"Age 20 Rate, 85 Cents.

"A fraternal beneficiary society incorporated, organized and doing business under the laws of the State of Illinois.

"It is hereby certified that neighbor Thomas W. Whitaker, a member of Camp No. 13665 of Modern Woodmen of America, located at Harrison, Arkansas, if

he shall pay benefit fund assessments in accordance with the provisions of the existing by-laws of this society, or as such by-laws hereafter may be changed, added to, or amended, is, while in good standing, entitled to the privileges of the society, and his beneficiary or beneficiaries hereinafter named shall, in case of his death, while a beneficial member of this society in good standing, be entitled to the privileges of the society, and his beneficiary or beneficiaries hereinafter named shall, in case of his death while a beneficial member of this society in good standing, be entitled to participate in the benefit fund of this society to the amount of one (1) thousand dollars, without interest, to be paid to said beneficiary or beneficiaries, to-wit, Laura D. Whitaker, related to said member as mother; provided, however, that all the conditions and agreements contained in said member's application for beneficial membership and in this certificate, and in the by-laws of the society, as said by-laws now exist, or hereafter may be added to, modified, amended, or enacted, shall be fully complied with; and provided further that, if any beneficiary named in this certificate shall die at the same time, or in a common disaster, or prior to the death of said member, or in the event of the disqualification of such beneficiary under the provisions of the by-laws of this society, now in force or as hereafter amended or enacted, and if such member shall have failed to have had another beneficiary named in the place and stead of such deceased or disqualified beneficiary, then the amount specified to be paid such deceased or disqualified beneficiary, under this benefit certificate, shall be payable in accordance with the by-laws of this society in force at the time of the death of said member.

"This benefit certificate is issued and accepted only upon the foregoing conditions and the express warranties, conditions and agreements printed on the back of this certificate, there designated as 'Conditions,' and numbered from one to twelve inclusive, which said warranties, conditions and agreements are hereby made a

part of this benefit certificate to the same effect and extent as if incorporated herein over the signature hereto.

"In witness whereof the said Modern Woodmen of America has, by its head consul and head clerk, signed and caused the corporate seal of said corporation to be affixed to this certificate, at the city of Rock Island, in the State of Illinois, this 11th day of February, 1925.

(Signed) "J. G. Ray, Head Clerk.
"A. R. Talbot, Head Consul.

"Member adopted 6th day of April, 1925, and certificate delivered this 6th day of April, 1925.

(Signed) "G. C. Coffman, Clerk.
"D. Brooks, Consul.
"Harrison Camp No. 13665, M. W. of A."

On the 6th day of April, when the clerk of the camp delivered the policy to the insured, insured signed the following certificate: "I have read and hereby accept the above benefit certificate and agree to all the conditions therein contained and referred to. I hereby warrant I am now in good health. I agree and understand that this certificate is not binding upon the society until signed by me, nor unless I am now in good health."

The defendant pleaded all the statements and warranties as a defense, but it is unnecessary to set out the pleadings at length.

The appellant, who was plaintiff below, testified, in substance, that she was the mother of the deceased, Thomas W. Whitaker, who died on May 6, 1925, at her home in Harrison. She testified that he had a policy in the defendant company, which he gave her for safekeeping. She said the company refused to pay the policy upon his death, and she brought suit. He turned the policy over to her exactly a month before his death. He died on the 6th day of May. The benefit certificate copied above was here introduced in evidence. She testified that they solicited her boy to join the fraternity on February 2, and he was in sound health, 19 years old, and

lived at home, and was her only boy. She stated he was in good health. That the signature at the bottom of the certificate or policy was the signature of her son. She further testified that the insured was called upon by Dr. Poyner Sunday before the delivery of the policy the following day. That Dr. Poyner was called to see her daughter, and her son complained of feeling bad, but he did not want to go to bed and did not want any medicine. The doctor was called back that evening to see the insured on account of bleeding nose. The boy was up the next day, and was in good health. He worked some the day the policy was delivered, ate his breakfast, and was feeling all right, and nobody could see anything wrong with him; he was all right every way.

Cleve Coffman, clerk of the camp, testified, in substance, that he was the cashier of the First National Bank at Harrison, and clerk of the Modern Woodmen at the local camp there. That he issued receipts for the payment of dues to members and delivered certificates of membership and benefits. That he delivered and signed the certificate on which the suit was based. The insured was reported as a member April 4 and report was sent in to the head clerk in May. The policy was delivered to the insured April 6. The insured made payment of his dues on April 6 in person, and the certificate was delivered to him in person. Here the proofs of death were introduced, and the witness continued, that he notified the head clerk of the death of the insured. Insured was initiated on the 2nd day of February, but did not pay any money until the 6th of April, when his policy was delivered. He said he did not deliver the certificate because he supposed the boy did not have any money.

Dr. J. H. Poyner was called by the defendant, and testified, in substance, that he was a regular practicing physician in Harrison, and had been practicing for thirteen years; that he visited Thomas W. Whitaker on the 5th of April, 1925, at his home, examined him, and

found that he had influenza and also leakage of the heart; that he visited him twice on this day, the last time being in the night, when his nose was bleeding; he could hear the leakage of his heart very distinctly. He had treated a number of cases of leakage of the heart; that leakage of the heart is usually the result of some other disease; that the insured had a pretty bad leakage of the heart; that he did not consider him a person in good health at said time, and that he would not recommend a man in his condition as a good insurance risk.

Dr. J. H. Fowler testified, in substance, that he was a practicing physician in Harrison, and had been for twenty-five years. That he treated insured in his last illness, being called first on April 18. That he found him suffering pain in his foot and leg, and also found him suffering from a heart lesion, or a murmur when he breathed. He could not tell how long he had been in this condition. He did not consider a person with leakage of the heart as a good risk for insurance. He had known this boy for many years and could not tell anything was wrong with him until he was called to see him. He said the flu is one of the common causes of heart affection; if you see a boy on the street you could not tell whether he had heart trouble by looking at him; he might have it and you could not tell it.

Defendant then offered its answer in evidence, and pleaded the clauses of the policy with reference to warranties, etc.

The plaintiff then recalled Laura D. Whitaker, who testified, in substance, that the insured had never been sick until his last sickness; that he never took any medicine; that he objected to them sending for Dr. Poyner and that he objected to taking medicine. That he worked for different parties after the 5th day of April; that he was not sick or in bad health on the 6th day of April or any day thereafter, until Dr. Fowler came to see him on the 18th.

Wm. Cole, J. W. Wynn, Oscar Rogers, Effie Whitaker, Jane Whitaker and Mrs. J. B. Ritchie all tes-

tified that they knew the boy intimately, and that he was seemingly in good health and did not give any indication of heart trouble.

Cleve Coffman was recalled, and he and Rex Poyner both testified that they saw the insured after April 5 and prior to his death, and that he was in good health.

Dr. C. M. Routh testified, in substance, that he was a practicing physician, and had been practicing in Harrison since 1902. That in 1925, in February, he was district medical examiner for insurance for the Modern Woodmen, and examined the insured, making a close examination, and found him in good health at the time.

Vance Holt and William Cole both testified, in substance, that they saw the insured in February, March and April, 1925, and he appeared to be in perfect health and physical strength.

Dr. Fowler was recalled by the plaintiff, and testified, in substance, that a person might have any kind of fever that might cause temporary regurgitation of the heart; that, if a person were examined in February and found in good health and no heart trouble, and on the 5th day of April found to have flu and regurgitation, and on the 6th was up and seemingly in good health, having the ability to climb trees and jump to the ground without any apparent injury, and seemed to be in good condition and able to perform manual labor, and on the 5th of April had leakage of the heart, he would think it was temporary. That there was nothing in insured's condition when he examined him that showed organic heart trouble. That when he visited him on the 18th of April he found that the deceased had rheumatism and organic heart lesion.

Dr. L. Kirby was called by the defendant, and testified, in substance, that he had been practicing medicine in Harrison since the 21st of October, 1871; that leakage of the heart is becoming a common disease, and causes a good many deaths; that a doctor can tell by putting an ear down or using a stethoscope whether a person has

heart leakage; that one may have heart leakage and may be up and doing manual labor, but he did not regard such a person in good health. That, assuming that on the 5th of April the person was found to have the same disease and had been sick several days before the 18th, and supposing that he died on the 6th day of May, of rheumatism and organic heart lesion, in his opinion, as a doctor, he had leakage of the heart all the time from April 5 until the date of his death; he said it is sometimes a little hard to determine whether regurgitation of the heart is chronic or temporary; that it might be temporary under the hypothetical facts stated in this case, or it might not; that, if the boy was able to go on with his work and perform the physical feats related in the hypothetical question, it would look like, on the surface, that he did not have heart trouble, but, on the other hand, it would be probable that he would have such trouble.

The court, upon its own motion, gave the following instructions:

"Gentlemen of the Jury: In this suit Laura D. Whitaker seeks to recover from the Modern Woodmen on a certain policy that was issued to her son, Thomas W. Whitaker, some time in April, possibly in the year 1925. She alleges in her complaint that her son, Thomas W. Whitaker, was insured, his life was insured with this defendant company, and it has been admitted that this policy was issued to him and under the rules and regulations and by-laws of the company, which are all considered as a part of the contract in this case; that is, the application and by-laws of the company are all a part of the contract or policy. It is admitted that he took out the policy and application for it, and all the allegations in the complaint had been admitted, except that the defendant says and alleges in its answer, at the time he accepted it, which was not effective or could not be effective until the time it was accepted by the insured, and it was claimed by the defendant in its answer, at the time he accepted this insurance policy on the 6th day of

April, 1925, that he was not in good health at the time, and therefore was not an insurable risk. Those are the facts, gentlemen, you would be called upon to try."

On request of the plaintiff, and over the objection and exceptions of the defendant, the court gave the following instructions:

"Instruction No. 1. In this case Mrs. Laura D. Whitaker is plaintiff and is seeking to recover $1,000 and 6 per cent. interest on the same from and after defendant rejected the claim. The defendant denies liability, and alleges misrepresentation upon the part of the assured, Thomas W. Whitaker, as to the condition of his health at the time of the delivery of the policy, and that is one of the issues you are called upon to try. It is agreed that the plaintiff is the mother of the assured and the beneficiary under the policy.

"Instruction No. 2. Before the plaintiff can recover the burden is hers to show by a preponderance of the testimony that her son had a policy of $1,000; had paid the usual and required rate; had made no misrepresentations to procure the policy; and that he died during the life of the policy. If you so find, your verdict will be for the plaintiff.

"Instruction No. 3. The deceased made his application for his policy of insurance and the policy was issued and delivered to him, and that places the burden on the defendant to establish by a preponderance of the evidence that the deceased had any physical ailment that would avoid the terms of the policy, and, unless the defendant established the same by a preponderance of the evidence, you will find for the plaintiff.

"I instruct you that the physical condition of the insured on the 18th day of April, 1925, when Dr. Fowler was called to treat him, can only be considered by you for the purpose of determining his physical condition at the time said policy was delivered to him, and for no other purpose."

The defendant requested a peremptory instruction, which the court refused to give, and then, at the request

of the defendant, the court gave the following instructions:

"Defendant's requested instruction. In this case, gentlemen, there is but one issue for you to determine, and that is whether Thomas W. Whitaker was, on the 6th day of April, 1925, the date of the delivery of the certificate, in good health. The defendant pleads that on said date the applicant was suffering with influenza and an affection of the heart. Upon this issue the burden is upon the defendant. If you believe from a preponderance of the evidence that the applicant, Thomas W. Whitaker, was on said date, April 6, 1925, affected with influenza and leakage of the heart, or either of such diseases, then in that event you must find for the defendant; and it makes no difference whether deceased knew of such condition or not."

The defendant filed motion for a new trial, urging several errors, but the instruction that it asked and which was given by the court told the jury that there was but one issue for them to determine, and that that was whether Thomas W. Whitaker was, on the 6th day of April, the date of the delivery of the certificate, in good health.

In addition to the one question that counsel states is for the jury, they argue the question of the admissibility of the evidence, and very earnestly contend that non-expert witnesses cannot state their opinion as to the physical condition of the deceased, but can only testify to facts, that is, what he did and said and how he acted, and that, when they have testified to these facts, it is then the province of the jury to determine the issue as to his health. They call attention to a number of cases in which this court has held that, as a general rule, the witness must state only facts and not state the conclusions at which he has arrived from such facts. In speaking of the testimony of non-expert witnesses who testified that one appeared to be suffering, looked like she was sick, seemed to be in bad health, and that, a short time before the injury, she appeared to be in very good health, this court said:

"The testimony comes within the rule approved by this court in *St. Louis, I. M. & S. R. Co.* v. *Osborne,* 95 Ark. 310-317, 129 S. W. 537, where we held that it was not error to allow non-expert witnesses to state facts within their knowledge and observation as to the plaintiff's physical condition, habits, etc., before and after the date of the alleged injury. Judge Elliott, in his treatise on Evidence, volume 1, § 679, states: 'An ordinary witness may testify in a proper case as to the state of his health. Thus, he may testify that he has suffered pain, or state his physical condition generally. * * * So, such a witness may testify that another person seemed to be sick, suffering pain, nervous, or in good or bad health.' See also § § 675 and 676.

Where one person is acquainted with another and they come in contact with each other frequently, it is not a matter of expert knowledge for one to tell whether the other appears to be sick or well. These are matters of common experience and observation. And a non-expert witness, after stating the facts upon which his opinion is based, may even give his opinion in such matters." *K. C. S. R. Co.* v. *Cobb,* 118 Ark. 569, 178 S. W. 383.

There are numerous cases to the same effect. This court has also frequently held that non-expert witnesses may testify whether, in their opinion, a person is sane or insane, after giving the facts upon which they base their opinion. As to whether one is in good health or not is a matter of opinion. The experts themselves do not know, but can merely give their opinion, and persons that constantly associate with one would probably be able to tell more accurately whether one was in good health than an expert who did not associate with the person frequently. At any rate, we think that it was proper for the witnesses to be permitted to testify as to whether or not the deceased was in good health on the 6th day of April, the day the policy was delivered.

A physician testified that, on the 5th day of April, the day before the policy was delivered, he attended the

deceased, and that he had a leaky heart, but not only this physician, but all others who testified at all, testified that this might be chronic or temporary. But the physicians testified as to his condition of health, and these non-experts testified, and it was then submitted to the jury on an instruction requested by the defendant telling them that there was but one issue, and that was whether Whitaker was, on the 6th day of April, in good health. We think the court did not err in permitting the testimony of the non-expert witnesses.

It is next contended by the appellant that the counsel for the appellee and the court erred in their failure to distinguish between false representations and warranties. There is no controversy about the good health of the applicant at the time the application was made. It is not contended that at that time he was not in good health. But it is contended that, on the 6th day of April, the day the policy was delivered, he signed a certificate, and that that certificate was a warranty that he was in good health. It is not entirely clear from the record in this case whether that certificate was written on the benefit certificate or not, but we think, from the appearance of the record and the testimony, that it was. It was a statement as follows: "I have read and hereby accept the above benefit certificate, and agree to all the conditions therein contained and referred to. I hereby warrant I am now in good health. I agree and understand that this certificate is not binding upon the society until signed by me, nor unless I am now in good health. Thomas W. Whitaker."

It is contended that the statement in the above certificate, "I hereby warrant I am now in good health," constitutes a warranty, and therefore must be true. The testimony of the clerk who delivered the policy shows that Whitaker came to the bank, and the policy was delivered to him, and he signed it, and if there was anything to indicate that he was not in good health at the time, this witness did not mention the fact, and was not asked about it by either party. He was the clerk of the

camp, whose duty it was to deliver the policy only in case the insured was in good health at the time. He delivered it to him on that day, evidently believing that he was in good health.

This court has said: "Statements or agreements of the insured which are inserted or referred to in a policy are not always warranties. Whether they be warranties or representations depends upon the language in which they are expressed, the apparent purpose of the insertion or reference, and sometimes upon the relation they bear to other parts of the policy or application. All reasonable doubts as to whether they be warranties or not should be resolved in favor of the assured. * * * A warranty, being a part of the contract itself, as contradistinguished from a representation, which is a mere inducement to the policy, must necessarily appear in the contract itself in express terms or be so referred to in the policy as to clearly indicate that the parties intended it to form a part of the contract." *Metropolitan Life Ins. Co.* v. *Johnson,* 105 Ark. 101, 150 S. W. 393.

"The doctrine or rule as to warranties in contracts of insurance, as stated in the earlier cases, is, in substance, that, if any warranted statement in the application is shown not to be the exact and literal truth, the insurance is forfeited, and that this result must follow even though the statement be made in the utmost good faith, and relates to a fact which is in no manner material to the risk against which the insurance is taken. In most jurisdictions, where the Legislature has not interfered to change it, the same statement of the rule is still adhered to, but its manifest harshness, to say nothing of its absurd extreme of technicality, has led the court to greatly limit its application, by emphasizing the distinction between warranties and representations, and by holding strictly to that other rule, which requires contracts of insurance to be taken most strongly against the insurer, and that courts should so interpret the contract, if it be fairly possible, as to avoid a forfeiture. It is now settled that the use of the word 'warrant' or 'war-

ranty' in the application or policy is of itself by no means conclusive upon the question whether, in view of the entire record, any given answer or statement of the insured is to be given technical effect as a warranty, rather than as a representation."

The court cites many cases, and then proceeds: "Indeed, in the Port Blakely Mill Company case, *supra,* the court goes to the extent of saying that the word warranty is of such general signification and of such general and discursive use that, except as it may be restrained or explained by the writing as a whole, it is absolutely without legal significance. Again, it is said that the rule is universal that statements contained in the application will not be construed to be warranties, if elsewhere in the contract there can be found reason to suppose that such was not the clear understanding of the parties. * * * We do not overlook the fact that the warranty is repeated a number of times throughout the application, and that it is very sweeping in form, and that it is so repeated without the qualification which we have noted. * * * If such a provision were enforceable regardless of good faith of the insured and regardless of his knowledge of hidden infirmities, no person could know whether he was insured or not. The form of the question necessarily calls for an opinion, and an agreement to warrant the truthfulness of the answer is no more than to warrant that the applicant will make a *bona fide* answer as to his opinion of the character of his ailment." *Teeple* v. *Fraternal Bankers' Reserve Soc.,* 179 Ia. 65, 161 N. W. 102, L. R. A. 1917C 858.

The defendants then argue that there is no question about the good faith of Whitaker. They did not claim that his statement was not what he thought was true, and, while the authorities are divided on the question, many authorities hold that a warranty as to good health is merely a statement of opinion, and, if made in good faith and the applicant believes his statement to be true, this is a compliance. In other words, that a warranty as to good health is warranty of the good faith of the

applicant. In speaking of statements with reference to good health it has been said:

"Conceding that the representations contained in the application for the policy were made warranties by the reference to them in the policy, still we cannot say that they were untrue. The application was not introduced, and we are not advised by the evidence of its contents. We cannot determine that there was either misrepresentation or concealment of facts. For aught that appears in this record, there may have been a full disclosure of every fact material to the risk, and a true answer to every question propounded. * * * A warranty is in the nature of a condition precedent; it must appear on the face of the policy; or, if on another part of it, or on a paper physically attached, it must appear that the statements were intended to form a part of the policy; or, if on another paper, they must be so referred to in the policy as clearly to indicate that the parties intended them to form a part of it. A warranty cannot be created nor extended by construction." *Mutual Benefit Life Ins. Co.* v. *Robertson,* 59 Ill. 123, 14 Am. Rep. 8.

Again it has been said: "The practical operation of such literal warranties is so often harsh and unfair that courts require their existence to be evidenced clearly and unequivocally, and are not inclined to allow it to rest upon a mere verbal interpretation where a reasonable construction of a contract as a whole will authorize a different meaning. All reasonable doubts as to whether statements inserted in or referred to in an insurance policy are warranties or representations should be resolved in favor of the insured. By statute at least two States (Pennsylvania and Ohio) have eliminated warranties from the law of insurance in those States, and the constitutionality of such statutes has been sustained by the Supreme Court of the United States." *Spence* v. *Central Accident Ins. Co.,* 86 N. E. 104, 236 Ill. 444, 19 L. R. A. (N. S.) 88.

It will be remembered that the appellant's physician not only examined the applicant thoroughly, but stated

that he had known him all of his life, and he knew at the time he examined him whether or not he was in good health, and that he stated that at that time he was in good health. After that the policy was issued. It was delivered to the insured at the Bank of Harrison when the insured was apparently in good health. The statement of the insured was evidently not in the face of the policy, but he signed a statement to the effect that he was in good health at that time, and, while the statement itself contains the word "warranty", we think it was not a warranty further than that the insured warranted the truth of his answer. That is, that he believed it to be true. Being made at the time it was, under the circumstances, we think it was a representation and not a warranty, although the word "warranty" was used.

As has been said by some other courts, if a statement of the assured when the policy was delivered that he was in good health, believing that his statement was the absolute truth, would avoid the policy if it turned out that there was some unknown ailment, then no one would know whether he had insurance or not. Our conclusion is that it was not a warranty but a representation.

The appellant next contends that the court erred in giving instructions to the jury. The court, at the request of the appellee, gave the following instruction: "Before the plaintiff can recover, the burden is hers to show by a preponderance of the testimony that her son had a policy of $1,000; had paid the usual and required rate; had made no misrepresentation to procure the policy, and that he died during the life of the policy. If you so find, your verdict will be for the plaintiff."

The appellant says that it is not alleging any misrepresentations, but alleges a breach of warranty. Since we hold that the clause in the statement signed by the insured was a representation and not a warranty, the appellant was contending and did contend that the statement of the insured was untrue, and therefore in effect contended that it was a misrepresentation. But the appellant itself requested and the court gave the follow-

ing instruction: "In this case, gentlemen, there is but one issue for you to determine, and that is whether Thomas W. Whitaker was, on the 6th day of April, 1925, the date of the delivery of the certificate, in good health. The defendant pleads that, on said date, the applicant was suffering with influenza and an affection of the heart. Upon this issue the burden is upon the defendant. If you believe from a preponderance of the evidence that the applicant, Thomas W. Whitaker, was, on said date, April 6, 1925, affected with the influenza and leakage of the heart, or either of such diseases, then in that event you must find for the defendant, and it makes no difference whether deceased knew of such condition or not."

This instruction submitted to the jury the one issue of whether Whitaker was in good health at the time he received the policy, and we think it was more favorable to the appellant than it was entitled to. Our conclusion is that the issue was submitted to the jury under proper instructions, and their finding on the question of fact is conclusive. The judgment is therefore affirmed.

Mr. Justice SMITH dissents.

BENEFIT ASSOCIATION OF RAILWAY EMPLOYEES v. JACKLIN.

Opinion delivered May 2, 1927.

1. EVIDENCE—OPINION OF NONEXPERT.—Where the defense to a suit on an accident insurance policy was that insured committed suicide, which was an excepted risk, it was not error to permit the coroner to testify as to whether sufficient time intervened between the time of shooting and his arrival at the scene thereof for some one to place a pistol under insured's hand.
2. EVIDENCE—OPINION OF NONEXPERT.—In an action on an accident insurance policy where the defense was that insured committed suicide, which was an excepted risk, and where another witness demonstrated in the jury's presence that he could use a pistol with his right hand and put it at the place where insured was

shot, it was not error to overrule an objection to the question to the coroner as to whether it would be practical for a right-handed man to shoot a pistol with his left hand.

3. APPEAL AND ERROR—ADMISSION OF EVIDENCE—HARMLESS ERROR.—In an action on an accident insurance policy, where the defense was that the insured committed suicide, which was an excepted risk, and where defendant's witness testified as to his relations with insured's wife and about going to Hot Springs with her and having a photograph taken, it was not prejudicial error to permit plaintiff to introduce in evidence the photograph of the wife and witness.

4. TRIAL—APPLICATION OF INSTRUCTION.—Where the defense to a suit on an accident insurance policy was that insured committed suicide, which was an excepted risk, an instruction that, before the jury would be justified in finding that insured committed suicide, there must be evidence from which such conclusion would be reasonable and probable, and not merely speculative or conjectural, was not erroneous as instructing that the suicide must be conclusively shown.

5. TRIAL—SUFFICIENCY OF EVIDENCE.—A question as to whether testimony is so speculative or conjectural as to entitle the defendant to go to the jury is a preliminary question for the court.

6. EVIDENCE—WEIGHT AND SUFFICIENCY.—Where testimony is admitted, it becomes a question for the jury to determine whether the thing sought to be proved thereby is shown to be reasonable and probable, and not merely speculative.

7. TRIAL—INSTRUCTION—WEIGHT OF EVIDENCE.—In an action on an accident insurance policy where the defense was that insured committed suicide, an excepted risk, an instruction telling the jury that, to defeat recovery, the evidence must be such that it would appear that suicide was probable and reasonable, *held* not erroneous as on the weight of evidence.

8. TRIAL—REFUSAL OF INSTRUCTIONS.—In an action on an accident policy where the issue for the jury was whether insured was actually killed or committed suicide, refusal of defendant's instruction that the issue was whether insured committed suicide or was murdered, and that there were presumptions against both suicide and murder, and hence presumptions were equally balanced, *held* not error under evidence.

9. INSURANCE—SUICIDE—JURY QUESTION.—Even where the proofs of death show that the deceased committed suicide, it is still a question for the jury to determine; the presumption that deceased did not commit suicide prevailing until overcome by proof to the contrary.

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

Rose, Hemingway, Cantrell & Loughborough, for appellant.

Tom W. Campbell, for appellee.

MEHAFFY, J. The plaintiff, the administratrix of Harvey U. Boyd, deceased, brought suit on an accident insurance policy carried by deceased with the defendant which provided for the payment of $2,000 upon loss of life resulting from bodily injury sustained through accidental means.

The plaintiff alleged that Harvey U. Boyd lost his life by accident on September 21, 1925. That Bessie Boyd was designated as beneficiary in the policy, and that she was also shot and fatally wounded on the same day. That plaintiff was also the administratrix of the estate of Bessie Boyd, deceased, and alleged that proof of death had been made, and asked judgment of $2,000 with interest, damages, and attorney's fees.

The answer denied that the death of Harvey U. Boyd resulted from bodily injury sustained through accidental means and that Harvey U. Boyd committed suicide, which is an excepted risk.

W. A. Lamb, the coroner of Pulaski County, testified that he was called to the Boyd home on September 21, 1925; he presented a diagram of the residence, gave the names of the persons who roomed there, and said that Mr. Boyd was lying on the floor and Mrs. Boyd was on one bed, and the children were on the other bed. That she was lying on the side of the bed next to the wall, facing the wall, with a bullet wound in the back part of her brain that had entered and ranged to the left. That Mr. Boyd was lying on the floor, with his feet partly under the bed on the side he was alleged to have been sleeping on, with his head slightly under the edge of the bed the children were sleeping on. That a pistol was in his hand, and a bullet wound at a point just left of the center of the back of his neck. His right eye was bloodshot, as if the bullet had gone toward it. The bed

clothing was on fire. Mr. Boyd had his trousers on, and Mrs. Boyd was dressed in her night clothes. That the pistol was under Boyd's left hand, and his right hand was stretched out to the right. That there was a powder-burn at the place where the bullet entered his head. It was about an inch and a half or two inches in diameter, and spread out in different directions.

Witness testified that he was experienced in cases of death resulting from pistol shots. That the pistol was against Mr. Boyd's head, and also against Mrs. Boyd's head. The flesh on his head was slightly burned. If a pistol is held back from the flesh it will not lacerate the flesh, but if it is held up against it it will explode and lacerate the flesh.

He said that most suicides followed drinking sprees or a family disturbance.

When witness arrived there he said that Mr. Clark and Mr. Herrin were there, and there were four rooms in which people were sleeping in the house, and there were doors leading into the Boyd's room from the three in which Herrin, Clark and Miss Baer were sleeping. Boyd's room was connected with four other rooms by doors.

He said he did not notice any screens being cut. The next morning he searched all of the rooms, and in Mr. Herrin's room found a handkerchief which had soot or grease on it, and red, as though it was blood. The bloody handkerchief was behind Mr. Herrin's bed.

When he arrived there Mr. Herrin was in Boyd's room. He got there between 4:30 and 5 o'clock, and he was then dressed. He did not notice whether he had his shoes laced. As he recollected, he had his collar and tie on. He was not positive whether Mr. Clark had a coat on. He was positive that Mr. Herrin did not have his hat on when he arrived. The pistol was right under Boyd's hand, on the floor. He was not clutching the pistol. Miss Baer came into the room that morning. She was fully dressed. "I can't take the pistol in my

right hand and point the muzzle of it to the place on the back of my head that corresponds to the bullet-hole in the back of Boyd's head. I will have to take it in my left hand. If I were going to shoot a pistol, I would shoot with my right hand."

When asked if he thought it practical for a right-handed man to shoot a pistol with his left hand, he answered: "It is not often the case. I arrived there between 30 or 40 minutes after the accident occurred. A person would have time to dress in that time, and enough time intervened for some one to have placed a pistol under the man's hand. There were several persons in the room, and, in coming to a decision, I did not confine my questions solely to the persons in the house. I went back there every day for a week to get additional information. There were powder-burns on Mrs. Boyd right around the wound at the back of her head. One of her hands was powder-burned, but I don't remember which."

R. L. Allen testified, in substance, that he was on the Little Rock police force, and was called to the Boyd residence on the morning of the shooting. Officer Bennet went with him. There was a bullet-hole in the back of Mrs. Boyd's head. She was powder-burned and there was a little blood on her. "The best I remember, both of her hands were powder-burned. I know that one of them was. The bullet entered Mr. Boyd's head a little to the left of center and maybe a little above the line of the hair. As I remember, his right hand was on the floor and left hand was lying across the body, and the gun was lying a little under his right hand. I found an empty bottle on the table. It was an Angostura Bitters bottle. I don't think Mr. Clark was fully dressed when we got there. Mr. Herrin was in the other room. He was fully dressed. I saw Miss Baer also. The pistol was partially under Mr. Boyd's right hand." He said he could put it anywhere, and demonstrated snapping the trigger twice.

A number of other witnesses testified to substantially the same facts, and there was also testimony that Mr. Boyd had been drinking, that he had had domestic troubles, and that other men had been going out with his wife and that he had remonstrated with her about this, but we do not deem it necessary to set out the testimony at length. There was a verdict against the appellant, and a motion for a new trial, which was overruled, and exceptions saved, and appeal taken to this court.

The court gave the following instructions at the request of the plaintiff, over the objections of the defendant:

"On April 22, 1924, the defendant, Benefit Association of Railway Employees, issued and delivered to Harvey U. Boyd its policy of insurance, in which policy the defendant agreed that, upon the death of the said Harvey U. Boyd during the life of said policy, if such death were caused solely through external, violent and accidental means (excluding suicide, sane or insane), the defendant would pay to Bessie Boyd, wife of the said Harvey U. Boyd, if living, otherwise to the estate of the said Harvey U. Boyd, the sum of $2,000, with the further provision that, if all monthly premiums on said policy were promptly paid on the dates due, for a period of one year or more immediately preceding such death of the said Harvey U. Boyd, then in such event the defendant should pay an additional $100 upon the occurrence of such death of the said Harvey U. Boyd. All premiums upon said policy were promptly paid upon the dates due for a period of more than one year preceding the death of the said Harvey U. Boyd. On September 1, 1925, said Harvey U. Boyd died from the effects of a gunshot wound. A few hours after his death, on the same day, his said wife, Bessie Boyd, also died from the effects of a gunshot wound. Plaintiff, Lula B. Jacklin, has been appointed and is now the duly constituted and acting administratrix of the estate of the said Bessie Boyd. The above stated facts are undisputed. The defendant

alleges, in its answer in this case, that the said Harvey U. Boyd committed suicide, and on that ground alone the defendant contends that it is not liable for the payment of the insurance under said policy.

"2. The only issue to be determined by the jury in this case is whether or not Harvey U. Boyd committed suicide. It will be presumed in law, unless and until evidence is introduced to the contrary, that the said Harvey U. Boyd did not commit suicide. The law places the burden upon the defendant to prove by preponderance of the evidence that he did commit suicide before you would be justified in so finding. Unless you find from a preponderance of the evidence in this case that the said Harvey U. Boyd in fact did commit suicide, your verdict should be for the plaintiff.

"3. If you find and believe that the evidence in this case is evenly balanced upon the question as to whether or not the said Harvey U. Boyd committed suicide, then your verdict should be for the plaintiff.

"5. In attempting to determine whether or not the said Harvey U. Boyd committed suicide, you would be authorized to take into consideration all of the proved facts and circumstances which have been testified to in this case. Before you would be justified in finding that he did commit suicide, there must be evidence from which such a conclusion would be reasonable and probable, and not merely speculative or conjectural. If you find from a consideration of all the evidence in this case that it is merely speculative or conjectural as to whether the said Harvey U. Boyd committed suicide, your verdict should be for the plaintiff.

"6. If you find for the plaintiff in this case you should find for her in the sum of $2,100, with interest thereon at six per cent. per annum from November 13, 1925, to this date."

The court also gave the following instructions:

"If you do not find from the testimony that Harvey U. Boyd committed suicide, then it is immaterial how his death occurred, and your verdict will be for the plaintiff."

The court then gave the following instructions, at the request of the defendant:

"2. You are instructed that the only question for you to decide is whether or not H. U. Boyd committed suicide. If he did, you should find for the defendant. If he did not, you should find for the plaintiff.

"7. The burden is on the defendant to prove by a preponderance of the evidence that the insured committed suicide, and by the term 'preponderance of the evidence' is meant the greater weight of the evidence.

"8. You are the sole judges of the weight of the testimony and the credibility of the witnesses, and, in passing upon the credibility of the witnesses, you may take into consideration their demeanor upon the stand, their interest in the litigation, the consistency or the inconsistency of their testimony, and any other facts or circumstances which may tend to shed light upon the truthfulness or untruthfulness of such testimony."

The court refused to give the other instructions requested by the defendant.

It is first contended by the appellant that the court erred in permitting the question asked of Dr. Lamb and his answer with reference to whether or not sufficient time intervened for some one to place a pistol under the man's hand, and also objected to the question propounded to the coroner as to whether it would be practical for a right-handed man to shoot a pistol with his left hand, and urges, as a reason why it was error to admit this testimony, that the court has always condemned liberality on the part of the trial court in letting non-expert witnesses give their opinions and usurp the province of the jury.

It may be said, in answer to this argument, in the first place that the coroner claimed to have had some experience, and, moreover, he simply made a demonstration in the presence of the jury that we think it would be proper for any one to make, and, besides that, another witness not only testified that it would be practical, but

he showed in the presence of the jury that he could use the pistol with his right hand and put it at the place where Mr. Boyd was shot. We therefore do not think there was any error committed by the trial court in admitting this testimony.

The appellant next contends that the court erred in permitting plaintiff to introduce in evidence a photograph of Mrs. Boyd and defendant's witness, Herrin. Herrin himself testified about his relation with Mrs. Boyd and about going to Hot Springs with her, and that there was never anything dishonorable between them. He had also testified, without objection, that, on the trip to Hot Springs, they went to Happy Hollow and had their picture taken, and went from there to the tower. And the effort seems to have been made to show the relation between Herrin and Mrs. Boyd, and there is quite a great deal of testimony about her going out with him and about Mr. Boyd remonstrating with her about it, and we do not think the introduction of the picture in evidence was in any way prejudicial. Mr. Herrin was present and testified about the trip to Hot Springs and about having the picture taken, and, of course, he knew whether it was accurately taken; and, whether relevant or not, it could not have resulted in any prejudice to the appellant. It could have been no more hurtful than the witnesses telling about the trip and about their picture being taken together. The appellant does not undertake to show in what way the photograph was harmful. There is no statement as to what the photograph was, how it showed the parties with reference to each other, nor any statement of fact at all by the appellant as to why the picture would not be competent, except that it had no probative force, and that it was an effort to stir the jury and excite the feeling against the appellant by such a photograph, and for that reason it was incompetent. We are unable to see how the photograph, taken as it was, could in any possible way prejudice the appellant, since the testimony was introduced without objection, showing that they went out together, went to Hot Springs together, and,

while there, went to Happy Hollow and had their picture taken together, and there was nothing more in the photograph than the testimony had shown. We therefore conclude that it could not have been prejudicial.

The appellant's next contention is that the court erred in giving plaintiff's instruction No. 5. The specific objection argued is that the last clause tells the jury that the evidence offered by appellant must be such that a conclusion of suicide would reasonably follow. And counsel state in telling them that, and telling them that if, from a consideration of the evidence, it is speculative, their verdict should be for the plaintiff, and they argue that, to the untrained mind of the jury, the words "speculative" and "conjectural" have no technical meaning, and then the instructions simply meant that, unless suicide was conclusively shown, which is an impossibility with only circumstantial evidence in the case, they should find for the plaintiff.

We do not agree with the counsel for the appellant in this contention. In the first place, the jury were supposed to be men of ordinary intelligence and could understand the difference between reasonable and probable on one hand and speculative and conjectural on the other. And the instruction does not tell the jury that, unless suicide was conclusively shown they should find for the plaintiff, and the instruction, we think, could not be construed to mean anything of the sort. It simply tells the jury that there must be evidence from which such conclusion, that is, a conclusion that he committed suicide, would be reasonable and probable. And this does not, in any construction that could be placed upon it, mean, and it cannot mean, that, unless suicide was conclusively shown, they would find for the plaintiff. It is true that the question as to whether the testimony is so speculative or conjectural as to entitle the defendant to go to the jury is a preliminary question for the court. But, when testimony is admitted, then it is certainly a question for the jury to determine whether the thing sought to be proved by such evidence

is shown to be reasonable and probable and is not merely speculative.

Moreover, defendant's specific objection to the instruction is that it is an instruction upon the weight of evidence and that it placed a greater burden on the appellant than was warranted, and we cannot agree with counsel for appellant in this contention. It was in no sense an instruction on the weight of evidence, but it simply told the jury that the evidence must be such as it would appear from it that suicide was probable and reasonable, and gave the jury no intimation in any way what the court thought about the evidence or its weight, and the only burden it put upon the appellant was to show by evidence that suicide was reasonable and probable. Certainly this was not an instruction on the weight of evidence and would not be any improper burden upon the appellant. It is wholly different from the cases cited by the appellant, where the court told the jury that the defendant must establish, by a preponderance of evidence, such payment, to the satisfaction of the jury. It is never necessary, in a civil case, that a jury should be satisfied of the truth of their verdict. They may, after a thorough investigation, still not be satisfied, but there is certainly no error in telling the jury that the thing must be probable or reasonable. And the fact that there may be misgivings or doubts in the minds of the jury would not justify them in finding a thing to be true where the evidence was speculative and conjectural.

The appellant next complains because the court refused to give its instruction No. 4, which, among other things, told the jury that the issues were narrowed down to whether the insured committed suicide or was murdered, and that there are presumptions against both suicide and murder, so in this case the presumptions are equally balanced. This instruction told the jury, in effect, that the deceased committed suicide or was murdered, and we think this does not necessarily follow from the proof in this case. And it was a question for the jury to find whether he was accidentally killed, either by him-

self or some third person, or whether he committed suicide, and this would make the instruction erroneous and justify the court in refusing to give it, even if there had not been added to it the clause with reference to presumption.

One of the strongest presumptions is the presumption against suicide. This court has said: "In the first place, there is a presumption against suicide or death by any other unlawful act, and this presumption arises even where it is shown by proof that death was self-inflicted—it is presumed to have been accidental until the contrary is made to appear. This rule is founded upon the natural human instinct or inclination of self-preservation, which renders self-destruction an improbability with a rational being." *Grand Lodge of A. O. U. W.* v. *Banister,* 80 Ark. 190, 96 S. W. 742.

It will be observed that the court in the above case said that the death is presumed to have been accidental until the contrary is made to appear. Certainly one could not make it appear by offering another presumption, the presumption against murder. This court is thoroughly committed to the doctrine that death is presumed to have been accidental until it is proved, not presumed, that he died from some cause not accidental.

"The presumption is always against suicide or self-destruction on the part of a sane person who came to his death under circumstances not explained." 22 C. J. 95.

"The presumption of law is in favor of life and the natural desire and struggle to preserve rather than destroy it. The presumption is that he (plaintiff's intestate) fell into the hole accidentally, perhaps carelessly." *Milwaukee Fuel Co.* v. *Industrial Commission of Wisconsin,* 159 Wis. 635, 150 N. W. 998.

The Supreme Court of Oklahoma approved an instruction reading as follows: "You are instructed that, when a person dies, the law presumes that he has died from natural causes, and presumes that he had not died from self-destruction. This presumption obtains unless it is overcome by evidence establishing the fact

that such person committed suicide." *Modern Brotherhood of America* v. *White,* 66 Okla. 241, 168 Pac. Rep. 794, L. R. A. 1918B 520.

"The presumption was against suicide, and the burden was on the defendant." *Travelers' Insurance Co.* v. *Allen,* 237 Fed. 78.

Even where the proofs of death show that the deceased committed suicide, still it is a question for the jury to determine, and, although such proof has been made by the plaintiff, the presumption is that the deceased did not commit suicide, and that presumption prevails until it is overcome by proof to the contrary.

It was said in a case where the proof of death showed suicide: "The jury were entirely at liberty to properly find that the wound, although self-inflicted, was accidental." *Home Benefit Assn.* v. *Sargent,* 142 U. S. 691, 12 S. Ct. 332 (35 L. ed.) 1160.

The appellant complains of the court's refusal to give its instructions No. 6 and No. 9, but we do not agree with counsel for appellant that there was any error in the refusal to give these instructions. After a careful examination of the entire record we have reached the conclusion that there was sufficient evidence to submit to the jury, and that it was submitted to the jury under proper instructions, and the verdict of the jury is conclusive. The judgment is therefore affirmed.

PEMBERTON *v.* BANK OF EASTERN ARKANSAS.

Opinion delivered May 2, 1927.

1. APPEAL AND ERROR—CONCLUSIVENESS OF FINDING OF COURT.—The court's finding as to the value of property, claimed by defendant to be exempt, not against the preponderance of the testimony, is conclusive on the Supreme Court.
2. EXEMPTIONS—CONSTRUCTION OF EXEMPTION LAWS.—Constitution, art. 9, § 2, relating to exemptions, and Crawford & Moses' Dig., §§ 5544, 5554, being enacted for the benefit of debtors, must be liberally construed.
3. EXEMPTIONS—AMOUNT ALLOWED.—Where a debtor claims specific exemptions, and the court finds the value of the articles claimed

exceed $500, it is the duty of the court, under § 5554, to deliver to the debtor as exemptions articles not exceeding the value of $500, and to sell the balance only.

Appeal from St. Francis Circuit Court; *E. D. Robertson,* Judge; reversed.

W. J. Lanier, for appellant.

C. W. Norton, for appellee.

MEHAFFY, J. Suit was begun in the justice of the peace court in St. Francis County on the 19th day of November, 1923, upon a promissory note for $300, executed and delivered by appellant and Lee Crews to appellee, Bank of Eastern Arkansas. Summons and attachment were issued and served, and judgment was rendered against appellant and Crews. Crews filed schedule and claimed his personal property as exempt, and his claim was allowed. The appellant filed a schedule of his personal property totaling $543, and of that amount he claimed articles aggregating $420, according to his verified schedule.

The justice court refused to allow a supersedeas, and appellant appealed to the circuit court. Evidence was taken in the circuit court, the plaintiff testifying that the property claimed as exempt by him was worth less than $500 and the other witnesses testifying that it was worth more than $500.

The list as claimed by appellant with their values is as follows:

One-half of the cotton and seed on 30 or 35 acres	$250.00
One-half of corn	68.00
One blue or dapple mule	40.00
One Ford touring car	30.00
Two turning plows	5.00
Two middle-busters	10.00
One stalk cutter	10.00
Two scrapers	4.00
One orchard harrow	2.00
Five field hoes	1.50
Total	$420.00

It is unnecessary to set out the testimony. The court found, after hearing all the testimony, that the value of the property was $793, and this finding we do not think is against the preponderance of the testimony, and it is therefore conclusive on this court. The property was afterwards sold and brought much less than the value fixed by the court, but the kind of property owned by the appellant, at a forced sale under the circumstances in this case, would probably sell for very much less than its real value. The only question to be determined here is whether the appellant had complied with the law requiring him to select the specific articles which he claimed as exempt when his schedule, according to the valuation found by the court, exceeded $500, which he would be entitled to claim as exempt, as he was a married man and the head of a family.

Section 20, article 9, of the Constitution reads as follows:

"The personal property of any resident of this State, who is married or the head of a family, in specific articles to be selected by such resident, not exceeding in value the sum of $500, in addition to his or her wearing apparel and that of his or her family, shall be exempt from seizure on attachment or sale on execution or other process from any court on debt by contract."

The above section of the Constitution is repeated as § 5544 of Crawford & Moses' Digest. It will be observed that the Constitution and statute allow exemptions in specific articles to be selected by himself not exceeding in value the sum of $500. The circuit court held that, when the value of the articles in appellant's schedule exceeded $500, it then became the duty of appellant to select from that list articles whose aggregate value did not exceed $500, and that, because he did not do that, he waived his right to exemption.

We think the court erred in this ruling. This court has many times held that he must select the articles he claims as exempt. But the question of whether he has complied with that law when the articles selected by him

and claimed by him to be worth less than $500 and the court finds they are worth more, has never been decided by this court. While this court has held that he must make the selection, it has also held uniformly that the exemption clause of the Constitution is highly remedial and should be liberally construed. This court has said:

"It is said that the effect of such a ruling would be to deprive Guiling of his exemptions; but, if he was entitled to exemptions in this case, still there is nothing in the transcript before us to show that he had claimed his exemptions, as required by the statute. *Prima facie,* all personal property is subject to sale on execution, and defendant cannot be allowed exemptions unless they are claimed in the manner provided by statute." *Scanlan* v. *Guiling,* 63 Ark. 540, 39 S. W. 713.

"It is settled in the decisions of this court that, as to property exempt from execution, there are no creditors; that, as they cannot sell it under execution, they are not injured by a sale of it by the owner, and are not concerned with the motives which may prompt the sale. * * * Under our statute a debtor, claiming property to be exempt from execution, is required to make a schedule of all his or her property, including moneys, rights, credits and choses in action, specifying the particular property claimed as exempt under article 9 of the Constitution of 1874, and file the same with the officer issuing the execution, after having given five days' notice in writing to the opposite party. * * * If he would claim exemption for any of said property, he must bring himself and his property within the exceptions of some statute by proper proof." *Blythe* v. *Jett,* 52 Ark. 547, 13 S. W. 137.

"Laws exempting a reasonable sum out of insolvent debtors' estates to provide insurance for their wives and children have received a liberal construction in other jurisdictions. The Supreme Court of Missouri, in *Judson* v. *Walker,* 155 Mo. 166, 55 S. W. 1083, construing somewhat similar statutes, says: 'These statutes are now pronounced by the courts praiseworthy, and construed with

liberality.' '' *Davis, State Bank Commr.*, v. *Cramer,* 133 Ark. 224, 202 S. W. 139.

This court has also said that, where a debtor's property is worth more than $500, he must make a schedule of all of his property and specify particular property which he wishes exempted under the Constitution. *Griffin* v. *Botterall Shoe Co.,* 137 Ark. 37, 207 S. W. 439.

Under constitutional provisions and statutes which require the debtor to make the selection, many courts hold that it is his duty to make the selection, and that it is not the duty of the officer to make it for him. But there are many cases holding otherwise, and practically all the authorities that we have examined hold that a judgment debtor is not required to select property at all when all of his property is exempt from execution. Simply a claim to the officer that his property is exempt is all that is required when all of his property is exempt. That is, when the aggregate value of his property does not exceed his exemptions.

Section 5554 of Crawford & Moses' Digest is as follows:

"If the decision shall be that the property described exceeds in value the amount exempted by the Constitution, then the justice or clerk shall revoke the supersedeas so far as concerns such items of property described as the said appraisers may designate as in excess of the amount of exemption by the Constitution provided for, and the cost of the proceeding shall be paid by the defendant in the action.''

We take that to mean that, when the list selected by the debtor as exempt and shown, according to his estimate, to be within the $500, but the appraisers fixed it about $500, the debtor does not have to reselect, but it then becomes the duty of the officer, whether the court or the clerk, to revoke the supersedeas as to that in excess of his exemptions. That being true with reference to the procedure in the justice court and before the clerk, we think it should apply in the circuit court also when the value is fixed by testimony taken in the circuit court.

When the debtor files his list and swears that the aggregate value of the property claimed as exempt is less than $500, and the court finds that it exceeds $500, the defendant has made a selection, he has complied with the law, and we think it then becomes the duty of the court, under this statute, to sell that portion of his property only which is in excess of the amount allowed the debtor as exempt.

The controversy here was about the value of the property, and there was no controversy about the debtor claiming it as exempt. He was claiming it all the time as exempt. The officers and court knew that he was entitled to $500 as exempt.

As said by the Illinois court: "These statutes have not declared what shall be done in a case like the present, and we are left to ascertain the legislative intention by inference or interpretation. Seeing the intentions or purposes of the legislation in adopting these acts, we cannot doubt that, had such a case occurred to them, they would have embraced it in the language of the law, because it is fully within its reason." Thompson on Homestead and Exemptions, 675.

The author further said in this connection: "An apt illustration of the results which are frequently reached by extending to statutes of exemption a liberal construction will be found in a case in Illinois, where a debtor claimed the right to reserve from execution a horse worth more than $100, but not more than $160. There were in force two statutes of exemption, one allowing the debtor certain specific chattels, and also permitting him to select 'sixty dollars' worth of other property suited to his or her condition in life,' and a later one exempting certain additional chattels, among them 'one yoke of oxen, or one horse in lieu thereof, not exceeding one hundred dollars in value.' Putting the two together, the court sustained the right of the debtor to select the horse in question." Thompson on Homestead and Exemptions, 675.

Exemption laws are enacted by the Legislature for the benefit of the debtor, and, as this court has frequently said, must be liberally construed. And, as we have already said, there is no statute prescribing what shall be done under circumstances like we have here. All the property that this debtor owned was worth very little, if any, more than his exemptions. According to his judgment, it was worth less than his exemptions. And the subsequent sale of the property seems to justify the debtor's estimate of the value.

In speaking of how exemptions should be claimed, it is said in Thompson on Homestead and Exemptions, 663: "It is enough if it is made to the levying officer in a way in which he cannot, or ought not to, misunderstand it. 'Men whose property is levied on are generally under some degree of mental excitement. It is not to be expected that their words should be calmly weighed.'"

The officer here could not doubt that the debtor was claiming his exemptions. He was bound to know that he was entitled to at least $500 exempt. The value of the articles claimed as fixed by the court exceeded that amount. Since the debtor had selected the property that, according to the proof taken by the court, exceeded the amount that he was entitled to claim as exempt, it was the duty of the court to allow the debtor or to set apart to the debtor $500 worth of articles claimed as exempt, and to sell the balance only.

Persons for whose benefit statutes of exemption are enacted are usually very poor people. It frequently happens that all the property they possess would not sell for $500, although it may be worth more than that to them. And we hold that, when a debtor makes it clear that he is claiming his exemptions and specifies the particular articles that he claims, it is the duty of the court to set aside those articles as exempt, and, if they are in excess of the amount the debtor is entitled to claim, the court should deliver to him as exempt articles not exceeding the value of $500, and sell the balance only.

The judgment of the court is reversed, and remanded with directions to allow the debtor his exemptions by delivering to him the property claimed as exempt, not exceeding $500, or, if the property cannot be restored to him in as good condition as when taken from him, that he be given the value in money of such articles as cannot be so restored.

SINCLAIR OIL & GAS COMPANY v. LANGLEY.

Opinion delivered May 2, 1927.

1. MASTER AND SERVANT—SUFFICIENCY OF EVIDENCE.—In a suit by a pipe-fitter against his employer for injuries sustained while attempting to tighten a pipe connection, the evidence *held* not to show that it was a physical impossibility for the accident to have occurred as contended by plaintiff.
2. MASTER AND SERVANT—NEGLIGENCE OF FELLOW SERVANT.—In a suit by a pipe-fitter against his employer for injuries sustained while attempting to tighten a pipe connection, the evidence of negligence on the part of plaintiff's fellow servant *held* sufficient to require submission of the issue to the jury.
3. TRIAL—DIRECTION OF VERDICT.—The trial court cannot direct a verdict against the plaintiff except where, conceding credibility of his witnesses and making all legitimate inferences, it is plain that his case is not sufficient in law to entitle him to a judgment.
4. MASTER AND SERVANT.—An employer is liable for the injuries of a servant, though he was injured in taking the more hazardous of two ways to tighten a pipe connection, where he was working in the manner in which he was instructed to act by his foreman.
5. MASTER AND SERVANT—CONTRIBUTORY NEGLIGENCE.—Even though there may be two ways open to an employee in which to perform his work, one of which turns out to be less dangerous than the other, and he attempts the other way, yet, if that way is not so dangerous that a person of ordinary prudence would not have undertaken it, the courts can not say that the employee was guilty of negligence because he chose that way which was reasonably safe, but not the safer.
6. APPEAL AND ERROR—DISCRETION AS TO CONTINUANCE.—Matters of continuance are largely in the discretion of the trial court, and no reversible error can be predicated thereon unless there is a manifest abuse of such discretion.

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

Roscoe R. Lynn, for appellant.

C. B. Andrews and *William F. Denman,* for appellee.

McHANEY, J. This action arises on account of a personal injury received by appellee while in the employ of appellant as a "connection" man, or pipe fitter, in the oil fields of Nevada County. A two and one-half inch pipe line had been laid on the ground from a near-by oil well to a large storage tank, 15 feet in diameter and 25 feet high, and a riser pipe of the same size was connected therewith and erected on the outside of said tank, 18 inches above the top thereof. On top of this riser a tee joint was screwed, with a plug closing the hole in the top of the tee, and a discharge pipe 8 or 10 feet long threaded or screwed into the remaining opening in center of the tee. It is called a tee joint on account of its resemblance in shape to the capital letter "T." This discharge pipe was so arranged as to discharge the oil coming from the well through this line of pipe into the tank and through a nipple or elbow joint attached to the end of the discharge pipe and extending down into the funnel opening in the top of the tank. Appellant's foreman, after this line had been constructed as described, decided that the tee on top of the riser was not screwed down far enough, and directed appellee and his brother, a fellow-servant, to go upon top of this tank, disconnect the nipple or elbow joint from the end of the discharge pipe, and tighten the tee down. While this testimony on this point is not very clear, we think this is the effect of the evidence. He said: "Q. What did he (the foreman) tell you to do? A. Told us to take it off and make it tighter. I told him I didn't think it would bear making tighter. He said, 'Yes, make it tighter.' We went back up there and taken it loose, me and my brother, and taken this nipple out, it went in on the other side, and undertaken to make it up two more rounds." They followed instructions, took the nipple off the tank-end of the discharge pipe, and proceeded to tighten the

tee down by using the discharge pipe as a fulcrum, appellee backing up and pulling thereon, and his brother, on the opposite side, holding, steadying and pushing. When they had taken the end of the discharge pipe as far out over the edge of the tank as they could go, appellee went down to the top of a lower adjacent tank, on the steps of a ladder or stairway leading from the top of one to the top of the other, and, by means of a pole, brought the discharge pipe on around as far as possible, and then went back to the top of the tall tank, lassoed the discharge pipe with a rope and pulled it back to normal position. This was round one. They proceeded in like manner on round two, but, as they approached near the edge of the tank in the same formation as in round one, for some unknown reason appellee's brother turned loose his hold, which precipitated appellee and the discharge pipe off the tank, over the steps and down onto the top of the shorter tank, resulting in severe and painful injuries to various portions of his body, especially to his back and hips. Suit was brought, substantially alleging these facts as a basis of recovery. Issue was joined, a trial had, which resulted in a verdict and judgment for appellee in the sum of $2,000, and wherefore this appeal.

Counsel for appellant first contends that it was a physical impossibility for the accident to have occurred in the way appellee contends it did occur. He and his brother are the only witnesses to the accident. They are in substantial accord as to how it occurred. It was submitted to the jury, and its finding is against appellant. Moreover, the accident did occur, and there is no dispute in the testimony as to how it occurred. We therefore hold appellant is wrong in this contention.

Next it is contended that appellee's testimony does not show actionable negligence. Without reciting the testimony *verbatim,* or again reviewing it, we hold that there was sufficient testimony to submit to the jury this question, that is, whether the injury was caused by reason of the negligence of appellee's fellow-servant in turning loose his hold on the discharge pipe as he did. A

trial court cannot direct a verdict against the plaintiff except in cases where, conceding the credibility of the witnesses, and giving full effect to every legitimate inference that may be deduced from their testimony, it is plain that the plaintiff has not made out a case sufficient in law to entitle him to a verdict and judgment thereon.

The next contention is that, instead of screwing the tee down in the manner attempted, they should have disconnected the discharge pipe from the tee, and with a pipe wrench taken a turn or two on it. In other words, they took the more hazardous of two ways to accomplish the purpose, and that the court erred in not instructing the jury as requested on this point. A sufficient answer to this contention is that they were doing the work in the manner they were instructed by the foreman, or at least in the manner they understood the foreman to instruct them to perform it. Also, the law is to the contrary. In the case of *Hedrick* v. *H. D. Cooperage Co.*, 97 Ark. 553, 134 S. W. 957, this court said: "Even though there may be two ways open to an employee in which to perform his work, one of which turns out to be less dangerous than the other, and he adopts the other way, yet, if that way is not so dangerous that a person of ordinary prudence would not have undertaken it, the court should not say that the employee was guilty of negligence because he chose that way which was reasonably safe, but which was not the safer. We think, as is said in our former cases, that to adopt that rule would be to make the employee the insurer of his own safety in choosing between two methods of doing his work, either of which might be reasonably safe."

Again, in *St. L. I. M. & S. R. Co.* v. *Coutch,* 111 Ark. 5, 162 S. W. 1103, in answer to a requested instruction that, "if the plaintiff had more than one method by which he might have performed his duties, and he voluntarily chose the more hazardous one, knowing it to be such, then the plaintiff made his choice at his own risk," this court said: "It should not be said that, because plaintiff went between the cars when it was possible for him to

have chosen a safer route around them, he was as a matter of law not entitled to recover. According to his testimony he chose that route under the direction of his foreman, and it had been the custom of the employees to cross over in that way."

Other complaints are made by counsel for appellant relative to the giving of appellee's instruction No. 1 and No. 2, but we do not deem it necessary to set them out, or to discuss them in detail. They were correct declarations of law applicable to this case, and many times sustained by this court. There was no error in the refusal of the court to grant appellant a continuance after counsel for appellee had stated his case. The request was made on the ground that the statement was materially different from the allegations of the complaint, but we do not agree with appellant in this regard. Matters of continuance are largely in the discretion of the trial court, and no reversible error can be predicated thereon unless there is a manifest abuse of such discretion.

No error appearing, the judgment is affirmed.

AMERICAN ALLIANCE INSURANCE COMPANY v. PAUL.

Opinion delivered May 2, 1927.

1. REFORMATION OF INSTRUMENTS—MUTUAL MISTAKE.—To entitle a party to reform an instrument in writing, it must be shown that the mistake was common to both parties, and that the instrument as delivered did not express the contract as understood by either.
2. REFORMATION OF INSTRUMENTS—SUFFICIENCY OF PROOF.—While equity will reform a written instrument on account of a mutual mistake, if it does not reflect the intention of either party, yet the proof of such mistake must be clear, unequivocal and decisive, but the rule does not require that the proof be undisputed.
3. INSURANCE—REFORMATION OF POLICY.—Where insurer and insured intended a fire policy to cover cotton while in the possession of a warehouse company, but the policy required storage in a certain warehouse, the insurance agent not knowing that the warehouse company had acquired another warehouse, the policy was

properly reformed, after loss of the cotton in such other warehouse, to cover it while stored there, since such limitation of coverage, under the circumstances, amounted to inequitable conduct justifying reformation.

4. INSURANCE—REFORMATION OF INSTRUMENT.—A policy of fire insurance, like any other written instrument, is subject to reformation, where the facts and circumstances will justify, so as to express the real intention of the parties.

5. INSURANCE—PENALTY AND ATTORNEY'S FEES.—In a suit to reform a fire insurance policy by changing the description of location of the property insured, and for value of which the insured property was destroyed, it was error to assess the statutory penalty and attorney's fee, where plaintiff made demand for the full value of the property destroyed without payment or tender of premiums due.

6. INSURANCE—DEDUCTION OF UNPAID PREMIUMS.—In a suit for reformation of a fire insurance policy and for the value of insured property which had been destroyed, the amount of unpaid premiums should be deducted from the judgment, which was for the value of the property destroyed plus interest.

Appeal from Jefferson Chancery Court; *Harvey R. Lucas,* Chancellor; reversed in part.

Cockrill & Armistead, for appellant.

Rowell & Alexander, for appellee.

McHANEY, J. On November 22, 1924, appellee, E. L. Paul, was the owner of thirty-seven bales of cotton in transit *via* Missouri Pacific Railroad Company from Grady to Pine Bluff, Arkansas, shipper's order bill of lading for twenty-seven bales of such cotton having been issued and delivered to appellee, and the other ten bales moving separately from H. A. Bankston to H. A. Bankston, Pine Bluff, Arkansas, notify E. L. Paul, c/o Pine Bluff Compress & Warehouse Company, Pine Bluff, Arkansas. On that date appellee went to the office of the Home Insurance Agency in Pine Bluff to procure insurance on this cotton, which he did through Mr. George W. Wells, president of the agency company, who caused to be issued a policy of insurance in appellant company in the sum of $5,000 for a premium of $22.40 for a term of six months from November 22, 1924, to May 22, 1925, against loss by fire on the following described

property, "while located and contained as described herein, and not elsewhere, to wit:

"$5,000 on cotton in bales, owned or held by the assured, in trust, or on commission, or on joint account with the Pine Bluff Compress & Warehouse Company's Compress and Warehouse, and on platforms and tramways adjoining said compress, situated near the eastern city limits of Pine Bluff, Arkansas, and also while in or on cars on sidetracks and switches before actual delivery of cotton is made to the said compress, but not while in transit nor while bill of lading is in force. * * * It is further understood and agreed that, if this policy covers at more than one place or location (and within the meaning of this clause each warehouse, yard or platform is understood to be a separate location), then the whole amount of insurance named herein shall be distributed and apply in each location as the value of the property insured in each location bears to the total value of the property insured in all locations. * * *"

Prior to obtaining this insurance appellee had borrowed a sum of money from the National Bank of Arkansas, for which this cotton was security, and, by agreement of parties, a loss payable clause to the National Bank of Arkansas was attached to the policy and delivered to the National Bank of Arkansas by the agency, on the direction of appellee, Paul, who did not read and never saw the policy until after the loss hereinafter mentioned.

The Pine Bluff Compress & Warehouse Company had for many years owned and operated a very large compress and warehouse near the eastern city limits of Pine Bluff, which it called No. 3, and the St. Louis Compress Company had owned a cotton warehouse on the west side of the city, which, in September, 1924, it sold to the Pine Bluff Compress & Warehouse Company, and which was known as warehouse No. 1, but same had not been used by the latter company for the storage of cotton until the middle of November, and neither Mr. Paul nor Mr. Wells of the insurance agency knew, at the time this

policy was issued, that the Pine Bluff Compress & Warehouse Company either owned or was using for storage of cotton warehouse No. 1 in the western part of the city. In press or warehouse No. 3 there were two rates for insurance on cotton stored therein, depending on the location of the cotton in the compartments. There were twelve storage compartments in this press, and, if the policy was to cover while located in compartments from one to twelve, the premium rate is 64 cents, but if the location of the cotton is limited to compartments five to twelve, the premium rate is 39 cents per hundred dollars. The premium rate in warehouse No. 1 is $2.31 per hundred dollars, and if the policy covers cotton in both warehouses, in the nature of a blanket coverage, the premium rate is $2.81 per hundred dollars. At the time the policy was written, neither party having in mind the possibility of the location of the cotton in the warehouse No. 1, they discussed the difference in rates in warehouse No. 3, and Mr. Paul chose the higher rate in order that there might be no contention regarding the location of the cotton in the event of loss.

The twenty-seven bales covered by the bill of lading before mentioned were brought into Pine Bluff promptly, but were not unloaded in warehouse No 3 on account of congestion, and, by direction of the warehouse company, they were delivered to and stored in warehouse No. 1. Thereafter, on December 11, warehouse No. 1 was destroyed by fire, in which these twenty-seven bales were burned. The other ten bales were delivered to compress No. 3 in the eastern end of the city. Appellee did not discover, for some time after the fire, that his cotton had been destroyed, but he did later discover this fact, and, on December 31, 1924, he was in the office of the Home Insurance Agency and advised Mr. Wells that twenty-seven bales of his cotton were burned. Mr. Wells promised to notify the company of the loss, and stated that it would not be long before he would hear from them. On that day, December 31, after Mr. Paul had left the office, Mr. Wells wrote him a letter advising him

that, in his judgment, the company was not liable, for the reason that he had discovered, on examination, that the policy covered loss in press No. 3, and did not cover loss in press No. 1, and in this letter he made this statement:

"After you were in our office this A. M., and when we started to report loss to the company, we found that this policy was issued, upon your instructions, to cover in press No. 3, situated in the eastern part of Pine Bluff, at rate of 64 cents per annum. We mention rate, as there could be no doubt as to whether the policy should cover, for, at time you took out this policy, you had us give you tentative figures as to the cost of same. The rate in press No. 1, which burned, is $2.31 per $100."

After denying liability, he stated in the letter that they were reporting the loss to the company, advising it fully, and would let Mr. Paul hear from him again when he heard from the company. The agency thereafter, on the first of each month, rendered a bill to appellee, Paul, for the premium on this and other policies, and, on March 16, 1925, while in the office of the agency, he signed a check written out by Mr. Wells for $30.40, covering his bill for this and other premiums, and on that day, after Mr. Paul had left the office, Mr. Wells wrote a letter to him, returning the check for $30.40, and again denying liability under the policy in question, in which he stated:

"We could have and would have been just as pleased to write you insurance there (meaning in press No. 1) as in press No. 3, in fact, we would have liked it better, as rate in that location is higher, and, as we work upon a commission basis, our commission would have been greater."

Appellant having denied liability, appellees, E. L. Paul and the National Bank of Arkansas, brought suit in the Jefferson Chancery Court for a reformation of the policy, by changing the description of the location of the property insured from what it was as issued to read "while contained in any compress or warehouse belonging to the Pine Bluff Compress & Warehouse Company, in or adjacent to the city of Pine Bluff, Arkansas," and

for judgment for $3,000, the agreed value of the twenty-seven bales of cotton, interest, 12 per cent. damages, attorney's fees, and costs. The court, after hearing the evidence, decreed a reformation of the policy in accordance with the prayer of the complaint, gave judgment thereon for $3,000, and added the penalty and attorney's fees in the sum of $300, in which the court made a finding of fact to the effect that, quoting appellant's abstract, "there was a mutual mistake, that is, that there was a meeting of minds and an agreement actually entered into, but that the policy, in its typewritten form, does not express what was really intended by the parties." The court further found that the agent Wells and appellee, Paul, both understood the cotton was insured while in the custody of the warehouse company, and so intended it, and that, even if it could be said that that was not the intention of the agent, then his conduct was so inequitable as to justify reformation. "For either reason, this court finds the evidence clear, satisfactory and convincing that the intent of the parties was not correctly expressed in the typewritten portion of the policy, and the policy—that part of it where the mistake of the draftsman occurred in failing to give the correct location of the property—should be reformed." From the decree against it appellant has appealed to this court.

Appellant's first contention for a reversal is that the decree of reformation is not sustained by the evidence, for the reason, first, that, to entitle a party to reform an instrument in writing, it must be shown that the mistake was common to both parties, and that the instrument as delivered did not express the contract as understood by either, and that the evidence in this case is not sufficient to show this; and, second, that reformation of a written contract will be granted only where the proof is clear, unequivocal, decisive and beyond reasonable controversy, and that the evidence in this case does not measure up to this standard. As abstract propositions of law, both of the above declarations or statements of the law are correct. The substance of the first prop-

osition is taken from *Varner* v. *Turner,* 83 Ark. 131, 102 S. W. 1111; and in *Cherry* v. *Brizzolara,* 89 Ark. 309, 116 S. W. 668, 21 L. R. A. (N. S.) 508, both propositions are sustained. In the first case, quoting from the syllabus, it is said: "To entitle a party to reform a deed upon the ground of mistake it must be clearly shown that the mistake was common to both parties, and that the deed as executed does not express the contract as understood by either of them."

The second syllabus of the next case sustains the second proposition of law above stated as follows: "While equity will reform a written instrument on account of a mutual mistake if it does not reflect the intention of either party, yet the proof of such mistake must be clear, unequivocal and decisive."

Any number of decisions of this court might be cited, and a great number of them are cited and quoted from in appellant's brief, running from *McGuigan* v. *Gaines,* 71 Ark. 614, 77 S. W. 52, down to the recent case of *Norsworthy* v. *Hicks,* 170 Ark. 877, 281 S. W. 660. But we do not agree with counsel that these rules have not been met and satisfied in this case. Let it be remembered that neither the agent of appellant nor Mr. Paul knew that the compress company had more than one warehouse for the storage of cotton in the city of Pine Bluff; that appellee, Paul, knew nothing about the location of the one warehouse in the eastern part of the city. What Mr. Paul wanted, and what Mr. Wells intended necessarily, was that the cotton should be insured while in the possession of the compress company, wherever it might be located, and Mr. Wells believed that it would be located in warehouse No. 3, as that was the only place that it could be put and be in a warehouse in the possession of the compress company, as he knew of no other at that time. The fact that it might be located a part in one place and a part in another place is distinctly recognized by the second clause of the policy above quoted, although neither party actually contemplated such at the time. A portion of the language of that clause is, "that, if this policy covers at more than

one place or location (and within the meaning of this clause each warehouse, yard, or platform is understood to be a separate location)," and this is a recognition that the cotton might be in different locations.

While Mr. Wells testified very positively that he wrote the policy in accordance with the instructions of Mr. Paul, he says that, when Mr. Paul came into his office and asked him what it would cost to insure the thirty-seven bales, he asked him where the cotton would be, and that Mr. Paul said in the Pine Bluff Compress & Warehouse Company, showing conclusively, to our minds, that it was the intention of both parties that the cotton should be insured while in the possession of the Pine Bluff Compress & Warehouse Company, wherever it might be located. This conclusion is further borne out by the fact that, in the letter of December 31, 1924, he stated that the policy was issued on Mr. Paul's instructions to cover in press No. 3 "at rate of 64 cents per annum. We mention rate as there could be no doubt as to whether the policy should cover, for at time you took out this policy you had us give you tentative figures as to cost of same."

In other words, Mr. Wells bases his statement that Mr. Paul instructed him to insure this cotton in warehouse No. 3 on account of the rate charged. The fact that he charged him a 64-cent rate is the foundation for Mr. Wells' belief that Mr. Paul gave him such definite instructions, rather than an independent recollection that Mr. Paul had so instructed him. This letter was written December 31, shortly after the fire, and his recollection of the matter at that time was undoubtedly better than it was at the time of the trial. In his letter of March 16 Mr. Wells states that he would have been pleased to have written his insurance covering press No. 1. On December 31, Mr. Paul went to Mr. Wells' office and notified him that twenty-seven bales of his cotton had been destroyed in warehouse No. 1, and Mr. Wells at that time did not know, or at least did not remember, that the policy did not cover warehouse No. 1, and told Mr. Paul that

he would notify the insurance company and would hear from them shortly. He did not know, or did not remember, that it was not covered until he looked at his records and found that he had caused the policy to be written so as to cover only in press No. 3. Again, it is not disputed that Mr. Paul wanted his cotton insured and that Mr. Wells agreed to insure it while in the possession of the Pine Bluff Compress & Warehouse Company. Mr. Wells, as agent of appellant, agreed and undertook to do this. If therefore, having undertaken to protect Mr. Paul against loss of this cotton by fire, while in the possession of the warehouse company, he either carelessly, negligently or fraudulently so wrote the policy as to limit the coverage to loss to a particular possession instead of possession generally, this would amount to inequitable conduct, such as to justify reformation of the policy.

In the case of *Welch* v. *Welch,* 132 Ark. 227, 200 S. W. 139, this court went thoroughly into the question of reformation of written instruments, and there held that a court of equity will reform written instruments either where there is a mutual mistake or where there has been a mistake of one party accompanied by fraud or inequitable conduct of the other party, and quoted Pomeroy, Eq. Jur. (3 Ed.), vol. 4, par. 1376, as follows:

"Equity has jurisdiction to reform written instruments in but two well defined cases: (1) Where there is a mutual mistake—that is, where there has been a meeting of minds—an agreement actually entered into, but the contract, deed, settlement, or other instrument, in its written form, does not express what was really intended by the parties thereto; and (2) where there has been a mistake of one party accompanied by fraud or other inequitable conduct of the remaining parties. In such cases the instrument may be made to conform to the agreement or transaction entered into according to the intention of the parties. The conditions of fact giving rise to the exercise of the jurisdiction to grant reformation are numerous. Almost all written instruments may be reformed when a proper occasion is furnished."

In order to justify reformation it is not necessary that the facts be undisputed. In *Troupe* v. *Ancrum,* 146 Ark. 36, 225 S. W. 9, it is said, quoting from syllabus:

"While, to justify reformation of an instrument for mutual mistake, there must be something more than a mere preponderance of the evidence, the rule does not require that the proof be undisputed; it is sufficient if the testimony is unequivocal and clear, that is, such as to satisfy the court that the mistake was made and that the instrument does not express the intention of the parties."

A policy of fire insurance, like any other written instrument, is subject to reformation, where the facts and circumstances will justify, so as to express the real intention of the parties. *Conn. Fire Ins. Co.* v. *Wigginton,* 134 Ark. 152, 203 S. W. 844, where this court reformed a fire insurance policy so as to attach a standard mortgage clause to same instead of a loss-payable clause, and this was done on conflicting evidence.

It necessarily follows, from what we have said, that the decree of the court in reforming this policy to cover the loss of these twenty-seven bales of cotton is correct.

The last contention of counsel for appellant is that the court committed error in assessing a penalty and attorney's fee, and this contention is made on the ground that the penalty and attorney's fee statute applies only to a suit on a written policy, and that no recovery was had in this case on the written policy involved herein; that the policy was reformed by parol testimony and a recovery had on the policy thus reformed. We agree with counsel that the court erred in assessing penalty and attorney's fees, but for a different reason from that alleged. The case of *Ætna Ins. Co.* v. *Short,* 124 Ark. 505, 187 S. W. 657, cited by counsel, is not authority to sustain appellants' contention on this ground. In that case no policy was issued. Here the policy was issued, but not written in accordance with the intention of the parties. We agree with the contention that there can be no recovery for attorney's fees and penalty, for the reason that appellees cannot recover the full amount sued for—the sum

demanded. *Pacific Mutual Life Ins. Co.* v. *Carter,* 92 Ark. 378, 123 S. W. 384, 124 S. W. 764. The premium on this policy has not been paid, and there was no offer on Mr. Paul's part to pay same during the course of this trial. Furthermore, the uncontradicted testimony shows that the rate in warehouse No. 1 is $2.31 per hundred dollars, whereas the rate in compartments from one to twelve in warehouse No. 3 was 64 cents. We cannot tell from the evidence in the record what the rate on warehouse No. 1 would be for six months, whether one-half of the annual rate or not. If we could so determine this matter, judgment would be entered here. The decree of the chancery court in this regard was erroneous, and in this respect it is reversed, with directions to determine the amount of the premium due for the six months' period on the twenty-seven bales of cotton in warehouse No. 1, of the value of $3,000, and the amount of the premium due and unpaid for the ten bales of cotton located in warehouse No. 3, and deduct the total thereof from the $3,000 and interest, as allowed in the decree, and enter judgment for the balance thus found to be due. It is so ordered.

TAAFFE v. SANDERSON.

Opinion delivered May 2, 1927.

1. ELECTIONS—CONTESTS.—The purpose of the court in all election contest cases is to determine whether the contestant or the respondent has received the highest number of legal votes.
2. ELECTIONS—CANDIDATE'S PLEDGE.—The candidate's pledge that he was familiar with the Corrupt Practice Act (Crawford & Moses' Dig., § 3896, *et seq.*) and all laws governing the same, *held* substantial compliance with § 3898, requiring a statement that the candidate will in good faith comply with its terms, especially where it was not contended that provisions of the Corrupt Practice Act had been violated.
3. ELECTIONS—AFFIDAVIT OF REPUTABLE CITIZEN.—Appellant in an election contest could not complain of the court's holding that one of 11 persons supporting contestant's affidavits was not a

"reputable citizen" in the sense of a qualified elector, under Crawford & Moses' Dig., § 3772, where the person objected to was in all respects qualified except that he had not resided in the ward 30 days at the date of the primary, under § 3757 *et seq.*

4. ELECTIONS—QUALIFIED VOTERS.—Voters who requested others to make payment for them of poll taxes and obtain receipts were not disqualified from voting, where voters promised to pay and did pay third persons the amount of such tax.

5. ELECTIONS—QUALIFICATION OF VOTERS.—Voters *held* not deprived of the right of suffrage by the fact that the bank which was to pay their poll tax for them as agent made the payment after the time allowed, where the payment was made in pursuance of the tax collector's agreement extending credit.

6. TAXATION—LIABILITY OF COLLECTOR.—The tax collector is responsible on his official bond for any credit extended to taxpayers, and is not subrogated to the State's right of lien.

7. ELECTIONS—CANVASS OF BALLOTS.—In an election contest, a ruling that the ballots would be opened and canvassed did not require the court to render judgment for the contestees where contestants closed their case with the reservation of the right to offer ballots at the conclusion of all testimony.

8. APPEAL AND ERROR—DISCRETION AS TO COURSE OF TRIAL.—Trial courts are vested with a large discretion in determining the orderly course of trial, which will not be reversed except for manifest abuse of discretion.

9. ELECTIONS—ASSESSMENT OF MARRIED WOMEN.—Where married women voters placed on the tax books had not been properly assessed for poll taxes because their names were placed after their husbands' names with the words "and Mrs.," such women had no right to exercise the franchise as qualified electors.

10. STATUTES—EXTENSION OF PRIVILEGE.—Where a privilege is extended to one class of citizens on certain conditions and subsequently thereto the like privilege is conferred on another class, conditions attached to the exercise of the privilege necessarily attach to the subsequent class.

11. STATUTES—EXTENSION BY INFERENCE.—A statute extends by inference to cases not originally contemplated when it deals with a class within which a new class is brought by later statutes.

12. ELECTIONS—ADDITION OF NAMES TO THE POLL TAX LIST.—In an election contest under Crawford & Moses' Dig., § 3773, the action of the court in striking out the names of persons as electors who, after delinquency, had their names added to the clerk's list by the sheriff and deputies on payment of poll tax and penalty, instead of by clerk, *held* proper; their assessment being erroneous, under § 3738.

13. ELECTIONS—QUALIFICATION OF VOTERS.—In an election contest under Crawford & Moses' Dig., § 3773, voters from other counties who did not appear on the official printed list of taxpayers, and who gave no evidence of qualification, and persons who had become 21 since the last assessment time, *held* disqualified as electors, under § 3777.

14. ELECTIONS—PRINTED LIST OF VOTERS.—In an election contest, under Crawford & Moses' Dig., § 3773, the printed list of qualified voters, complying with § 3740, the printed signature of the county clerk certifying thereto, *held* the official list, rendering voters whose names did not appear thereon disqualified in the absence of other evidence of qualification.

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

Otis Gilleylen, J. R. Morrell, Abe Collins and *A. D. DuLaney,* for appellant.

John J. DuLaney, A. P. Steel, Feazel & Steel and *James D. Head,* for appellee.

McHANEY, J. At the Democratic primary, August 10, 1926, in Little River County, appellant, George Taaffe, appellee, J. G. Sanderson, Charles Billingsley and P. M. McCord were rival candidates for sheriff and collector. Appellant, A. T. Collins, appellee, C. S. Cobb, W. D. Waldrop and W. E. Kinsworthy were rival candidates for county judge. On the face of the election returns Taaffe was nominated for sheriff and Collins for county judge. Sanderson and Cobb, each having received the next highest votes to the winners for the respective offices, and being dissatisfied with the result as reflected by the returns, filed a contest before the county central committee at its meeting on August 13. The committee spent two days hearing the contest, and, after due deliberation, found that Taaffe and Collins had won, and dismissed the contests. Thereafter, on the 23rd day of August, and within the time provided by law, the contestants filed separate identical complaints in the circuit court against Taaffe and Collins, to which separate identical answers were made, the cases consolidated, tried, and briefed together. Each complaint was verified by what purported to be ten reputable citizens, and, in addition to all the

formal jurisdictional matters necessary, it charged that Collins and Taaffe were the sheriff and collector and deputy sheriff and collector, respectively, and conspired together to nominate Taaffe to succeed Collins, and to nominate Collins, the retiring sheriff, to the office of county judge, and to accomplish the alleged conspiracy by issuing poll-tax receipts to voters favorable to them, without being assessed as required by law, and to put such names on the clerk's delinquent list; that 150 names were thus placed on the clerk's list; that they placed the names of 60 women voters on the taxbooks by adding the words "and Mrs.," with the initials of the husband, after the husband's name, and that these women had not been assessed properly; that other names were improperly placed on the taxbooks by them, and that a number of poll-tax receipts were issued after July 3, in violation of law. Many individual voters were challenged in a number of townships, and other allegations of irregularities on the part of election judges in permitting many persons to vote who were not qualified electors, were made, the contention being that such votes cast for the contestees should be thrown out, and, by so doing, would result in the nomination of the contestants.

The case was submitted to the learned trial judge without a jury, a jury not being necessary or proper under the law. Section 3773, C. & M. Digest. The hearing was begun on September 14, and, after very patiently and painstakingly hearing a mass of testimony, running through a record of almost 1,000 pages, the court, on September 25, rendered a judgment finding that Sanderson had defeated Taaffe for sheriff and collector by 46 votes, and that Cobb had defeated Collins for county judge by 13 votes. To reverse this judgment the contestees have appealed to this court.

Before proceeding to a discussion of the issues we deem it proper to observe that the real object of the courts in all election contest cases is to determine whether the contestant or the respondent has received the highest number of legal votes. This should be the guiding star,

like the Star of Bethlehem to the wise men of old. This court, 50 years ago, in the case of *Govan* v. *Jackson,* 32 Ark. 553, so held, and, further, that the contest is "not confined to the ground specified in the contestant's notice of contest." This case was cited with approval in *Ferguson* v. *Montgomery,* 148 Ark. 83, 229 S. W. 30, and in *McLain* v. *Fish,* 159 Ark. 199, 251 S. W. 686.

There can be no real representative form of government, no real representative democracy, without honest elections, and there can be no honest elections where the will of a majority or plurality of the qualified electors is thwarted and not permitted to prevail. In order to prevent this the Legislature has passed many laws, including what is commonly known as the Corrupt Practice Act, § 3896 *et seq.,* C. & M. Digest; and the people, by the initiative, have enacted a law known as the Brundidge Primary Election Law, § 3757 *et seq.,* C. & M. Digest. These acts were born of experience, and the courts have sustained and enforced them.

We come now to a consideration of the points of law raised by counsel on this appeal.

1. It is first contended that Sanderson failed to comply with the Corrupt Practice Act in that he failed to file the pledge required by § 3898 of C. & M. Digest with the county clerk thirty days before the election, "stating that he is familiar with the requirements of this act, and will, in good faith, comply with its terms." This complaint does not apply to Cobb. Sanderson did file in proper time the following pledge: "I, James G. Sanderson, hereby certify that I am familiar with the Corrupt Practice Act applying to the Democratic primary, and all of the laws governing same." His pledge was defective in that he omitted to say that he would in good faith comply with its terms, and appellant Taaffe contends that this was a fatal defect, for the reason that he could not legally be a candidate until he had literally complied with this requirement. We do not think this point well taken, and we hold that this was a substantial compliance, especially so in view of the fact that it is not contended

that any other provision of this act was violated or that Sanderson was guilty of any of the corrupt practices denounced by the act. Moreover, it is difficult to perceive how Taaffe can be heard to complain of this defect in the pledge, if, in fact, he did not receive a sufficient number of votes to give him the nomination, as the court held. Certainly, if he did not receive a plurality of the votes, no court could declare him the nominee.

2. The next contention is that the complaints of both contestants were not supported by the affidavits of ten qualified electors as required by law, and that Sanderson was not himself a qualified elector. No such contention is made as to Cobb. Each complaint is supported by eleven affiants who claim to be qualified electors. By § 3772, C. & M. Digest, the complaint must be supported "by the affidavits of at least ten *reputable citizens,*" the words "qualified electors" not being used. But this court held in *Simmons* v. *Terrall,* 145 Ark. 588, 224 S. W. 977, that the word "citizens" as used in the act is synonymous with the word "electors." So the meaning is the same. One of the affiants, C. P. Smith, was a citizen and resident of Jefferson Township, just outside the corporate limits of the city of Ashdown, and, 12 days before the primary election, he removed from thence to ward 2 in the city of Ashdown. With the exception that he had not resided in ward 2 thirty days at the date of the primary, or at the date of signing the affidavit, he was in all respects a qualified elector. The court held that this affiant was not a qualified elector, and appellant cannot complain. We do not decide whether the court properly so held, as it is not necessary in this case. There does not appear to be any serious contention about the qualifications of the other ten affiants, except as to two, Joe Gill and G. C. Cobb, but it is suggested that they were not sworn according to law. Counsel are in error, as the affidavit appended to the complaint is in due form. It appears that tax receipts for affiants Joe Gill and G. C. Cobb were obtained from the collector in apt time by others, at their request, on their promise to pay, and for which they did pay. The

same thing is true with reference to Sanderson. His partner, Mr. Orton, obtained a tax receipt for all members of the firm of Sanderson & Orton and for a number of their employees, tenants and customers, including Joe Gill. G. C. Cobb's poll tax was paid by check of the Cobb Grain Company. There is no merit to this contention. *Whittaker* v. *Watson,* 68 Ark. 555, 60 S. W. 652; last case of *Cain* v. *CarlLee,* 171 Ark. 334, 284 S. W. 40. In the latter case this court said: "The evidence in this case shows affirmatively and beyond dispute that there was no element of gift involved in the payment of the poll taxes of the seventeen persons hereinbefore referred to; therefore the payment made for them does not fall within the condemnation expressed in *Whittaker* v. *Watson, supra.*"

3. It is further contended under this heading that payment of the poll taxes in question was not made until after July 3, and that this disqualifies them. The facts are that the firm of Sanderson & Orton is a very large taxpayer, the tax bill of this firm amounting to approximately $7,000. The collector issued the poll-tax receipts for this firm in apt time, but actual payment therefor was not made by the firm until required by the collector before settlement. The effect of this transaction was that the collector extended credit to this firm, in accordance with the usual and almost, if not entirely, universal custom so to do in the case of banks, trust companies and other large taxpayers, who pay taxes not only for themselves but for their customers and clients. The fact that a bank, as my agent, has paid my poll tax after Saturday before the first Monday in July, by an arrangement with the collector not to pay before that time, certainly could not have the effect of depriving me of my constitutional right of suffrage. The collector is responsible on his official bond for any credit extended taxpayers, and is not even subrogated to the State's right of lien. *N. Y. Life Ins. Co.* v. *Nichols,* 170 Ark. 791, 281 S. W. 21. We therefore overrule this contention.

4. It is next contended that the court erred in refusing to render judgment for the contestees at the close of contestant's evidence. This contention is based on the ruling of the court that it would require both parties to introduce all proof relative to the disqualification of voters challenged, so as to enable the court to determine such qualifications, and then the ballots would be opened and canvassed to determine how such persons voted, to enable the court to determine the net result on each contest; and the contestants closed their case with the reservation of the right to offer the ballots in evidence at the conclusion of all the testimony. There was no error in this ruling, as trial courts are vested with a very large discretion in determining the orderly course of the trial, and this court will not reverse therefor, except for a manifest abuse of such discretion. Furthermore, this court seems to have recognized the correctness of this procedure in the case of *Blann* v. *Benton,* 171 Ask. 805, 284 S. W. 40.

5. It is next contended that the court erred in holding that the women voters who were on the so-called "Mrs." list hereinbefore mentioned were not qualified electors, 49 of whom voted for Taaffe, and one of whom voted for Sanderson, and 6 for Cobb. A majority of the court, with which Mr. Justice WOOD, Mr. Justice HUMPHREYS and the writer of this opinion do not agree, hold that this contention is not well taken. This identical question as now raised has never before been directly decided by this court. The authority for the right of women to vote is contained in Amendment No. 19 to the Federal Constitution as follows:

"The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex," and Amendment No. 8 to the Constitution of this State, a portion of which reads as follows:

"Every citizen of the United States of the age of twenty-one years, who has resided in the State twelve months, in the county six months, and in the precinct,

town or ward one month, next preceding any election at which they may propose to vote, * * * and who shall exhibit a poll-tax receipt or other evidence that they have paid their poll tax at the time of collecting taxes next preceding such election, shall be allowed to vote at any election in the State of Arkansas,'' etc.

This amendment was adopted at the general election in 1920, and superseded the poll-tax Amendment No. 6 adopted in 1908, which requires the payment of a poll tax of all male persons as a condition precedent to the right to vote. The Legislature in 1909 passed an act, one of the sections of which is brought forward in C. & M. Digest as § 3738, which provides that, after the taxbooks are delivered to the collector, any person whose name has, for any reason, been omitted, or not assessed, may have his name included in the list and placed upon the books in the hands of collector, by application to the county clerk at any time before the last Saturday before the first Monday in July, in which case the clerk shall certify the supplemental list to the collector and charge him with the amount of tax and penalty so added. In addition to the poll tax the clerk is required to assess a penalty of $1 for failure to assess, and, in addition to the assessment of a poll tax in such cases, the clerk is required to assess any property owned by the applicant, which, for any reason, has been omitted from the taxbooks. The majority is of the opinion that the language of this section is broad enough to include women, although the masculine gender is used throughout the section, and that this contention falls within the principle that, where a privilege is extended to one class of citizens upon certain conditions, and that, subsequent thereto, a like privilege is conferred upon another class, the conditions attached to the exercise of such privilege by the former class necessarily attaches in like manner to the subsequent class. There is a well-established principle of law which applies to the construction of constitutions as well as statutes, and that is that a statute extends by inference to cases not originally contemplated when its deals with a class within

which a new class is brought by later statutes. *Nations* v. *State,* 64 Ark. 467, 43 S. W. 396, and case-note to 4 Ann. Cas. at 7.

In the first CarlLee case, 168 Ark. 64, a number of persons were challenged for the reason that their names had been illegally added to the taxbooks without being assessed according to law. The court, in its opinion, does not say that women voters were on the list of such names, and, without mentioning any distinction, quoted with approval from *Craig* v. *Simms,* 160 Ark. 269, 255 S. W. 1, and said: "The statute does not give the county collector the power to assess a poll tax and deliver it to a person otherwise qualified to vote at an election. Hence he can have no such power; his power is only to collect a poll tax as provided."

It is the contention of the majority that the word "person," as above used, is broad enough to cover both males and females. While this is true, it is the view of the minority that, since the question was not directly raised, and therefore not before the court, in either the Craig or the CarlLee cases, so much of the opinion in these cases as would include women voters in this regard is *obiter,* and not authority for the question now before us.

A study of the constitutional provisions relating to the assessment and collection of a poll tax and the provisions of the statutes enacted pursuant thereto, leads inevitably, in the opinion of the minority, to the conclusion that, neither by constitutional nor statutory provision, is a woman required to assess a poll tax as is required of a man. Section 3, article 14, of the Constitution of 1874 provides for the support of the common schools by the assessment of a tax not to exceed two mills, and by an annual per capita tax of $1 to be assessed on "every *male* inhabitant of this State over the age of twenty-one years." The Legislature in 1905 submitted an amendment to this section, which was voted on as Amendment No. 5 at the general election in 1906, and declared adopted by the Speaker of the House on January

17, 1907, in which the State tax limit for schools was raised to three mills and the per capita or poll tax of $1 was again required of every *male* inhabitant over the age of twenty-one years, and raised the district school tax which might be voted from five to seven mills. Again, in 1918, another amendment to this section of the Constitution was adopted, fixing the State school tax at three mills and the per capita tax of $1 on every *male* inhabitant over the age of twenty-one years, and authorizing school districts to vote as much as twelve mills in any one year. This is amendment No. 9, and this amendment, together with the enabling acts passed pursuant thereto, was the law in force at the time the election in controversy was held in 1926. Again, in 1925, the Legislature submitted an amendment to this same section of the Constitution, fixing a State tax for schools of three mills, "an annual per capita tax of $1 to be assessed on every *male* inhabitant of this State over the age of twenty-one years," and fixed eighteen mills as the limit to be voted in school districts. This amendment was submitted at the general election in October, 1926, and was declared adopted by the Speaker of the House in 1927, and now appears as Amendment No. 11, so designated by the Secretary of State. So it will be seen that the Constitution nowhere provides for or requires the assessment of an annual per capita tax of $1 on any person except *males* over the age of twenty-one years. Nowhere do we find a provision that women are required to assess and pay an annual per capita tax. It will be seen from the woman suffrage amendment, heretofore mentioned, that every citizen of the United States is permitted to vote "who shall exhibit a poll-tax receipt or other evidence that they have paid their poll tax at the time of collecting taxes next preceding such election." The other provisions of the Constitution heretofore mentioned require *males* to assess a per capita or poll tax, but the only requirement with reference to women is that, in order to vote, they shall exhibit "a poll-tax receipt or other evidence that they have paid their poll tax at the time of collecting taxes

next preceding such election." The sections of the statutes relative to the assessment and collection of such annual per capita tax nowhere use language indicating any such requirement of women. See §§ 8979, 8993, 9889, C. & M. Dig. It is therefore the opinion of the minority that a woman is not required to assess or pay a poll tax in any event, unless she wishes to pay same in order to vote, and that the clerk could not assess her for a penalty for failure to assess at the time required of a man, because she is not required to do so, and that the provisions of § 3738 of the Digest are not therefore applicable to women voters.

6. It is next contended that the court erred in holding certain voters not to be qualified electors because not legally assessed on what is known in the record as the "clerk's list." The court for this reason threw out 15 votes for Taaffe and 25 votes for Collins. The clerk, after turning the personal taxbook over to the collector, opened in the back of the book what is called the "clerk's list," and on this list is placed the names of parties who failed to assess their poll tax during the assessment time, and their names were afterwards added. The clerk himself assessed four of such persons, but neither the clerk nor his deputies assessed any other names on such delinquent list. After turning the book over to the sheriff with the four names on it, he told the sheriff and his deputies to put the names of any delinquent persons thereon who desired to be assessed, without bothering him about it. Thereafter, when delinquents came to the collector's office who wanted to be assessed and pay the tax and penalty, they were permitted to do so, and the sheriff or his deputies added such names to the list. The court threw out such names added by the collector's office, on the ground that they had not been properly assessed, as provided by § 3738, C. & M. Digest, and we think this action of the court was proper. *Craig* v. *Sims,* 160 Ark. 275, 255 S. W. 1; *Cain* v. *CarlLee,* 168 Ark. 69, 269 S. W. 57.

7. It is next contended that the court erred in holding five voters from other counties not qualified because they failed to file with the judges of election their poll tax receipts, or certified copies thereof, or that the judges of election failed to return such evidence of qualification with the ballots. It was agreed that these persons had all the qualifications of electors in the counties from which they moved, and in Little River County, and in the precinct where they resided. But, having paid their poll tax in other counties, they did not appear on the official printed list of taxpayers, and it therefore became necessary for them to follow the provisions of the statute in order to be entitled to vote. Section 3777, C. & M. Digest. Since the same rules of law would apply to such voters as would to persons who had become twenty-one years of age since the last assessing time at which they could have assessed and been on the list, after twenty-one, raised by appellants' assignment No. 9, we will discuss the two together. Twenty-one votes for Taaffe and 17 for Collins were thrown out by the court of persons voting who had become twenty-one years of age within such time. We hold that there was no error in so doing, as the exact question is decided adversely to appellants' contention in *McLain* v. *Fish,* 159 Ark. 199, 251 S. W. 686; *Craig* v. *Sims,* 160 Ark. 267, 255 S. W. 1; *Storey* v. *Looney,* 165 Ark. 455, 265 S. W. 51; *Wilson* v. *Danley,* 165 Ark. 565, 265 S. W. 358; and in the three CarlLee cases.

8. The next contention of counsel is that the court erred in holding that the printed list of qualified electors was an official list and that the voters at the election who did not appear on such list, and whose vote was not accompanied by the other evidence required by law of the qualification of the voter, were not qualified electors, and threw out 14 for Taaffe and 10 for Collins of such votes for such reason. Section 3740 of C. & M. Digest makes certain requirements with reference to this official list of qualified electors of the county, and this section was not literally complied with. We hold that the requirements with reference to the publication of such list were sub-

stantially complied with. All parties so recognized it until this contest arose, and it bore the printed signature of the county clerk, certifying thereto, and that, if a voter's name did not appear thereon, he would be required to file with the judges other evidence of his qualifications, and such evidence would have to be returned by the judges, under the authority of the cases heretofore cited.

Several other contentions are made by counsel for appellants, but we do not deem it necessary to take them up separately and discuss them, as to do so would unduly extend this opinion, if not already too long. But suffice it to say that we have examined each of the contentions carefully and do not find any error of the court sufficient to justify a reversal of this case. The judgment of the circuit court is therefore affirmed.

CROWN CENTRAL PETROLEUM COMPANY v. FRICK-REID SUPPLY COMPANY.

Opinion delivered May 9, 1927.

1. MINES AND MINERALS—IMPLIED CONTRACT.—Where the owner of an oil and gas lease, without any contract, made connection with the main line of the gas company and used its gas in drilling oil wells, there was an implied contract to pay for the gas used.
2. MINES AND MINERALS—LIEN FOR MATERIAL.—A lien given by Acts 1923, p. 500, § 1, for labor performed and material furnished in drilling or operating oil or gas well, must have its foundation in contract, express or implied.
3. MINES AND MINERALS—LIEN FOR GAS USED IN DRILLING.—Where the owner of an oil and gas lease, without any contract, made connection with the main line of the gas company and used its gas in drilling oil wells, there was an implied contract to pay for the gas, for which the gas company had a lien on the lease under Acts 1923, p. 500, § 1.
4. MINES AND MINERALS—FUEL MATERIAL.—Acts 1923, p. 500, § 1, gives a materialman who shall furnish fuel material a lien for gas used in operating an oil drill, since the gas was intended to constitute fuel material just as much as coal, oil, or wood.
5. MINES AND MATERIALS—RIGHT TO LIEN.—Where the owner of an oil and gas lease made connection with the line of a gas company

and used its gas in drilling three oil wells, and was thus bound under implied contract to pay for the gas used, the transaction constituted an entire one, and the gas company could file a lien against all of the wells drilled on leasehold, under Acts 1923, p. 500, § 1.

6. MORTGAGES—PRIORITY OF MATERIALMAN'S LIEN. — The lien for material furnished in drilling oil wells under Acts 1923, p. 500, § 1, *held* superior to that of the holder of a mortgage executed after the wells were drilled.

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

STATEMENT OF FACTS.

This appeal involves the priority of the appellant's claim to a lien to an oil and gas lease to that of several materialmen and laborers on said lease.

The record shows that the Center Oil Company was the owner of an oil and gas lease in the Norphlet area of the El Dorado field in Union County, Arkansas. The Center Oil Company drilled three producing wells and carried its oil to the United Central Oil Corporation, and gave it a mortgage on its wells. The United Central Oil Corporation conveyed its lien to the Crown Central Petroleum Corporation, and it asked that its claim in the sum of $10,527.38 be declared a first lien on the interests of the Center Oil Company. Frick-Reid Supply Company, between the 25th day of June and the 20th day of August, 1924, sold and delivered to the Center Oil Company materials which were used in drilling the oil wells above referred to, and there remained due and unpaid on said account the sum of $4,446.10. The Natural Gas & Petroleum Corporation furnished natural gas which was used in drilling said oil wells, and claims a materialman's lien on said oil and gas lease to secure the sum of $1,450. Two laborers also filed liens for small amounts. The facts will be specifically stated and discussed under appropriate headings in the opinion.

The chancellor found that the claim of Frick-Reid Supply Company in the sum of $4,446.10 and that of the Natural Gas & Petroleum Corporation in the sum of

$1,450 should be declared to be liens for material prior to the lien of the appellant. The court also allowed the claims of the laborers, and declared them to be a lien upon said oil lease. The court made a specific finding that the mortgage lien of appellant was subordinate to the liens of the Frick-Reid Supply Company and the Natural Gas & Petroleum Corporation for the materials furnished and used in the drilling of said oil wells. A decree was entered of record in accordance with the findings of the chancellor, and, to reverse that decree, appellant alone has prosecuted an appeal.

Rose, Hemingway, Cantrell & Loughborough, for appellant.

Kitchen & Harris, Jeff Davis and *J. S. Brooks,* for appellee.

HART, C. J., (after stating the facts). Appellant seeks to defeat the claim of the Natural Gas & Petroleum Corporation on the ground that the gas furnished and used in drilling the oil wells in question was sold to the Center Oil Company on general account, and that the credit was given wholly to the contractor without reference to the use which was to be made of the materials. Hence it is claimed that there is no lien under the statute in favor of the Natural Gas & Petroleum Corporation. The evidence shows that the Natural Gas & Petroleum Corporation had pipe lines near where the Center Oil Company was drilling its oil wells. Without any contract, the Center Oil Company made connection with the main line of the gas corporation and used its gas in drilling its oil wells. Under this state of facts there was an implied contract on the part of the Center Oil Company to pay the Natural Gas & Petroleum Corporation for its gas which was used in drilling and operating said oil wells. It is true that the foundation of the right to secure a lien for labor performed or material furnished must be a contract with the owner of the land upon which the lien is sought to be enforced, and, if there does not exist such a contract, express or implied, the person claiming it must fail. Thornton's Law of Oil and Gas, 4th ed. vol. 1,

§ 371. This holding is in accord with our construction of our materialman's lien statute. In *Burel* v. *East Arkansas Lumber Co.,* 129 Ark. 58, 195 S. W. 378, 10 A. L. R. 1017, it was held that the lien given by the statute must have its foundation in contract and must correspond with the contract.

In the case at bar the lien is given by § 1 of act 615 of the Acts of 1923. General Acts of 1923, p. 500. The section provides, in effect, that any person who shall, under contract, express or implied, with the owner or lessee of any gas, oil or mineral lease in land, perform labor or furnish materials or supplies used in digging, drilling and operating any oil or gas well, shall have a lien on the whole of such leasehold interest in said land.

As we have already seen, when the lessee of the oil lease made the connection with the mains of the gas corporation and used its gas in drilling its oil wells, there was an implied contract to pay for the gas, and this gave the gas corporation a lien upon the lease under the provisions of the statute above referred to. In no sense of the word could it be said that the gas corporation furnished the gas on general account and extended credit to the owner of the leasehold without reference to the use which was to be made of the gas. There being an implied contract to pay for the gas, and there being no general credit extended to the owner of the lease, the provisions of the statute apply, and its provisions fit the facts exactly.

It is next insisted that the language of the statute does not give the materialman a lien for gas used in operating the oil drill. In making this contention they refer to the language of the statute which gives a lien to any person or corporation who shall "furnish fuel material." They contend that it was the legislative intention to give a lien to persons who furnish coal, wood or oil for fuel purposes. We cannot agree with counsel in this contention. It is perfectly plain to us that gas was intended to constitute "fuel material" just as much as coal, wood or oil which might be used for that purpose.

It is next contended that there is no lien under the statute because there was no separate contract for the oil wells. As we have already seen, the lessee connected with the gas main of the gas corporation and used its gas in drilling the three wells. There was an implied contract to pay for the gas, and the transaction constituted an entire one. This court, in the construction of our mechanics' lien statute, says that a lien for materials furnished may be filed against two or more buildings located on lots which are not contiguous. *Burel* v. *East Arkansas Lumber Co.,* 129 Ark. 58, 195 S. W. 378, 10 A. L. R. 1017, and *Carr* v. *Hahn & Carter,* 133 Ark. 401, 202 S. W. 685. In the case first cited it was held that a chancellor's finding, that the construction of several buildings on lots which were not contiguous was done under a single contract so as to support a mechanic's lien on all the lots for the materials used on the job, will not be disturbed on appeal where the evidence shows that the parties treated the building operation as one joint piece of work. In a case-note to 10 A. L. R., at page 1026, it is said that the great weight of authority is to the effect that, where labor is performed or materials furnished under one contract and for one owner, for two or more buildings located on distinct but contiguous lots, a single mechanic's lien may be filed against all the buildings. Numerous cases from courts of last resort of the various States are cited which support the text. The same rule applies here, and we are of the opinion that the parties treated the transaction in question as an entire contract, and the gas corporation had a right to file a lien against all the wells drilled on the leasehold.

In this connection it may be stated that the claim of the Frick-Reid Supply Company was for materials furnished and used in drilling the three oil wells under a single contract, and what we have said above applies with equal force to its claim. The liens of both claimants were filed within the statutory length of time, and we need not consider whether or not they were superior to the liens of the laborers, because the appeal has been

prosecuted for the benefit of the appellant alone, who claims a superior lien by virtue of a mortgage which was assigned to it.

The mortgage given by the Center Oil Company and assigned to the appellant falls squarely within the rule announced in *Ferguson Lumber Co.* v. *Schriber,* 162 Ark. 349, 258 S. W. 353. In that case it was held that, under our statute that a materialman's lien relates back to the commencement of the building, a plaintiff, under contract to furnish materials for a building, takes precedence over a mortgage, where it began to furnish the materials before the mortgage was filed for record. The facts of this case bring it within the rule there announced, and the lien of the claimants for material is superior to that of the holder of the mortgage.

The construction we have given this lien statute is in accord with our holding in *Pierce Oil Corporation* v. *Parker,* 168 Ark. 400, 271 S. W. 24. In that case, under our statute requiring road contractors to pay for labor and materials used in the prosecution of the work, persons supplying oil or gasoline to be used in operating motor-trucks engaged in hauling stone for the construction of the highway cannot be said to be supplying material to be used in the prosecution of the work. On the other hand, it was held that materials which are used directly in the construction of improved roads are lienable. In the case at bar, the gas was used directly in operating the oil drill, and therefore was used in drilling the wells, just as dynamite or other explosives used in breaking up earth are materials used within the meaning of the statute providing a mechanic's lien for the use of such materials in the prosecution of the work.

The result of our views is that the decree of the chancellor was correct, and it will therefore be affirmed.

HOLFORD v. STATE.

Opinion delivered May 9, 1927.

1. INTOXICATING LIQUORS—BURDEN OF PROOF.—On an indictment for manufacturing a still in violation of Acts 1921, p. 372, § 4, the burden is on the State to prove beyond a reasonable doubt that accused manufactured a complete still.
2. INTOXICATING LIQUORS—WEIGHT AND SUFFICIENCY OF EVIDENCE.—Evidence that defendants were making a copper vessel in a secluded place, and that one defendant, when arrested, said it was his "first time," and afterward said he would like to get out easily, *held* insufficient, as mere suspicious circumstances, to raise a question for the jury in a prosecution for manufacturing a still in violation of Acts 1921, p. 372, § 4.
3. INTOXICATING LIQUORS—ATTEMPT TO MANUFACTURE STILL.—A mere attempt or intention to manufacture a still is not a violation of Acts 1921, p. 372, § 4, providing that no person shall manufacture a still without license.
4. INTOXICATING LIQUORS—UNCOMPLETED VESSEL NOT A STILL.—An uncompleted copper vessel which could not be used as a still for separating the alcoholic spirits from fermented substance without additional appliances such as a blanket or cover and worm is not a still, within Acts 1921, p. 372, § 4, prohibiting the unlicensed manufacture of stills.
5. INTOXICATING LIQUORS—MANUFACTURE OF STILL DEFINED.—Acts 1921, p. 372, § 4, prohibiting the unlicensed manufacture of a still refers to the finished product which can be used in the production of alcoholic spirits.
6. STATUTES—CONSTRUCTION OF CRIMINAL STATUTES.—The courts should construe criminal statutes strictly, and not so as to create offenses under statute which are not in express terms created by the Legislature.
7. INTOXICATING LIQUORS—MANUFACTURE OF STILL.—Merely engaging in the process of manufacturing a still is not a crime within Acts 1921, p. 372, prohibiting the manufacture of a still without license, as the law is not violated until the still is completed.

Appeal from Sebastian Circuit Court, Greenwood District; *Cecil Warner*, Special Judge; reversed.

Holland & Holland, for appellant.

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

WOOD, J. W. A. Holford and Eris Pitchford were jointly indicted in the Sebastian Circuit Court for the

crime of manufacturing a still. Will White testified that he was marshal of the city of Hartford. He arrested the defendants in July or August, 1925. He found them about 3½ miles west of Hartford, in a woodland about three or four hundred yards west of Pitchford's house. They were behind a thicket from where he approached them. Witness could not see them until he got to them. They could not have been seen from the public road. Witness and the two parties who were with him arrested Holford and Pitchford. They were standing there around a good sized wood fire. They had soldering irons in the fire and the solder was lying by it. There was a hammer on the ground with the rest of the utensils. Before witness and his assistant officer came up they heard rattling like laying tin on the floor. The defendants had a fruit jar there with a little whiskey in it, and a bottle of acid and a smoothing iron. Witness identified the articles that were found. There was a large can made of copper and there were also pieces of copper. When Holford and Pitchford were arrested we searched them, and Holford said he didn't have any gun. Witness looked around to see if they could find anything else that might be connected with a still, but could not find anything. The whiskey in the jar was corn whiskey. There was not over a quarter or half inch in the bottom of the jar. They arrested them for making a still. The still consisted of a copper tank, which was exhibited to the jury. In the making or manufacture of whiskey it is necessary to have some kind of container in which the mash or fermented liquor is put, then the heat is applied so that the vapor will rise and pass into a pipe or worm for condensation. The next step is to put the fire under it, and some arrangement has to be made whereby the vapor could be retained. It has to be inclosed. There must be a worm or some kind of contrivance or pipe whereby the steam that is retained in the vessel can be drawn off and cooled, through water or otherwise. The vapor could not be confined to the can exhibited, because it was open. There was no opening whereby a stillworm or pipe or substitute for a worm

could be connected so the vapors could be drawn off. The witness then describes minutely the can and appliances which were found. There were two sheets of copper at the place—one large sheet and one small—that appeared to be scraps from which the vessel was made. The other articles were tools and material used in the making of the vessel. It was agreed that neither of the defendants had made application and paid for license as a maker of stills.

Harlan Read, who assisted the marshal in making the arrest, testified, substantially corroborating the testimony of the marshal, except he testified that the character of the woods on the other side of the thicket was open. Witness thought that the parties could have been seen from the road on that side, which was about 350 yards distant, and it was also about the same distance from Pitchford's house. The parties were all standing together. Pitchford said that it was his first time to be caught, and then later on said he would like to get out of it as easy as he could. He was talking to Mr. Meyers. The defendants were told, when arrested, that they were being arrested for making the articles which the officers called a still. Witness was not sure whether he said he had never sold any whiskey. Witness was asked the following questions:

"Q. Didn't he say that that was the first time he ever was arrested; that that was his first time to be arrested? A. He said that was his first time—I don't know whether it was his first time of being arrested. Q. I will ask you if he did not say that that was the first time that he was ever arrested? A. First time he was caught. Q. Did he say caught? Do you remember that he said it was the first time he was caught? A. He said, 'This is my first time;' he never said whether arrested or caught either one. Q. Then you did not intend to say a moment ago that he said it was his first time to be caught? A. I will not be positive. Q. You are not sure whether he said the first time to be arrested or to be caught? Any

way he did say first time? A. He said it was his first time."

Witness further stated that he never saw a still in operation, and did not know enough about it to qualify as to what makes a still. He would not undertake to state that the vessel exhibited was a completed still. Witness called it a still.

The deputy sheriff, Stewart, testified that he had been in possession of the articles captured by Reid and White. He gave the dimensions of the can as follows: 21½ inches on the inside across the flat side, from the flat side to the other side 17½ inches, and 17¼ inches across the bottom. The dimensions from top to bottom are practically the same. Witness had captured a number of stills. In a completed still there is a boiler or receptacle for boiling the mixture to create vapor and the withdrawing of the vapor in pipes or coils so as to liquefy it. The copper container or kettle is not capable of being used for the purpose of boiling the mixture to create vapors as it stands; the remaining portion of the kettle could be constructed from the copper sheets that were found by the can. It would have to have a top on it to confine the steam or vapor, and in that top there would have to be a device with an opening suitable to make connection with a pipe or worm, before it could be used as a still. If the large piece of copper, about 2½ feet, should be placed on top of the vessel and made a part of it, there would still be lacking the proper contrivance on the top to make a still. It would require some additional equipment on the top or at either end, or side—an opening cut for a pipe connection. There was nothing of that kind delivered to the witness with the articles captured. With the material at hand there was nothing to prevent anybody from putting a top on the vessel like the bottom.

Alfred Stewart was recalled as a witness, and was allowed to testify, over the objection of the appellant, that the vessel introduced in evidence could not be used as a still without something being placed over the top of

it. They could take a heavy woolen blanket or something of the kind that would absorb the moisture and put it over the vessel and wring it out. It has been done that way. The vessel could have been converted into a still in that way. Any vessel that could be used in that way to boil the mash would make a still. Witness would not designate such a vessel as a still, but it could be used for that purpose. The vessel in controversy witness would not call a still, but, by putting a blanket over it, it could be made a still.

The sheriff of the county testified, over the objection of the appellant, that it was possible to use the vessel exhibited as a still by covering it with a blanket or something that would hold the vapor which comes from the mash and then wring out the blanket or covering. Alcoholic liquor could be produced in that way, the same as if it went through a pipe. It is possible to make whiskey in a vessel of that nature. Witness did not know about a small vessel like a water bucket, but it would be possible with a container of the size of the one exhibited, if covered with a blanket or other covering in the manner stated.

George McLaughlin testified, on behalf of the defendants, that he knew the defendants; that he saw Pitchford some time in July or August, 1925, with reference to making some syrup for witness from sorghum came. Pitchford told witness that he would be ready to make the syrup in three or four days; that he had to make a cooler to his pan someway. Pitchford was a good syrup maker. He was a farmer, and also engaged in raising cane and making molasses for himself and others. In making sorghum the defendant used a copper vessel somewhat similar to the vessel in evidence. The can was used to cool the syrup. Witness described the manner in which the can was used for cooling syrup. Witness was in no way related to the defendant.

Two other witnesses testified to the effect that Pitchford was a farmer and had a sorghum mill. He used a copper vessel for the purpose of cooling the sorghum.

This was customary. The vessel was about 18 inches or 2 feet long and about 16 inches deep and ten inches wide—something like that.

The defendant himself testified that he was a farmer, and also made syrup for himself and people in the community. He had been engaged in that business ever since he reached his majority, and his father had been engaged in the same business before him. That was his business in 1925. Witness was under contract to make syrup for McLaughlin, and, when McLaughlin came to see witness about it, witness was not prepared to make the syrup on that day, because he did not have a cooler, and witness, at the time he was arrested, was manufacturing the can which was introduced in evidence to be used as a cooler for making syrup. Witness employed Holford to assist him. They started to make the vessel in front of witness' gate, but witness' little boy came out where they were and picked up the bottle of acid. Witness then told Holford they would go down in the pasture to finish making the vessel. This they did, and that is where the officers arrested them. Witness had never seen a still made and witness had never heard of the possibility of making a still in the manner described by some of the witnesses. Witness did not know, at the time he was making this vessel, that it was possible to convert the same into a still by putting a blanket over same, etc., as described by some of the witnesses. Witness told the officers, at the time he was arrested, that he had never made any whiskey, had never sold any whiskey, and that was the first time he was ever arrested. These statements were true. Witness wanted to make a can that would hold about a day's run of syrup—45 or 50 gallons—and witness was told by the man from whom he bought the copper that it would make a can of about that capacity. Witness had not finished the can when the officers arrested him. He intended to put an end on the can. The large piece of copper that was found with the can had been cut and fitted on the end just like the other end. Witness then described the manner in which the can was to be used as

a cooler, exhibiting the same to the jury. Witness further explained what he said to the officers when he was arrested by saying, "The officers called it a still." Witness said, "Well, that is the first time I was ever accused of anything like that. I never sold any whiskey and never made any, and never was arrested before in my life." Witness told Mr. Reid, one of the officers, that he would like to know how to get out of it, because they had arrested him and had accused him of having a still. Witness told him he wanted to get out of it, because he had never been accused of anything of the kind before. Witness further explained in detail that his purpose in making the vessel was to use the same as a cooler in the manufacture of syrup.

Holford, the other defendant, testified that he was doing the soldering in making the can for Mr. Pitchford. He did not know that they were making a still. Pitchford stated that he was making a cooler for his sorghum mill. On cross-examination witness stated that he had been convicted of a felony about eighteen months before in Oklahoma. The crime was for selling whiskey, and the penalty was sixty days in jail and $100 fine.

At the conclusion of the testimony counsel for the defendants prayed the court to instruct the jury to return a verdict of not guilty. The court refused the prayer, to which ruling the defendants duly excepted. The court instructed the jury, over the objection of the defendants, that, if the defendants, within three years next before the indictment was returned, in Sebastian County, Arkansas, unlawfully and feloniously manufactured a still which may be used for the purpose of producing alcoholic and intoxicating liquors, and which was manufactured for that purpose, without first having qualified under the laws of the United States as a manufacturer of stills and without paying the tax as required by the laws of the United States on stills, they should find the defendants guilty, otherwise they should acquit them.

The court gave the usual instructions on reasonable doubt, presumption of innocence, and the credibility of witnesses. The defendants presented several prayers for instructions, which, in varying form, in effect requested the court to define a still, and to tell the jury that the vessel in controversy could not be used as a still, and, if the jury found that the defendants manufactured the tank in question, but did not manufacture any other device or apparatus whereby the tank could be converted into a still, the jury should find the defendants not guilty.

The defendants further asked the court to instruct the jury in effect that, if the vessel in controversy could not, without use of some other appliance, be used for the production of distilled spirits, they should find defendants not guilty. The defendants further prayed the court to instruct the jury that the vessel in controversy was not a still; and further, to instruct the jury that, even if they found that the defendants manufactured the tank in controversy intending the same to be used for the production of alcoholic spirits, yet, if the same was not so completed as to make it a still, they should find the defendants not guilty.

At the request of the defendants the court instructed the jury that they had a right to make the metal tank in controversy if the same was not, in fact, a still for the manufacture of alcoholic spirits.

The defendants duly excepted to the rulings of the court in refusing their prayers for instructions, and also to the rulings of the court in giving instructions on its own motion. The jury returned a verdict finding defendants guilty, and fixing their punishment at one year's imprisonment in the State Penitentiary. From the judgment sentencing the defendants in accordance with the verdict is this appeal.

1. The statute under which the appellants were indicted provides as follows:

"No person shall manufacture a stillworm or still without first having qualified under the laws of the United

States as a manufacturer of stills, without paying the tax required by the laws of the United States on the stills and worms manufactured. Any person who converts a kettle, washpot, metal can, tank, barrel, or other vessel into a still or who converts any metal pipe of any kind into a stillworm or a condenser for a still, shall be deemed to be a manufacturer of stills." Section 4, act 324 of the Acts of 1921, approved March 23, 1921.

Before the appellants could be convicted under the above statute it devolved upon the State to prove beyond a reasonable doubt that they had manufactured a still. There is no testimony tending to prove that the appellants had manufactured a still. On the contrary, the undisputed testimony proves that the appellants had not manufactured a still. The only circumstances upon which the State relies to sustain the verdict are that Pitchford, one of the appellants, said, when he was arrested, that it was his first time to be caught; that, later on, he stated that he would like to get out as easy as he could; and the further circumstance that the vessel was being manufactured in the woods three or four hundred yards from Pitchford's house, in a secluded spot. But the officer who testified on his examination in chief that Pitchford said it was his "first time to be caught" and then later said that he "would like to get out of it as easy as he could," on cross-examination stated that Pitchford said, "This is my first time; he never said whether arrested or caught, either one." The officer was asked this question: "You are not sure whether he said the first time to be arrested or to be caught?" and answered, "He said it was his first time." The officer further stated, in answer to the question, "Didn't Pitchford say he never made any whiskey and never sold any?" "He said he never made any, and wanted to get out of it as easy as he could."

The defendant, Pitchford, himself testified that he told the officer, at the time of his arrest, that he had never made any whiskey, had never sold any whiskey, and that was the first time he was ever arrested. He

further stated that he told the officers that he wanted to get out of it because he had never been into anything of that kind before. As to the place where the vessel was being manufactured, one of the witnesses for the State testified that it was in the open woods, beyond the thicket, and that, in his opinion, it could be seen from the road. The other witness for the State testified that it was in the open woods behind a dense thicket, and could not be seen from the road. In explanation of this circumstance the defendant, Pitchford, testified that they first began the manufacture of the vessel in front of his gate, and his little three-year-old boy came out and picked up the bottle of acid, and they then concluded to move the place of manufacture of the tank into the pasture and to finish the making of the vessel at the place where they were later arrested.

The appellant, Holford, testified that he was employed by Pitchford, and that Pitchford told him he was making a cooler for a sorghum mill. On cross-examination he stated that he had been convicted of selling whiskey in Oklahoma eighteen months before.

If it could be said that these circumstances were of an incriminating character at all, their utmost effect would be to create a bare suspicion that the appellants may have been engaged in the process of manufacturing a still at the time they were arrested, and that is not sufficient to justify the jury in returning a verdict of guilty against them. In *Reed* v. *State,* 97 Ark. 156, 133 S. W. 604, we held that "mere circumstances of suspicion are not sufficient to support a conviction of crime, which must be established by substantial evidence to the exclusion of a reasonable doubt." *France* v. *State,* 68 Ark. 529-532, 60 S. W. 236; *Cook* v. *State, ante* p. 711, and other cases there cited; Underhill's Criminal Evidence, 3 Ed., § 18, and numerous authorities there cited. The testimony of the appellant, Pitchford, was to the effect that he was manufacturing the vessel in controversy for the purpose of using the same as a cooler in connection with his business as a manufacturer of syrup from

sorghum cane. His testimony tended to prove that it was a necessary vessel, and was being properly constructed for that purpose, and the undisputed testimony for the State by all the witnesses was to the effect that, as far as constructed, the vessel could not be used as a still without further and additional appliances. In the absence of some incriminating testimony tending to show that the vessel was being manufactured by the appellants to be used as a still, we are convinced that the testimony is not sufficient to sustain the verdict, even if it could be said that appellant would be guilty if the vessel when completed could be used as a still.

2. But it will be observed that the statute does not make the attempt to manufacture a still, or the intention to manufacture a still, or the engaging in the process of manufacturing a still, a criminal offense. The statute, in plain terms, reads, "No person shall manufacture a still," and it must be such a vessel as would subject the party manufacturing the same to the payment of the tax required by the laws of the United States on stills. The statute defines a distillery as "any device or any process which separates alcoholic spirits from any fermented substance." The undisputed testimony in the record shows that the vessel under consideration here was not susceptible of being used as a still or distillery; it was unfinished, whether intended for a still or a cooler for syrup. It was not fit for either in its unfinished state, and could not be used as a still without additional appliances. Unquestionably the vessel, in the condition as found by the officers, was not such as to subject the manufacturer to the tax imposed by the United States laws on the manufacture of stills.

In *Hodgkiss* v. *State,* 156 Ark. 340, 246 S. W. 506, we said:

"The word 'still' is sometimes applied to the whole apparatus for evaporation and condensation, but in the description of the parts of the apparatus it is applied merely to the vessel or retort used for boiling and evaporation of the liquid." In that case we further said:

"Any kind of metal vessel can be improvised as a retort for use in boiling liquid for evaporation, but it was not intended to constitute an offense in having possession of such a vessel."

Likewise, by analogy, it should be said here that it was not intended to constitute an offense to be engaged in the manufacture of a vessel which could, with additional appliances, be used as a still, but which was intended for and, more appropriately, could be used as a receptacle or cooler for syrup. In *Moore* v. *State,* 154 Ark. 13, 240 S. W. 1083, we said:

"We think the Legislature used the word 'still' in its broad sense, and intended to include any device commonly used for separating alcoholic spirits from fermented substances, whether connected up or not, if the various parts had been assembled for the production of alcoholic spirits. Of course, the act was not intended to reach and punish individuals who had in their possession articles which might be converted into a still, unless the articles had been assembled for the purpose of separating alcoholic spirits from fermented substances."

Likewise, by analogy, it should be said here that the law levels its inhibition and punishment against those who manufacture stills, that is, the finished product which can be used in the production of alcoholic spirits. The Legislature has not seen fit to make it a crime to attempt, or to begin, the manufacture of a vessel which, if completed, might be converted into a still or be used as a still.

There is no better settled rule in criminal jurisprudence than that criminal statutes must be strictly construed and pursued. The courts cannot, and should not, by construction or intendment, create offenses under statutes which are not in express terms created by the Legislature. The courts cannot do so without trenching upon the exclusive functions of the Legislature. It occurs to us that a consideration of the entire act of which § 4 above quoted is a part, and the context of that particular section as well, under which the appellants were

indicted for the manufacture of a still, proves conclusively that it was not the intention of the Legislature to make it a crime to be engaged merely in the process of manufacturing a still. The second section of the statute, it will be observed, makes it a crime to keep in possession a still without registering the same with the proper United States officer, and a crime to set up a still. Likewise, the third section makes it a crime to set up and use a distillery for the manufacture of intoxicating spirits. Then comes the language of the fourth section, under which the appellants were indicted for *manufacturing a still.*

Now, it is certain that, under § § 2 and 3, no person could be convicted of keeping in his possession or setting up a part or parts of a still, but which could not be used as a still in the manufacture of liquors. A part or parts of a still which could not be used in the manufacture of distilled spirits would not be subject to registration or taxation under the United States laws. Nor would the person manufacturing a part or parts of an incompleted still be required to pay a license as a manufacturer of stills. The inhibition of the statute is against the manufacture, keeping, and setting up of stills—not against the manufacture, keeping or setting up of a part or parts of a still, but which are not, and never could be, a still. The Attorney General relies upon the cases of *Williams* v. *State,* 159 Ark. 170, 251 S. W. 370; *Peoples* v. *Nanninga,* 181 N. W. 1014, 213 Mich. 354; *Shoemake* v. *State,* 86 So. 151, 17 Ala. App. 461; *State* v. *Blackwell,* 105 S. E. 178, 180 N. C. 733; *State* v. *Pollard,* 113 S. E. 69, 120 N. C. 195; and *State* v. *Raven,* 74 S. E. 500, 91 S. C. 265, to support his contention that, if the appellants were engaged in the process of manufacturing a still, although they had not completed its manufacture, they would be guilty under the statute.

In the case of *Williams* v. *State,* Williams was convicted of the crime of making whiskey. In that case we said:

"If, upon all the facts and circumstances in the case, the jury might have indulged a reasonable inference that the appellant had manufactured whiskey in said county, within three years next before the finding of the indictments, then the evidence was sufficient to support the verdicts."

And we held that the evidence showing that the defendants, when arrested, were preparing to make whiskey, their ownership of a still which had been in use many years for the purpose of making whiskey, together with their confession that they were making the whiskey to sell to get out of debt, and that they had not been making whiskey very long, was sufficient to sustain the charge of *making whiskey*.

It would unduly extend this opinion to review the cases from other jurisdictions cited and relied on by the Attorney General. We have examined them, and, when considered in connection with the statutes and the facts upon which each of the particular cases were bottomed, we believe they are differentiated from the case at bar. In one of the cases, *State* v. *Raven*, 74 S. E. 500, 91 S. C. 265, the charge was keeping a distillery where liquors were manufactured, and Judge WOOD, speaking for the majority of the court, said:

"To constitute the offense of manufacturing liquor it is not necessary that the product of the manufacturer should be complete. Manufacture is the 'process of making by art or reducing materials into form fit for use, by the hand or by machinery,' and one employed in this process is manufacturing."

That doctrine we deem unsound when applied to our statute and the facts of this record. Two of the judges dissenting in that case, among other things, said:

"In misdemeanors, where an attempt is not an indictable offense, the law recognizes the existence of the point of repentance; and hence, unless the statute expressly makes the attempt or the engaging in the process of manufacturing liquors a crime, one is not guilty of violating the law until the manufacture is completed,

because he could repent at any moment, short of completing the process, stop, and save himself from the penalty of the law."

The views of the dissenting judges we believe to be more in accord with the well-established rules of criminal jurisprudence and are consonant with our own views of the law as applicable to our statute and the facts of this record.

Under the charge in this indictment the burden was on the State to prove that the appellants had manufactured a still. There is not a scintilla of evidence that the appellants had manufactured a still, nor is the testimony sufficient, as we view it, even to justify the inference that appellants were engaged in the process of manufacturing a still. Appellants were protected by the presumption of innocence which shielded them from conviction on circumstances of mere suspicion. This presumption of innocence entitled the appellants to an acquittal unless the State, by direct or circumstantial evidence, or by both, proved facts sufficient to justify the jury in concluding that the presumption of innocence had been overcome and that the appellants were guilty beyond a reasonable doubt.

We are convinced that the testimony is not sufficient to sustain the verdict, and that the court erred in not so holding and in not granting appellants' prayer directing the jury to return a verdict of not guilty.

The judgments are therefore reversed, and, inasmuch as the causes have been fully developed, the prosecutions should be dismissed. It is so ordered.

OUACHITA COUNTY v. STONE.

Opinion delivered May 9, 1927.

1. LICENSE—MOTOR VEHICLE REGISTRATION.—Acts Sp. Sess. 1923, p. 11, relating to the operation of a system of State highways, *held* to repeal Acts 1921, p. 490, § 15, amending Crawford & Moses' Digest, § 7414, relating to registration of motor vehicles, since the entire subject-matter of the former act was covered and the later act was evidently intended as a substitute.
2. STATUTES—IMPLIED REPEAL.—While the courts are slow to hold a prior statute repealed by implication, a later statute may have the effect of repeal, though such purpose is not expressly declared.

Appeal from Ouachita Circuit Court; *W. A. Speer*, Judge; reversed.

H. W. Applegate, Attorney General, *John L. Carter*, *Walter L. Brown* and *Gus W. Jones*, for appellant.

T. J. Gaughan, *J. T. Sifford*, *J. E. Gaughan* and *E. E. Godwin*, for appellee.

SMITH, J. Appellee, who is the assessor of Ouachita County, filed two claims with the county court of that county for services rendered pursuant to § 15 of act 494 of the Acts of 1921 (Acts 1921, page 490), which reads as follows: "That § 7414 of Crawford & Moses' Digest is amended to read as follows: 'The tax assessor of each county shall annually return to the county clerk a sworn list of all persons who own automobiles or other vehicles subject to any State license tax, and, as soon as any additional vehicle is acquired or brought into the county subject to such license tax, he shall promptly assess and return the name of the owner thereof, as herein required. The assessor shall be allowed fifteen (15) cents for every license fee assessed in this manner, to be paid out of the county highway improvement fund.' The said amount allowed the assessors under the provisions of this act shall be paid in the manner now provided by law for paying claims against the county after the claims have been duly verified and approved by the county court, and shall be in addition to any other compensation, and shall be paid out of said county highway improvement fund."

Appellee's claims were disallowed by the county court, but were allowed by the circuit court on appeal, and the county has duly prosecuted this appeal to reverse that judgment.

In support of his claims, appellee testified that he copied from the stubs in the collector's office the names of all persons who had paid the collector the automobile license tax, and, after copying the lists, he verified them and filed them with the clerk of the county court. The first list contained the names of all persons who had paid the license fee to the collector for the year 1925, and the fee claimed for that service was $615.45. The second list contained the names of persons who had paid the license fee for the year 1926, and the fee claimed for that service was $690.

In opposition to the claims of the assessor it is insisted by the county (1) that the act did not authorize the fee claimed, and (2) that the act was repealed by the subsequent act No. 5 of the special session of 1923, approved October 10, 1923. Acts Special Session 1923, page 11.

As we have concluded that the county is right in its second contention, we do not stop to inquire whether it is not also right in its first contention.

The act of 1921 is entitled: "An act to regulate the registration of motor vehicles, and for other purposes." By this act it is declared unlawful to operate a motor vehicle on any highway of this State without registering it, and a fee for the registration is provided, from which certain vehicles are exempted. Provision was made by which dealers might register cars before sale, and for computing the fee to be collected on all vehicles. The Highway Commissioner was charged with the duty of preparing a table or chart showing the fees to be collected, which he was required to furnish to the collecting officers of the different counties. The calendar year for the collection of the fee was stated, which fee was declared to be in addition to certain privilege taxes. Provision was made whereby the licenses might be

applied for and secured, and for the collection of delinquent fees against owners subject to the license tax who had failed to pay. By § 11 it was provided that the collector of each county should pay into the treasury of his county, to the credit of a fund to be known as the "county highway improvement fund," seventy per cent. of the collections, less the fee for collection, and that the balance should be paid into the State Treasury to the credit of the State highway fund.

Other sections provided for the return of blank applications for licenses which had been sent out to the collectors, for the operation of vehicles owned by nonresidents, and for the replacement of registration plates. Section 15 of the act has been quoted. The office of State Highway Attorney was abolished, and an additional assistant was provided for the Attorney General. The time was fixed in which the collection of the license fees should begin, and all laws in conflict with the act were repealed.

It will be observed that § 15 provides that the assessors shall be compensated for the service which that section requires them to perform out of the county highway improvement fund, and that § 11 of the act requires the collectors to pay into this fund seventy per cent. of their collections.

Act 5 of the special session of 1923 is entitled: "An act to be entitled, An act to lay out and operate a system of State highways, and providing for the construction, reconstruction and maintenance of said roads; fix automobile, gasoline and oil taxes, and participate in the payment of bonds of certain road improvement districts, provide limitations on costs on and certain of such districts, and for the distribution of certain funds to the various counties."

This act consists of eighty-five sections, and extends from page 11 to page 91 of the Special Acts of 1923. It is a very comprehensive act, and embraces all the matters covered in the act of 1921 and other subjects in addition. By § 84 of the Acts of 1923 numerous sec-

tions of Crawford & Moses' Digest are specifically repealed, but no reference is there made to the act of 1921, but the act of 1923 does repeal all laws and parts of laws in conflict therewith. Such, of course, is its necessary effect.

Section 11 of the act of 1921, which directs the collector to pay seventy per cent. of the collections to the treasurer of the county where the collections were made to the credit of the county highway improvement fund, was not specifically repealed, yet such is the necessary effect of § 6 of the act of 1923. By this section all fees which the act of 1921 authorized to be collected, with certain additional fees, were made payable to the State Treasurer, to the credit of the State highway fund.

The act of 1923 omits entirely the provisions of § 15 of the act of 1921, and we think the effect of this omission was to repeal it as well as the remainder of that act, and, having been repealed, there were no duties for the assessor to perform thereunder, and consequently that officer was not entitled to compensation for the service rendered by him pursuant thereto.

A comparison of the act of 1921 with that of the act of 1923 makes it clear that the legislative intent was that the later act should supersede the earlier one and thereby repeal it.

Where there is no express repeal of a prior statute by a later one on the same subject, it is to be presumed that no repeal was intended, and the courts are slow to hold that the prior statute was repealed by implication, but such may be the effect of the later statute, although that purpose was not declared. The rule in this behalf has been frequently declared by this court, a late case being that of *State* v. *White,* 170 Ark. 880, 281 S. W. 678, in which numerous earlier cases on the subject are cited. It was there said:

"In a recent decision we undertook to cover this subject in the following statement: 'It is a principle of universal recognition that the repeal of a law merely by implication is not favored, and that the repeal will not

be allowed unless the implication is clear and irresistible; but there are two familiar rules or classifications applicable in determining whether or not there has been such repeal. One is that, where the provisions of two statutes are in irreconcilable conflict with each other, there is an implied repeal by the later one, which governs the subject, so far as relates to the conflicting provisions, and to that extent only. * * * The other is that a repeal by implication is accomplished where the Legislature takes up the whole subject anew and covers the entire ground of the subject-matter of a former statute, and evidently intends it as a substitute, although there may be in the old law provisions not embraced in the new' (Citing cases)."

We think it is obvious that, by the act of 1923, the Legislature took up the whole subject of the act of 1921 and covered the entire ground of the subject-matter of the prior statute, and was intended as a substitute for it, and, this being true, the act of 1921 was repealed.

As the services charged for which form the basis of the claims against the county were authorized only by the act of 1921, it follows that there is no authority for the allowance of the claims.

The judgment of the court below will therefore be reversed, and the cause of action dismissed.

BANK OF KEO v. BANK OF CABOT.

Opinion delivered May 9, 1927.

1. BANKS AND BANKING—DELAY IN PRESENTMENT—BURDEN OF PROOF.—Where a bank takes a bill of exchange for collection and is guilty of some bad faith or positive wrongdoing in failing to make prompt demand for acceptance or payment thereof, it has the burden for showing that its wrongful act occasioned no injury, or of showing the extent of the injury.
2. BANKS AND BANKING—DELAY IN PRESENTING DRAFT.—Where a bank takes drafts for collection and negligently fails to present them promptly for payment and to return them promptly upon payment being refused, without being guilty of any fraud or

positive wrong, it is liable only for the actual damage caused by its negligence.

3. BANKS AND BANKING—BURDEN OF SHOWING DAMAGE.—Where a bank takes drafts for collection and negligently fails to present them promptly for payment and return them promptly upon payment being refused, but is guilty of no fraud or positive wrong, the burden of showing damage rests upon the plaintiff; Acts 1921, p. 527, § 14, not changing such rule as to burden of proof.

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

Williams & Holloway, for appellant.

Trimble & Trimble, for appellee.

SMITH, J. In December, 1924, Vernon Layne was engaged in the neighborhood of Cabot in buying cattle, which, when he had collected as much as a carload, were shipped to market. In payment of cattle purchased he gave drafts on his son, Buck Layne, payable at the Bank of Keo. A number of these drafts were deposited by the payees therein with the Bank of Cabot, which received them as cash items and gave the depositors credit therefor accordingly. Other drafts were cashed by the Bank of Cabot for the accommodation of the payees.

The Bank of Cabot transmitted these drafts to the American Southern Trust Company, its correspondent in Little Rock, and that bank sent the drafts to the Bank of Keo for collection. This was done in what is known as a cash letter, on the face of which was printed in large red letters the direction, "Cash letter—do not hold," and stamped thereon was the additional direction, "If not paid on presentation—return." The drafts thus remitted were received by the Bank of Keo, and the testimony supports the finding that there was negligence on the part of that bank in presenting the drafts for payment and in failing to return them when payment was refused.

The Bank of Cabot brought this suit to recover from the Bank of Keo the amount of the drafts, which were finally returned unpaid. There was testimony that some of the payees had carried accounts with the Bank of Cabot and that, if the drafts had been promptly returned,

they could, upon being dishonored, have been charged to the accounts of these depositors. There was also testimony to the effect that the drafts could, and, in the exercise of ordinary diligence by the Bank of Keo, would, have been returned to the Bank of Cabot before Layne had shipped out the cattle in payment of which the drafts had been drawn, and, if the drafts had been so returned, the Bank of Cabot might, by an appropriate action, have saved itself, in part at least, from loss.

The complaint filed by the Bank of Cabot against the Bank of Keo did not allege, nor was any testimony offered to show, that the drafts were good and collectable, that the drawees were solvent, or that the drafts would have been honored if the greatest diligence had been exercised by the Bank of Keo. It was the theory of the plaintiff that, when it had shown that the drafts were not collected nor promptly returned, and that it had been damaged by that failure, a *prima facie* case of liability was made, and that the measure of the liability was the face of the drafts themselves, unless it was affirmatively shown by the defendant bank that the drafts could not have been collected and that a loss would have been sustained even though it had not been negligent. The court adopted this theory, and the instructions given conformed thereto. There was a verdict and judgment for the plaintiff bank for the face of certain drafts. As to others, the jury probably found that the drafts were not retained for a period of time so great as to constitute negligence.

The question presented on this appeal is that of the burden of proof. Was the burden on the plaintiff bank to show, not only that it was damaged by the negligence of the defendant bank, and the extent of that damage, or was the burden upon the defendant bank (its negligence being established) to show that its negligence did not cause the damage sued for?

The authorities are divided on this question, and many of the cases are cited in the note to the annotated case of *Northwestern Nat. Bank* v. *People's State Bank,* 19 A. L. R. 551, 109 Kan. 506, 200 P. 278.

There are cases which hold that a bank, by a failure to make prompt demand of payment of a bill of exchange which has been placed in its hands for collection, makes the bill its own and renders itself liable to the owner for the full amount thereof; but the great weight of authority is against this view, and the general rule appears to be that the bank is liable only for the actual loss resulting from its failure to make prompt demand for acceptance or payment. The rule appears to be, however, that, where there is some element of bad faith or positive wrongdoing, the collecting bank is subjected to the higher degree of liability of showing that its wrongful act occasioned no injury, or of showing the extent of the injury caused.

A case of that kind is that of *First Nat. Bank of Monette* v. *First Nat. Bank of Lepanto,* 159 Ark. 517, 252 S. W. 594. It was there alleged that the defendant bank had converted a note sent it for collection or renewal. We there said that, if the bank had received the note, it should account for it, and if it had in fact converted the note, it should pay the plaintiff bank its value, whatever that might be. But, even in a case of that kind, the liability was held to be only the value of the note, which might not necessarily be its face.

In the case of *Second Nat. Bank* v. *Bank of Alma,* 99 Ark. 386, 138 S. W. 472, a collecting bank had wrongfully and contrary to its instructions released to a consignee a bill of lading to which a draft had been attached, and which should have been collected before the bill of lading was surrendered. The surrender of the bill of lading enabled the consignee to take possession of the article shipped without paying for it. The right of the remitting bank to recover damages from the collecting bank was declared, and it was there said that, where a collecting bank surrenders a bill of lading accompanying a draft, contrary to instructions, it is, in law, liable as for conversion for any damages which have been sustained by reason thereof. It was there further said:

"By the action instituted in this case the plaintiff could only recover the actual loss which was sustained by reason of any neglect or breach of duty committed by the defendant in the collection of said draft. Defendant had still the right, in its defense, to show that the plaintiff was not damaged by reason of its having surrendered the bill of lading without payment of the draft, although it was done contrary to instructions. It could show this by proving that the plaintiff was not the true owner of the draft and bill of lading, but was simply holding same as the agent of the Judge Machine Company (the consignor), coupled with no interest therein, and by proving any facts which would constitute a defense against the Judge Machine Company in event it was seeking a recovery against it."

Here there was no conversion of the drafts, and the liability of the Bank of Keo is predicated, not upon a positive wrong or fraudulent act, but upon the simple negligence of failing to promptly present the drafts for payment and to return them promptly upon payment being refused. In such a case the liability of the collecting bank is limited to the damage which its negligence caused, and the burden of showing this damage rests upon the plaintiff bank.

In 3 Am. & Eng. Enc. of Law (2d. ed.) chapter "Banks and Banking," p. 814, it is said:

"Where a bank which has undertaken the collection of a bill or note has been guilty of negligence in the performance of its duties, the damages which the depositor is entitled to recover are measured by the actual loss occasioned by the improper conduct of the bank. It is sometimes stated that the amount of a bill or note placed in the hands of a bank is *prima facie* the measure of its liability. But it seems that this is so only where the plaintiff shows in the first instance that there is a reasonable probability that the bill would have been accepted and paid if the agent had done his duty, or that, by the negligence of the agent, the liability of a drawer or indorser who was apparently solvent has been discharged."

In 2 Michie on Banks and Banking, page 1474, it is said:

"The liability of a bank, with which a check is deposited for collection, for negligence in not collecting it and not giving notice of nonpayment till after the bank on which it was drawn suspended payment because of insolvency, is only for such amount as the depositor will lose thereby, which he must allege and prove."

At page 1503 of the same author it was also said:

"In an action against a bank for negligent failure to collect paper intrusted to it for collection, or for failure to fix the liabilities of the parties thereto in case of failure to collect, the complaint must allege that the plaintiff suffered damages from the defendant's negligence, and the omission of such allegation will render a complaint bad on demurrer. Since the liability of a bank with which a check is deposited for collection, for negligence in not collecting it and not giving notice of nonpayment, is only for such amount as the depositor will lose thereby, he must allege and prove this."

In the chapter on "Banks and Banking," § 295, 7 C. J., p. 622, it is said:

"The burden of proof is on the plaintiff to show that the paper was collectable, that the bank was negligent in not collecting, and that an actual loss has followed; but, where the bank sets up affirmative facts in order to escape liability, it assumes the burden of proof as to such matters."

In the chapter on "Banks," in 3 R. C. L., p. 632, it is said:

"And, where the collecting bank has been negligent in the collection of paper intrusted to it, the customer must allege and prove the amount of damages he has suffered. On the other hand, there is authority for the position that the *onus* is on the bank when sued for neglect, in failing to give notice of demand of payment, and of protest of the note intrusted to it for collection, to show that its principal has incurred no damage from its neglect."

In the annotator's note to the case of *Northwestern Nat. Bank* v. *People's State Bank, supra,* it is said: "Despite expressions to be found in some cases to the effect that the measure of damages for breach of duty by a bank in respect to the collection of commercial paper is the face of the paper involved, the true rule, supported by the overwhelming weight of authority, is that the damages are measured by the actual loss suffered by the owner of the paper in consequence of the negligence or misconduct of the bank, at least, in the absence of bad faith, or positive wrongdoing, or failure to return the paper."

One of the leading cases holding that the burden of proof is on the plaintiff bank to show the negligence of the collecting bank and the damage resulting therefrom is that of *Hendrix v. Jefferson County Savings Bank,* 45 So. 136, 153 Ala. 636, which is annotated in 14 A. L. R. (N. S.) 686. A headnote in that case reads as follows:

"The liability of a bank with which a check is deposited for collection for negligence in not collecting it and not giving notice of nonpayment till after the bank on which it was drawn suspended payment because of insolvency, is only for such amount as the depositor will lose thereby, which he must allege and prove."

The Supreme Court of Alabama, in the case just quoted from, followed the earlier decision of that court in the case of *Bank of Mobile* v. *Huggins,* 3 Ala. 206, which last-mentioned case was cited and approved by this court in the case of *Pennington* v. *Yell,* 11 Ark. 213, 52 Am. Dec. 262, in which case an attorney was sued by his client for negligence in failing to collect a note which had been placed in his hands for that purpose. The Supreme Court of this State there said that the burden was on the plaintiff not only to show that the collection of the note was lost by the negligence of the attorney, but that the plaintiff should also have shown that the note evidenced a subsisting debt and that the maker thereof was solvent, "and, unless the latter be shown, he (the attorney) would be liable only for nominal damages; and

under no circumstances would he be liable for more than the actual damages that the client has sustained by reason of negligence."

The following cases support the text from which we have quoted: *Midwest Nat. Bank & Trust Co.* v. *Parker Corn Co.,* 245 S. W. 217, 211 Mo. App. 413; *Morris-Miller Co.* v. *Von Presentin,* 114 Pac. 912, 63 Wash. 74; *Sahlien* v. *Bank of Lonoke,* 16 S. W. 373, 90 Tenn. 221; *Terrell* v. *Commercial Nat. Bank,* 199 S. W. 1133 (Tex. Civ. App.); *Hilsinger* v. *Trickett,* 99 N. E. 305, Ann. Cas. 1913D, 421.

The trial court should not therefore have placed upon the defendant Bank of Keo the burden of showing the value of the drafts, as it did not convert them, but should have charged the jury that the burden was on the plaintiff, Bank of Cabot, not only to prove negligence on the part of the defendant bank, but also the amount of the loss which was sustained as the result of that negligence. The instructions given did not conform to this view of the law, and, for that error, the judgment of the court below must be reversed.

Section 14 of act 496, Acts 1921, page 514, is cited in support of the instructions given in this case. This section changed certain rules which had previously prevailed in this State (*Farmers' & Merchants' Bank* v. *Ray,* 170 Ark. 293, 280 S. W. 984), but there is nothing in this act to change what we conceive to be the true rule as to the burden of proof in actions of this character.

For the error indicated the judgment of the court below is reversed, and the cause remanded for a new trial.

INSURANCE UNDERWRITERS' AGENCY OF THE INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA v. PRIDE.

Opinion delivered May 9, 1927.

1. APPEAL AND ERROR—DEFENSE NOT RAISED BELOW.—A defense which was not raised in the trial court will not be heard for the first time on appeal.
2. INSURANCE—WHEN POLICY BINDING.—Where the owners of property in a store instructed the agent to keep it insured, without designating the name of the company, a policy written by the agent and turned over to a clerk in the store with a request for surrender of the old policy was enforceable, though the policy had originally been placed with another company, and had been canceled by the agent without notice.
3. INSURANCE—INSTRUCTION TO AGENT TO KEEP PROPERTY INSURED.—An instruction to an insurance agent to keep the property insured, leaving the selection of the company to the agent, gave him authority to accept a policy for insured when written, to waive cancellation notice clause of old policy, and to accept a new policy in lieu thereof.
4. INSURANCE—RIGHT OF ACTION OF LIEN-HOLDER.—A lien-holder can maintain an action on a policy under ordinary loss payable clause, as his interest may appear, independent of insured, if the lien-holder is entitled to the entire amount of the policy.
5. INSURANCE—VESTED RIGHT OF MORTGAGEE.—A mortgagee or lien-holder acquires a vested or enforced right under the ordinary loss payable clause, as his interest may appear, which cannot be destroyed by a settlement between the insurer and insured.

Appeal from Mississippi Circuit Court, Chickasawba District; *W. W. Bandy*, Judge; affirmed.

G. T. Fitzhugh and *J. T. Coston*, for appellant.

Gravette & Alexander, for appellee.

HUMPHREYS, J. This suit was brought in the Chickasawba District of the circuit court of Mississippi County by appellee and Paul Howard against appellant upon a fire insurance policy, No. 818634, to recover $3,000, the face value thereof, for the destruction of a stock of goods and fixtures by fire on November 26, 1924. On June 29, 1925, Paul Howard met Bruce Richards, the adjuster of W. L. Nelson & Company, general agents of appellant, in their office in Memphis, Tennessee, and made a statement to the effect that the policy sued upon

was never accepted by him but was attempted to be substituted by W. M. Burns, local insurance agent for appellant in Blytheville, Arkansas, for a policy theretofore written by said Burns in the Liverpool, London & Globe Insurance Company, without his authority and consent, and that he (Howard) was not in accord with the action of J. P. Pride, the mortgagee of the goods and fixtures, in the employment of attorneys and the institution of this suit. After making the statement he accepted $90 return premium on the policy sued upon and issued the following receipt for same:

"Receipt for Return Premium.

"June 29, 1925.

"Receipt is hereby acknowledged of the sum of ninety and no/100 dollars ($90), same being the premium under Insurance Underwriters' Policy No. 818634, being return to me by W. L. Nelson & Company, for the reason that such sum of money is for the premuim of the above policy which I did not order or ever instruct the said company and/or its agent to issue. I do not have the policy contract, for I am of the opinion that the same was destroyed by fire. If the policy contract was in my possession I would freely and willingly surrender same, and do hereby promise to do so if it is found.

"In witness whereof I have hereunto set my hand, this 29th day of June, 1925.

"Paul Howard, assured.

"Witness: Jno. Clinton."

On the same day Howard wrote and mailed the following letter to the attorneys which he and Pride had employed to bring the suit:

"Memphis, Tennessee, June 29, 1925.

"Messrs. Alexander & Gravette,
Blytheville, Arkansas.

"Gentlemen: Pursuant to my verbal instructions given you Saturday, June 27, 1925, I hereby instruct you to dismiss the suit filed in my name against the Stuyvesant Insurance Company under their Pol. No. 1130068, as I have made settlement with the company, they agree-

ing to pay the court costs, which I am advised is $11.05, and attorneys' fees of $30.

"You are also instructed to dismiss the suit under Insurance Underwriters' Pol. No. 818634, as I do not wish this suit further contested, being confident that this company should pay me nothing. Please advise me by return mail that these instructions are understood and that you have complied with my wishes.

"Please let me have your bill for expenses and court cost and attorneys' fee in filing the suit against the Insurance Underwriters' Agency.

"Yours very truly, Paul Howard."

The attorneys answered by return mail to the effect that the suit would not be dismissed unless the court dismissed it.

Appellant filed a motion to dismiss the case when court convened. The motion was granted as to Paul Howard and denied as to J. P. Pride.

An answer was filed, denying liability under the policy, and the cause proceeded to a trial in the name of J. P. Pride, resulting in a verdict and consequent judgment in favor of appellee for $1,200, from which is this appeal.

The facts, briefly stated, are as follows: Paul Howard purchased a stock of goods and fixtures in Blytheville, Arkansas, from J. P. Pride, on May 31, 1924, which were insured for $5,000. Pride executed a bill of sale to Howard for the property, reserving the title in himself until the purchase money was paid. The fixtures were valued in the trade at $2,069 and the goods at $1,892. In November, 1924, after the stock had been reduced to some extent by sales, Pride and Howard applied to W. M. Burns, who represented several insurance companies, including the company of appellant, for a cancellation of the $5,000 policy and issuance of a new policy for $3,000, $1,800 on the stock and $1,200 on fixtures, without selecting or designating the company in which the policy should be written. The selection or designation of the company was left entirely to the local

agent, Burns. The only instruction given by them to Burns was to keep their property insured. Burns knew that Pride had reserved the title when he sold the property to Howard, or at least that Pride owned an interest in the property. Howard paid the premium, and a new policy was issued in the Liverpool, London & Globe Insurance Company conforming to the application. The policy contained a provision for cancellation upon five days' notice. When Burns reported the issuance of the policy to the home office the Liverpool, London & Globe Insurance Company wired him to cancel the policy, which he did, without giving five days' notice, and immediately issued the policy sued upon and took it to the store and delivered it to the clerk in charge, Howard being absent, who put it in the cash register. It was the custom in canceling policies to pay no attention to the notice. The custom was for the agent to rewrite the insured in a new company and take up the old policy. The old policy in this instance was locked up in the safe, and the clerk did not have access to it. A rider was placed upon the policy stating that the amount due Howard thereon should be paid to J. P. Pride as his interest might appear. Through mistake or typographical error the rider applied to Insurance Underwriters of New York. The day after Burns left the policy with Howard's clerk he was in the store, and the clerk offered him the policy, but he informed the clerk that it was the old policy he wanted to take up, and refused to take up the new policy which he had left for Howard. The fire which destroyed the property occurred that night, and the new policy was burned. The old policy was obtained a few days after the fire and returned to the Liverpool, London & Globe Insurance Company.

Before discussing the questions properly raised for determination on this appeal, we will refer for a moment to the contention of appellant that the judgment should be reversed because the rider pasted on the policy applied to the Insurance Underwriters of New York and not to appellant. Appellant made no defense on this ground

in the trial court, and he cannot be heard to raise the question the first time on appeal. It is apparent that the reference to the New York company was a mistake, for, if not, appellant would have interposed the defense that the policy was not written or the premium received by it.

Appellant contends for a reversal of the judgment upon the ground that the policy sued upon was not delivered to Howard. The theory advanced is that, because the policy was not handed to and accepted by Howard, it did not become a binding obligation upon or contract between the parties, the argument being that there was no meeting of the minds of the parties upon the terms thereof, and therefore no contract. It is true that mutuality is one of the essentials of a contract, and such essential is not lacking in this contract. Both Pride and Howard conferred authority in the beginning upon Burns to insure their property in any company he represented, leaving the selection or designation of any company to him. Our court is committed to the doctrine that authority of such breadth and scope has the effect of constituting the agent of the insurer, the agent of the insured also to accept the policy when written, and to waive the cancellation notice clause. and to accept a new policy in lieu of an old one. *Phoenix Insurance Co.* v. *State,* 76 Ark. 180, 88 S. W. 917, 6 Ann. Cas. 440; *Commercial Union Fire Insurance Co.* v. *King,* 108 Ark. 130, 156 S. W. 445; *The Allemania Fire Insurance Co.* v. *Sweng,* 127 Ark. 141, 191 S. W. 903.

Appellant also contends for a reversal of the judgment on the ground that one who has a lien upon property cannot maintain an action under an ordinary loss-payable clause as his interest may appear in an insurance policy, independent of the insured. We can see no reason for this petition, if the lienholder is entitled to the entire amount of the policy, as in this case; nor why the lienholder would not have a right to use the name of the insured as well as his own in prosecuting a suit against the insurer if his interest was as great or greater than

that of the insured. We think the case of *Burlington Insurance Co.* v. *Lowery,* 61 Ark. 108, 32 S. W. 383, 54 Am. St. Rep. 196, is authority for the maintenance of such a suit by the lienholder in case it appears that his interest is as great or greater than that of the insured. If the doctrine were otherwise there could be no reason or use of inserting such a clause in a policy. It would merely serve as an invitation to every insured to settle with the insurer for a few dollars in case of loss, if the lien amounted to as much or more than the amount due under the policy. We think a mortgagee or lienholder acquires a vested and enforceable right under an ordinary loss-payable clause as his interest may appear in an insurance policy which cannot be destroyed by a settlement or adjustment between the insurer and the insured.

No error appearing, the judgment is affirmed.

MORRIS v. CALDWELL.

Opinion delivered May 9, 1927.

1. BANKRUPTCY—ILLEGAL PREFERENCE.—A deed by a bankrupt in an effort to prefer his mother for an antecedent debt and not for a present consideration, made only a few days before he filed a voluntary petition in bankruptcy, and at a time when he was hopelessly insolvent, and when his mother had reason to believe that he was insolvent and that the transfer would effect a preference, *held* void as an illegal preference.
2. BANKRUPTCY—VALIDITY OF GIFT.—The gift of an automobile by a bankrupt to his wife, presented to her about nine months before he filed his voluntary petition in bankruptcy, at a time when he had no expectation of becoming bankrupt, *held* valid.
3. APPEAL AND ERROR—CONCLUSIVENESS OF COURT'S FINDING.—A finding of fact by the trial court will be presumed correct, in the absence of an abstract of the testimony showing otherwise.

Appeal from Ashley Chancery Court; *E. G. Hammock,* Chancellor; affirmed.

G. P. George and *H. H. Hays*, for appellant.

A. A. Poff and *Jas. M. Smith*, for appellee.

HUMPHREYS, J. This is a suit by J. H. Caldwell, trustee in bankruptcy of the estate of H. W. Morris, to cancel a deed executed by the bankrupt to his mother, Mrs. M. H. Morris, for approximately 170 acres of land in Ashley County, Arkansas, subject to a mortgage in favor of the Bank of Parkdale for $2,587.48 and interest, and to subject the equity in a certain Ford car presented by the bankrupt to his wife, and a Delco plant, to the payment of the indebtedness of the bankrupt, upon the ground that the conveyance was voluntary, and that it and the gift of the automobile and the purchase and disposition of the Delco plant were made in violation of the bankrupt law and for the purpose of defrauding the bankrupt's creditors. Mrs. W. H. Morris, the mother of the bankrupt, and Mrs. Mabel R. Morris, his wife, filed separate answers, denying the material allegations of the complaint.

The cause was submitted to the court upon the pleadings and testimony, which resulted in a decree canceling the conveyance of the land and subjecting the bankrupt's equity therein to the payment of his indebtedness, and adjudging the automobile and Delco plant to Mrs. Mabel R. Morris.

Appeals have been prosecuted to this court by the respective parties from the decree in so far as same was adverse to them, and the cause is before us for trial *de novo*.

After a very careful reading of the testimony we have concluded that the decree rendered by the trial court should be affirmed.

The deed was made by the bankrupt in an effort to prefer his mother for an antecedent debt and not for a present consideration. He made the deed only a few days before he filed his voluntary petition in bankruptcy and at a time when he was hopelessly insolvent. His mother had reason to believe that her son was insolvent and that the transfer would effect a preference. It could serve no useful purpose to set out the testimony from

which this conclusion is drawn, and which would only serve to lengthen the opinion and be of no use as a precedent.

The Ford automobile was purchased in June, 1924, about nine months before the bankrupt filed his voluntary petition in bankruptcy. He traded in an old car on the new one for $225 and executed notes in the sum of $25.83 each for the difference, and paid the last one in June, 1925. Most of the notes were paid out of the business, as other debts. He gave the new car to his wife as a birthday present, which was not unusual. At the time, although in financial straits, he had no idea of failing in business and filing a petition in bankruptcy. He and all of his creditors thought his farm was worth two or three times as much as it sold for, and credit was extended to him on that account. The gift was a modest one, in keeping with the station in which he and his wife lived, and was not made for the purpose of covering up and shielding his property from his creditors. It would be carrying the doctrine to an extreme to allow creditors of a bankrupt to seize and appropriate for the payment of their debts inconsequential gifts made by him while in business to his better half in remembrance and celebration of her birthday. In the ordinary course of life wives and mothers expect outward tokens and evidences of affection from their husbands, and it would indeed be harsh to deprive a man struggling for financial existence from manifesting his affection in this manner and the wife and mother from being the happy recipients of modest gifts on special occasions like birthdays.

It is impossible from appellant's abstract to form an opinion with reference to the whereabouts or ownership of the Delco plant. It seems that the bankrupt purchased it at some time and sold it before he filed his petition in bankruptcy. The decree abstracted contains a finding by the court that the Delco light plant involved in this action belongs to the wife of the bankrupt, and we must presume that the finding was warranted, else the abstract of the testimony would show otherwise.

No error appearing, the decree is affirmed.

STANDARD LUMBER COMPANY OF PINE BLUFF v. WILSON.

Opinion delivered May 9, 1927.

1. MECHANICS' LIENS—STATEMENT OF ACCOUNT.—It is not essential that a materialman's lien statement, filed with the clerk of the circuit court, should contain an itemized statement of the account for materials.
2. MECHANICS' LIENS—ITEMIZED ACCOUNT.—Although the statement of a materialman's lien need not contain an itemized account, yet, when he seeks to enforce the lien by suit, he should present an itemized account.
3. MECHANICS' LIENS—TIME OF FILING STATEMENT.—Evidence showing that the last items of the materials furnished by materialman were included in the original contract for materials, that they were delivered on the premises and used in the construction of the building, and that the statement of the lien was filed within 90 days after their delivery, *held* to show that the statement of the lien was filed in time.
4. MECHANICS' LIENS—DEFENSE.—Where material is delivered on the ground where a building is being constructed, the owner must show that the material was not used in the construction of the building, in order to defeat a lien for the material.
5. ACTION—COMMENCEMENT OF CROSS-ACTION.—Where a cross-complainant issued no summons, but merely filed his cross-complaint, the date of the commencement of the cross-action was the date of the filing of the responses and answers thereto.
6. MECHANICS' LIENS—COMMENCEMENT OF CROSS-ACTION.—Where a cross-action to establish a materialman's lien was begun within less than 90 days from the delivery of the last materials furnished under the contract, the lien was thereby perfected, even if the lien statement filed with the circuit clerk was insufficient.
7. ACTION—COMMENCEMENT OF CROSS-ACTION.—Where no summons was issued on a cross-complaint to establish a materialman's lien, and response thereto was made, and an amended cross-complaint was filed to enforce the lien fixed by the filing of the lien statement, the date of commencement of the action to enforce the lien was the date of filing of answers to the amended cross-complaint.

Appeal from Union Chancery Court, Second Division; *George M. LeCroy,* Chancellor; reversed.

STATEMENT BY THE COURT.

This appeal is from a decree denying the appellant the right to a lien for materials furnished the contractor,

J. Alonzo Jones, and used in the construction of a three-story brick veneer residence for J. R. Wilson, upon his lots in block 5, Godwin Addition to El Dorado, Union County, Arkansas.

Before the contract was given to Jones, Mrs. J. R. Wilson and J. H. Bliss, the architect employed by J. R. Wilson to supervise the construction of the residence, had agreed with the Standard Lumber Company of Pine Bluff on a list of materials that would be required for the construction of the building, the millwork, at a price of $3,650.76.

After the contract was let to Jones, upon inquiry, the Standard Lumber Company agreed to furnish the materials as already selected, to him for the construction of the building. It was to be delivered and was loaded on the cars F. O. B. Pine Bluff, billed to the contractor, J. Alonzo Jones, at El Dorado, who was required to pay the freight there and take credit on the price of the materials.

J. R. Wilson required the contractor to execute a bond for the faithful performance of the contract, furnishing all materials for the agreed price of $19,676.72, but no bond was filed with the circuit clerk under the provisions of § 6912, C. & M. Digest, conditioned for the payment of all claims which might be the basis of liens.

The millwork and materials were prepared and constructed at the plant of the Standard Lumber Company at Pine Bluff and shipped to the contractor, Jones, at El Dorado, from time to time as needed in the construction of the building, the first shipment of said materials having been made on July 30, 1923, and the last shipment, according to appellant's contention, on March 27, 1924.

The contractor, Jones, proceeded with the construction of the residence, and on March 27, 1924, was indebted to the Standard Lumber Company (having only paid $1,000 on the materials furnished) and to various other persons for materials furnished and used in the construction of the building.

The Parlor City Lumber Company, which had furnished some lumber for the building, filed suit in the Union Chancery Court, Second Division, against J. Alonzo Jones, the contractor, and J. R. Wilson, the owner, for the amount due it for materials, and made the appellant, Standard Lumber Company of Pine Bluff, and all other material furnishers, defendants in the action.

On April 8, 1924, appellant filed its response in said action and also a verified cross-complaint and action against the said contractor and J. R. Wilson, owner, for the balance due it for said materials furnished for the construction of said residence. It alleged in its cross-action that it had sold to the said J. Alonzo Jones, the contractor, the millwork for the construction of said residence for the agreed price of $3,650.76 and had delivered same between the 24th day of May, 1923, and the 9th day of January, 1924, and attached to its complaint an itemized statement of the materials furnished, and claimed a lien on the said property for the amount due. No summons was issued on the cross-complaint, and on the 11th of June, 1924, J. R. Wilson, the owner, filed his response to said cross-action, and on June 23, 1924, the defendant, J. Alonzo Jones, the contractor, filed his response. On July 11, 1925, the Standard Lumber Company, with permission of the court, filed an amended answer and cross-complaint, alleging that its lien for said materials furnished had been filed in the office of the circuit clerk of Union County, Arkansas, within 90 days from the date of delivery of the last materials on the job under said contract. It alleged also that said last materials were delivered on March 22, 1924.

On July 25, 1924, said J. R. Wilson and Mrs. J. R. Wilson filed their joint response to the amended answer and cross-complaint of appellant. On March 20, 1924, appellant lumber company gave notice to J. R. Wilson of its intention to claim a lien upon the residence and property, setting out the amount thereof and from whom due, and that, upon expiration of ten days from the date of service of the notice and before the expiration of

ninety days from the date of delivery of the last items of the materials furnished, it intended to file a material lien on the property; and filed on the 31st day of March, 1924, with the circuit clerk of Union County, a verified and just account of the amount due, attaching to its affidavit for a lien a general statement of account, an itemized statement of the materials furnished, and a copy of the notice.

The itemized statement attached to the affidavit for the lien shows the last shipment of the materials by the Standard Lumber Company, under said contract, was made on the 29th day of December, 1923.

The testimony shows that the last materials delivered on the job by the Standard Lumber Company, under the contract, was after March 29, 1924.

Prior to November 12, 1925, the day of the trial, the defendant, J. R. Wilson, owner, paid off all the claims against said property and took assignments to himself, except that of the Standard Lumber Company of Pine Bluff, appellant.

The testimony also shows that Wilson, the owner, had required the execution of a bond by the contractor, but that it was worthless, the contractor and the surety not being financially responsible, that the contractor had abandoned the job before it was finished, and that the owner had already expended much more than the contract price in the completion of the building.

The court rendered a decree in favor of the appellant against J. Alonzo Jones, the contractor, and his bondsmen for the balance due on its claim, $2,450, with 6 per cent. interest from March 31, 1924, dismissed its cross-complaint against J. R. Wilson and Mrs. J. R. Wilson for want of equity, and denied it a lien against the property on the ground that its lien had not been perfected as required by law, and from this decree the appeal is prosecuted. Other facts will be referred to in the opinion.

John Carroll and *Rowell & Alexander*, for appellant.

E. W. McGough, for appellee.

KIRBY, J., (after stating the facts). Appellant insists that the filing of its verified account for materials and millwork furnished to the contractor and used in the construction of the improvement with the circuit clerk of Union County, after notice duly given to the owner, was a substantial compliance with the statute providing for fixing the lien against such improvement, and that the court erred in holding otherwise.

The undisputed testimony shows that the wife of J. R. Wilson, the owner, with the architect employed for designing and supervising the construction of the residence, agreed with the appellant lumber company, the material furnisher, upon the materials to be supplied the contractor and the price thereof, that they were to be furnished as needed, the whole bill of materials for the one price and lump sum agreed upon. That the materials were supplied upon the order of the contractor as requested, and used in the construction of the building, and that there had been paid, at the time of the filing of the account with the circuit clerk of Union County, only the sum of $1,000 on the account.

The undisputed testimony also shows that appellant filed its claim, duly verified, with the circuit clerk of Union County, showing the balance due upon the account for materials furnished, the amount for which a lien was claimed, with the description of the lots upon which the building was erected with the materials furnished, and that the ten days' notice required before the filing of such lien was duly given.

It is not disputed that the amount claimed is correct, but insisted that no lien was fixed by the filing of such claim, since it was not an itemized account and because it was not filed within 90 days after the last item of material was furnished to the contractor, as shown by the account.

The testimony shows, however, that certain items of materials were furnished to the contractor in accordance with the contract of sale of the materials after the date of the last item delivered, as shown on the account filed; being shipped on March 22 and 27, 1924, respectively, and delivered on the job and used in the construction of the building. The last item so delivered and used was shipped on March 27, 1924, the notice of the intention to claim a lien being given to J. R. Wilson, the owner, on March 20, 1924, and the lien filed in the office of the circuit clerk of Union County on March 31, 1924.

The affidavit for the lien claimed described the property to be charged therewith, contained a general statement of the account showing the amount claimed to be due thereon. The detailed itemized statement filed therewith did not contain the last items shown to have been delivered.

In testing the sufficiency of the account, so far as concerns the preservation of the lien, this court has held that it is not essential that the account filed be an itemized one, although, when it comes to enforcement of the claim by suit, then, for the purposes of defense, the owner may insist upon the presentation of an itemized claim.

In *Terry* v. *Klein,* 133 Ark. 366, 201 S. W. 801, it was said:

"Conceding that the words 'just and true account' mean, as ordinarily construed, an itemized account (*Brooks* v. *International Shoe Co.,* 132 Ark. 386, 200 S. W. 1027), this court has decided that failure to itemize the account does not defeat the lien. *Wood* v. *King,* 57 Ark. 284, 21 S. W. 471. In reaching that conclusion the court followed the rule which had been repeatedly announced here, that the lien of a mechanic or material furnisher 'springs out of the appropriation and use by the landowner of the mechanic's labor or the furnisher's materials, and not from the taking of those formal steps which the statute enjoins for the preservation and assertion of the lien and for giving notice to others of its existence and extent'; that the statute is highly remedial in its

nature, and that, when the controversy is between the holder of the lien and the proprietor of the land, an exact compliance with the statute at all points is not indispensable. *Anderson* v. *Seamans*, 49 Ark. 475, 5 S. W. 799." See also *Murray* v. *Rapley*, 30 Ark. 568; *Buckley* v. *Taylor*, 51 Ark. 302, 11 S. W. 281; and *Ferguson Lumber Co.* v. *Scriber*, 162 Ark. 349, 258 S. W. 353.

Miller, witness for appellant, testified that the handrail for the stairs and the astrangals for the doors were shipped on March 22, 1924, and the plate glass for the door was shipped on March 27, 1924; that said items of material were all a part of the original contract, and this testimony is not disputed or denied.

Morehead, foreman for contractor Jones, who completed the residence, stated that he received the astrangals for the doors shipped on March 22 and the plate glass shipped on March 27, 1924, and the same were used in the building. He also said that the handrail shipped on March 22, 1924, was delivered, and that he was waiting for the arrival of this material, which was needed for the completion of the building.

Mrs. J. R. Wilson testified that the handrail for the stairs and the plate glass were shipped as part of and included in the original contract; shipped and delivered without extra charge, and arrived near the completion of the building, which was in April, 1924.

J. Alonzo Jones also stated that the handrail was shipped as part of the original contract.

J. R. Wilson testified that the handrail for the stairs was delivered in March, 1924, but his understanding and belief was that it was not used.

Morehead, foreman, had charge of putting the handrail in the building, but did not know which one was used, another having been ordered from a different company on account of the delay in the arrival of the first, and both being on hand.

The amount of the account for which the lien was claimed was not increased or diminished by these items of materials last delivered, which were embraced in the

original contract to furnish materials, and, the account having been filed within 90 days after the same were furnished, was within the limit fixed by the statute. *Ferguson Lumber Co.* v. *Scriber, supra; Planters' Cotton Oil Co.* v. *Galloway,* 170 Ark. 712, 280 S. W. 999.

It is not disputed that the handrail shipped on March 22, 1924, was delivered on the ground where the building was being constructed, and, such being the case, the burden was on the owner to show that the material was not used in the construction of the building, in order to defeat a lien for the material thus furnished. *Van Houten Lumber Co.* v. *Planters' National Bank,* 159 Ark. 535, 252 S. W. 614.

Appellant's cross-complaint, also claiming a lien for materials furnished, and praying a foreclosure thereof, was filed on April 8, 1924, and the delivery of the last materials under the contract was after the date of shipment of March 27, 1924.

Appellee, J. R. Wilson, filed his response to the cross-complaint on June 11, 1924, and the separate response thereto of J. Alonzo Jones, the contractor, was filed on June 23, 1924.

This action on the cross-complaint against appellees was commenced upon the dates of filing of said responses and answers by appellees as shown, and duly commenced as to said appellees within less than 90 days from the delivery of the last materials furnished under the contract. The lien was thereby perfected, if it had not already been fixed by the filing with the circuit clerk. *Carr* v. *Hahn & Carter,* 133 Ark. 401, 202 S. W. 685.

On July 11, 1925, appellant filed an amendment to its cross-complaint in effect to foreclose its lien claimed to have been filed with the circuit clerk on March 31, 1924.

The appellees demurred to the amended complaint and filed their answer thereto on July 25, 1925, but they had already filed their response on June 11, 1924, to the cross-complaint of appellant for fixing the lien and its foreclosure, and the action to enforce its lien was commenced on that date, long before the expiration of the

fifteen months allowed by law for bringing suit for the enforcement of such lien. Such amendment hardly constituted a new cause of action, in any event, but only authorized the introduction of the proof of the filing of the account or lien with the circuit clerk in support of the allegation of the cross-complaint, that appellant was entitled to a lien for materials furnished for the erection of the building, and no other or different relief was prayed than in the cross-complaint for the enforcement of the lien alleged to exist for furnishing such material.

The chancellor's findings that the account for a lien was not filed with the circuit clerk of Union County within 90 days from the last item of materials furnished and that the last item of material was not furnished within 90 days from the date of the filing of the answers and responses by appellees to appellant's cross-complaint for establishment of the lien is contrary to the preponderance of the testimony, and his denial of appellant's claim for a lien for said materials furnished was erroneous.

This court holds that the last items of materials shown to have been furnished were included in the original contract for furnishing materials and that same were delivered on the premises and used in the construction of the building, and the lien claimed was filed with the clerk of the circuit court of Union County within 90 days thereafter, and also that the cross-complaint for establishment of a lien was responded to by appellees and the action begun within 90 days from the furnishing of said materials.

It is unfortunate that appellee shall have to pay again for the materials furnished his contractor and used in the construction of the residence, for which he is shown to have paid already much more than the contract price, but appellant has not been paid for its said materials, and it is in no wise its fault that the bond to the owner required of the contractor to indemnify him against such loss turned out to be worthless.

It follows that the decree must be reversed and the cause remanded, with directions to enforce the lien

against the improvement for the amount due appellant for the materials furnished, and for all necessary procedure therefor, according to the principles of equity and not inconsistent with this opinion. It is so ordered.

LESCHER v. BAIRD.

Opinion delivered May 9, 1927.

1. SPECIFIC PERFORMANCE — MISREPRESENTATIONS. — Misrepresentations alleged to have been made by the purchaser of property as to the character of improvements to be erected thereon *held* no defense to a suit for specific performance of a contract for the sale of real estate, where there was no mention of improvements in the contract.
2. CONTRACTS—REPRESENTATIONS AS TO FUTURE EVENTS.—Statements or misrepresentations as to future events or expectations and probabilities do not constitute "fraud."
3. VENDOR AND PURCHASER—VARIANCE BETWEEN OFFER AND ACCEPTANCE.—A purchaser having made an offer to purchase property could insist on performance of the contract according to the vendor's acceptance, although the acceptance did not cover all of the property mentioned in the offer, the difference not being material.
4. VENDOR AND PURCHASER—SUFFICIENCY OF DESCRIPTION OF PROPERTY. —Description of property in the contract for a deed as that "lying directly south of Twelfth Street pike facing north into Jackson Street, consisting of 300 feet along Twelfth Street pike and 140 feet deep south" *held* sufficient, where the property could be identified by an engineer with the aid of a map of the city.

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

John D. Shackleford, for appellant.

S. L. White, for appellee.

KIRBY, J. This appeal is from a decree of the chancery court for specific performance of the contract to convey a strip or tract of land in accordance with the written contract for the sale thereof. The complaint alleged the purchase of the land by the contract made, exhibiting a copy thereof; that the abstract of title was prepared,

and plaintiff expressed his willingness to accept the warranty deed of the defendants for the land purchased and make the payment of $3,000 in cash; that defendants had refused to perform the contract and execute the deed of conveyance, and were endeavoring to sell the land to other persons, and plaintiff tendered in court the agreed price of $3,000. Plaintiff also alleges the real estate agents, naming them, were entitled to 5 per cent. commission out of the purchase price, and prayed that the defendants be enjoined from disposing of the property, and that they be required to accept the $3,000 and execute a sufficient warranty deed conveying the property to plaintiff, or, upon the failure to do so, that the title to the property be divested out of them and vested in the plaintiff.

The answer admits the ownership of the land, the execution of the contract of sale, and alleged that it was procured through misrepresentations of the agents as to what sort of improvements would be erected on it by the plaintiff, and that they had refused to execute the deed upon learning that the erection of such improvements was not in contemplation by the purchaser, as had been falsely represented to them would be made thereon, but for which they would not have executed the contract.

A demurrer was sustained to the answer, and the defendants refused to plead further.

A copy of the contract introduced is as follows:

Exhibit A.

"Sadler & Wilbourn

Little Rock, Arkansas, Aug. 5, 1925.

"Sadler & Wilbourn.

"Gentlemen: I herein submit the following offer to purchase that part of the property of Mr. and Mrs. G. Lescher lying directly south of 12th Street Pike, facing north into Jackson Street, consisting of 300 feet along the 12th Street Pike and 140 feet deep south. I will pay for this property $3,000 cash. It is understood I am to be furnished abstract showing good title, and conveyance

to be made to me by warranty deed, all taxes now due or delinquent to be paid by seller.

"8/5/25. (Signed) Jno. P. Baird.

"We accept the above offer, and agree to pay Sadler & Wilbourn their commission (5 per cent.) $150, with the following exception: We think we have 330 feet fronting pike, and we want to leave 20 feet on the east and 20 feet on west for streets, the balance we agree to deed.

"(Signed) Geo. J. Lescher,
"(Signed) Susan H. Lescher."

The testimony shows the execution of the contract, that abstract of title was approved by the purchaser, who presented a deed conveying the lands to be executed by the owners, and was ready to pay the purchase money upon the execution thereof.

Baird, the purchaser, testified that he was willing to pay the money agreed upon and take a deed conveying the strip of property purchased along West 12th Street Pike either 150 or 140 feet deep from 12th Street Pike; that Mr. Lescher did not seem to know what he had, and that he said he was going to have it surveyed. "He knew that he was selling me the north 140 or 150 feet, the north 140 feet, with a 10-foot alley; that was his agreement. I was to have 290 feet with a 20-foot street at each end." He was to buy the whole north end of the property, reserving a street of 20 feet on each end, and Lescher thought the strip was 330 feet long. Lescher stated that he did not accept the offer and did not make the deed; did not believe the second deed left with him was right. It called "for 330 feet by 150 feet," and he did not agree with them on this description, as "I would have had no way to get back and forth to the rest of my property." That the agreement of sale was not carried out, and that the court declined to allow him to state what the representations were about the improvements to be erected.

Mrs. Lescher admitted execution of the contract of sale, but said she would not have signed it except for the representations of the improvements that would be made. They agreed to take the $3,000 and pay the agent's com-

mission, and that if they had made the deed to the 330-foot strip they would have had no means of getting back to the rest of their property. She wanted the improvements agreed to be made specified in the deed, and that she was still willing to make the conveyance if this was done.

The abstract of title was procured at a cost of $17.20, and a civil engineer figured out the true description of the land agreed to be sold from the contract and a map of the city of Little Rock, showing the streets mentioned in the contract.

The decree was for specific performance, that land should be conveyed as described by the engineer, except "a strip of land off the east and west sides of the property as described, 20 feet wide, reserved for a street"; that it was agreed at the time the contract was made that a strip of land 20 feet on the east side and also on the west should be opened for a public street permanently, and the court divested title thereto out of defendants to said 20-foot strip on the east and west sides of said property and vested it in the public forever for use as a street.

Decreed that appellants execute a warranty deed within 10 days conveying the title to the land to the plaintiff, Baird, and it to the clerk of the court. It was also decreed that the clerk make the deed conveying the title, upon failure of appellants to do so, and that he pay the costs of abstract and the brokerage fee for selling the land out of the $3,000 deposited in the court, the balance to the owners, the appellants.

Appellants insist for reversal that the contract of sale was not binding because of the misrepresentations made to them in its procurement about the kind of improvements that would be erected on the property purchased, and also that the minds of the parties did not meet and no contract of sale was made, since the offer as made was not accepted.

The contract makes no mention of the character of improvements to be erected upon the property purchased, says nothing about improvements at all, and no error

was committed by the court in its refusal to hear evidence upon that point. If it had been regarded a matter of moment, appellants doubtless would have made some reference thereto in their acceptance of the proposition, as they did about leaving 20 feet on each end of the strip of land for streets.

The general rule relative to such matters is laid down in R. C. L., vol. 12, as follows:

"It may be stated as a general rule that statements or representations as to future or contingent events, or as to expectations and probabilities, or as to what will be or is intended to be done in the future, or mere expressions of opinion about what will occur in the future, etc., do not constitute fraud, etc. They are generally regarded as mere expressions of opinion, or mere promises or conjectures, on which the other party has no right to rely."

It is stated further, under "Illustrations:" * * * "So, too, promissory representations looking to the future, such as to what the vendee can do with the property, how much he can make on it, or how much he can save by the use of it, do not generally constitute fraud."

The offer to purchase made by Baird was accepted by the Leschers, owners of the property, with a statement as to the width thereof, being 330 feet frontage on the pike, and their desire that 20 feet on the east and west ends should be left for streets, the balance they agreed to convey. This differs from the offer to purchase describing the property as 300 feet along the pike, but this was not material nor so regarded by the purchaser, who had the right to and did insist upon the performance of the contract.

The land purchased was sufficiently described in the contract to be identified by the engineer with the aid of a map of the city showing the location of the streets mentioned in the contract. *Dallar* v. *Knight,* 145 Ark. 522, 224 S. W. 983.

The court decreed the opening of the streets and dedicated to the public use the 20-foot strips on each end

of the tract purchased, fully meeting acceptance of the proposition for the purchase of the land, and decreed the conveyance of the remainder thereof to the purchaser in accordance with the contract of sale. We find no error in the record, and the decree is affirmed.

BICKLEY v. MORGAN UTILITIES COMPANY, INCORPORATED.

Opinion delivered May 9, 1927.

1. NUISANCE—ICE PLANT IN RESIDENTIAL DISTRICT.—In determining whether the operation of an ice plant should be restrained in the residential district of a city, the test whether, under the circumstances, its operation would constitute a nuisance is the reasonableness of operating the plant in such a locality, and under the attending circumstances.
2. NUISANCE—OPERATION OF ICE PLANT ENJOINED.—The operation of an ice plant in a residential district *held* a nuisance and should be restrained, where it materially injured property and annoyed the residents, regardless of how well it was constructed or conducted.

Appeal from Miller Chancery Court; *C. E. Johnson*, Chancellor; reversed.

James D. Head, for appellant.

Rose, Hemingway, Cantrell & Loughborough, for appellee.

MEHAFFY, J. This is a suit by appellants for an injunction to prevent the erection and maintenance of an ice plant on lots 5 and 6, in block 58, in the city of Texarkana. The following is in substance the complaint filed in the chancery court:

"The complaint alleged that the appellants were respectively the owners of lots set out therein; that the Morgan Company had purchased lots 5 and 6, in block 58, with the avowed intention and purpose of erecting thereon a plant for the manufacture and sale of ice; that appellant's lots were adjacent to the location selected for said plant; that appellants and their predecessors had continuously owned lots referred to for twenty years or

more, and during all of which time the same had been devoted exclusively to residential purposes; that the homes of each of the appellants were located on the various lots described in the complaint. It was also alleged that the defendant had begun excavation for an ice plant, and would continue the construction and erection thereof, unless restrained; that the maintenance and operation of an ice plant would materially interfere with the enjoyment by plaintiffs of their homes; that they would be greatly annoyed and harassed by continuous and successive noises throughout the day and night, which noises were necessarily incident to the operation of such plant; that trucks and automobiles congregated at said plant would emit noises in starting and stopping and in loading and distributing the ice, and that, by reason thereof, the peace and comfort of their homes would be disturbed and rest therein would be rendered almost impossible; that ammonia fumes would escape from said plant, to the great annoyance and detriment of appellants, and that the value of their property would be greatly depreciated and the occupancy thereof for dwelling rendered uncomfortable and practically impossible by the noises incident to the operation of said plant. That lots 5 and 6 had never theretofore been used for manufacturing purposes, but had been used almost exclusively for residential purposes. That the operation of said plant would necessarily result in a nuisance, to the irreparable damage of plaintiffs in the enjoyment of their homes, and in reduction of the market value of their property.

The prayer was for an injunction restraining the erection and maintenance of said ice plant.

The appellee filed answer, in substance as follows:

The answer denied the material allegations of the complaint, except the ownership by appellants of the various properties therein set out, and especially denied that the said plant would result in annoyance or disturb the rest of or the enjoyment of the comfort of the homes of the appellants. It alleged the purchase by Morgan Company of the property, at which time there was a

small frame cottage and filling station and an automobile paint shop thereon, and admitted that it was engaged in the construction of an ice plant thereon. It alleged that Broad Street is the main business street of the city, and is just south of Third Street, and that Broad Street is built up almost entirely of business concerns, including manufacturing concerns, and had been in such condition for years; that, in the past few years, Third Street has been taken for business purposes and practically all the residences removed therefrom, and that recently the fire limit had been extended by the city council, so as to include both blocks 58 and 59 of the city of Texarkana; that a permit for the erection of the building had been issued by the city authorities; that the business section was fast encroaching upon Third Street; that no new residences had been erected on Third Street for many years, and the old residences were being removed therefrom. The answer further alleged that the ice plant being erected would be modern, operated by electric motors, and practically noiseless; that it would be kept sanitary, and would be so erected and constructed as to be beautiful; that the deliveries of ice and ingress and egress to the plant therefor would be made from the Third Street side of the property, and that the erection and operation of said plant would not be a nuisance.

J. G. Bickley testified, in substance, that he had lived in the city for thirty years, and lived on lot 4 in block 58, and had lived there for seven years; that all of the lots in block 58, except 5 and 6, were occupied solely by residences, and there was only one rent house in the block, a residence owned by Olivette. Howard owns lot 8, in block 59, and in addition thereto has a little confectionery store in front of the house, while the east half of block 59 is owned and used by the Catholics for school and church purposes. Block 58 is used solely for residences, except a little plumbing shop and filling station on lot 6, and a little paint shop. There are no business houses in block 56. On block 55 there is an office building of the Security Mortgage Company, and from there on to

Hazel Street it is all residences. South of Third, in block 69, there is a garage, while Buhrman-Pharr Hardware Company is in block 68. The north half of block 67 is residences, while the south half of 67 is a little brick store. North half of block 66 is wholly residences. On the south half of 66 there is a streetcar barn; on the south half of 65 there is Tennison's tin shop; on the north half of that block are residences. Across Hickory Street, in block 64, the property is occupied by stores, residences and a garage; all of the property east of Hickory and north of Third to County Avenue streetcar line is occupied by residences, and the whole district of Fourth Street back to Hazel Street is devoted exclusively to residences, except a tire shop on Fourth Street. The Bottoms house, the second finest in the city, is on Fifth and Hickory, while W. H. Arnold lives directly across. in front.

The brick wall of the ice plant is within six feet of witness' bedroom window. They left a big window on the side next to witness' property. The first witness knew of the erection of the plant was when the work was begun, and he served notice on them that he was going to enjoin them. This was a week or ten days before suit was begun. No material had been put on the ground when notice was served.

Witness stated that he had observed the operation of the electrically driven ice plant of Mr. Powers, on Broad Street. At the time he took notice particularly of it it was only running a part of the machinery, but could easily be heard two blocks away at night. Witness is located two and a half blocks from the Powers plant. It would be necessary, in the operation of the plant of appellee, to use trucks or teams to distribute the ice, and that in the summer time plants are operated day and night. They begin their deliveries at four or five o'clock, and witness stated he could not live in his house at all because of the noise and fumes from the ammonia. He could smell ammonia from the Powers plant when out in the street, and could hear the running of the engine of the

Powers plant two and a half blocks from it. The ice is manufactured in sheet-iron buckets, and, when frozen, the buckets are dumped in hot water, and, when they pull more than one can at a time, you can hear them half a mile on a still night.

If they began operation at four o'clock in the morning there would be no sleep, and witness' property would be ruined for residential purposes, and he knows of nothing else that could run on his property, unless it was a tin shop or something of that character. Nearly all of the property in blocks 56, 57, 58 and 59 are owned by people who live in them; there are just a few rent houses. Mr. Booker, one of the plaintiffs, has lived there twenty years; the Brannons fifteen or twenty years; Mr. Casey has owned his property for twenty years.

On one of the lots, owned by Olivette, there is a small storehouse; the tire shop referred to is a little retail shop where they sell tires. The Iron Mountain Railroad has its main line and switch tracks beyond Broad Street, and Standard Lumber Company faces them. There is a coal-chute on Broad Street, and the Standard Lumber Company is two or three blocks from that. The coal-chute and the lumber plant run only in the daytime. The operators of streetcars live on the north part of block 66. Streetcars begin running at six o'clock in the morning. They are a block from witness' property, but he can hear them. In the daytime they can hear the tin plant, and there is nothing in the vicinity operating at night, except the streetcars, which run rather late. Witness knows nothing of the operation of ice plants. The only opening is on Pecan Street, and witness supposes they are going to unload ice there.

There have not been many buildings erected on Third Street in the past year. Several have been erected from the streetcar line facing toward State Line, but that is several blocks away. Bradfield built a small business building in the district, and this is the only one built in five years; this was a little plumbing shop on Third Street. The Powers ice plant is on Broad Street. Busi-

ness buildings on Third Street are now being erected near State Line. The place where this ice plant is being located is the only vacant lot that has been there for ten years; the other is all built up in residences, and has been for ten years or more.

Plat was introduced as part of the record.

T. A. Clark testified, in substance, that he was a nephew of Mrs. Ida J. Bottoms, and had lived there since 1899; she lives on the corner of Fifth and Hickory Streets, about two and a-half blocks from Powers' ice plant. Mrs. Bottoms was continuously annoyed by the noises from the Powers plant, and the noises disturb people in Mrs. Bottoms' home very much. The home is a comfortable, modern home, above the average.

Witness said that he had been around ice plants a good deal, and cannot see how they could be operated without noise. He does not see how the ice could possibly be loaded or unloaded, especially at night, without making disturbing noises. These plants in the summer operate both day and night. He knows nothing about the Morgan plant proposed to be put in. The Powers plant can be operated either by a gas engine or by dynamos. It is equipped for both. There is less noise with the electric equipment than with the gas or oil engine.

Mrs. Bottoms' home is near the lumber company, but the lumber company does not operate at night. It is the night noise, when one wants to rest, that worries you. Mrs. Bottoms has continuously complained of the Powers plant, and we finally got that plant to put on mufflers and other things to quiet down the noise.

He said he had seen no residences going up on Third Street lately, and thinks the only buildings are business houses. Mrs. Bottoms would be a little closer to the Morgan plant than the Powers plant, which is on Broad Street. His opinion is based on observation of ice plants, and it would be impossible to operate without such annoyance to any one living close. The business houses being built on Third Street are all close to State Line

Avenue and west of the streetcar line on Hazel. West of the car line there has been one plumbing shop built in the past year or so.

C. K. Faison testified, in substance, that he lives on the corner of Fourth and Beech, in a two-story building with a basement and fourteen rooms, used exclusively for his residence, and the home could not be replaced for $20,000. The persons he bought the house from lived there 26 years. He thinks the erection of an ice plant would reduce the value of his property 25 per cent. at least. That he has been around ice plants some and knows something of the operation of machinery. There is much noise of dumping ice into the vault and from the vault to the wagon. The noise from the plant running at night is bound to disturb those in residences, and, if loading began at four or five o'clock in the morning, you would have the same situation. "I cannot see how Texarkana could have business houses out as far as where I live for twenty years yet. There are no business buildings now within a block of it, and I reside within half a block of it. There are beautiful residences and churches all around. With the exception of one little store building, it has not been used, since I have been in Texarkana, for anything other than residences. I have lived in this dwelling for seven years, and the city has grown a good deal since I came here, both in business and residential sections. Business has not encroached on the north side of Third Street. On the south side of Third, the only business house amounting to anything is Buhrman-Pharr Hardware Company. No business houses have been built there east of the streetcar line on Hazel since I have lived there, with the exception of Bradfield's plumbing shop on Beech. I am three blocks from the railroad and more than that from the chute. I have rent-houses on Beech and Fourth Streets, and behind the rent-houses is a little store. There is no manufacturing plant north of Third Street, and has not been for 16 years. The only business house on Fourth Street is a small tire shop. Practically all the people own their

own homes. You can hear the Powers plant two blocks and a half when the wind is against you. You can smell the ammonia before you get to the ice plant. No new homes have been built in the vicinity lately, because there are no vacant lots. There are some vacant lots adjacent to the Catholic school, but they are not on the market. Powers plant is three and a half or four blocks from where I live. We sometimes hear the noise of ice plant and the trucks from Powers plant."

E. V. Olivette testified, in substance, that he had experienced disturbances from the Powers plant, had heard them load the trucks and men swearing, and, when the windows are open in summer, they heard the noise very plainly, and it disturbed them very much.

J. B. Booker testified that he lived in block 58 and had lived there for 33 years, and owned his home all that time. He is well acquainted in that community, and, with few exceptions, they all own their homes. Outside of the plumbing shop and little store on Pecan and Third and the barn or storage house built by Beasley on the north side of Third, there is nothing except this automobile shop referred to on Fourth Street, except residences. The only store in the vicinity now is a small one in front of the Bickley residence, and that is not large enough for a garage, and the man who owns it has a residence on the same lot. You can hear the noise from the Powers plant two or two and a half blocks away, and probably more than that. The operation of an ice plant, in my judgment, as proposed by Morgan, would materially annoy me and my family in our home, and I think we could not live there in any comfort, as we are only 150 feet from the plant. In summer it is necessary that we have our windows up, and from my house I can hear the noises of loading and unloading ice at the Powers plant. At night those noises are more perceptible than in the daytime. I know nothing of the Powers plant. I have brought no suit against the Powers ice plant. It is two blocks further off than the Morgan plant. I know it will be impossible for them to run it without noise.

It is impossible for any machinery that I have ever heard to run without noise. I own two houses there, and it is all the property I have in the world. I could not get a fair price for it. The property could not be devoted to any other purpose.

Chattie Casey lives across the street from Mr. Booker, and has lived there all her life. Her father is now ill. That in summer time they can hear the Powers plant from her house, and it was almost impossible to live there until last summer, when they muffled the noise some. They don't think they can live there with the Morgan ice plant running. In summer it disturbs them, because these noises begin about four or five o'clock, and there is no means of shutting them off from their house. The ice-wagons come around their place about five o'clock in the morning, and get started about four. They could hear the trucks loading every morning. It would be bad to live right close to an ice plant on account of the noises, not only from the machinery but also from the trucks and the men operating them.

Mrs. Katherine Gray testified, in substance, she was the daughter of Mr. Faison (Booker), who is an engineer on the railroad, and sleeps in the daytime. When the wind is in the right direction they can hear, in the daytime, the Powers ice plant, and hear the trucks and the noise of the people down there. From her experience with the other plant she doesn't see how they could live there at all with the Morgan plant running.

Mrs. J. S. Kirby testified, in substance, that she lived in the home of J. G. Bickley, and in the early morning the noise from the Powers plant from their trucks and wagons disturbs them. She said, from her experience and observation, she thinks it would be impossible for them to stand the noise and racket in the early morning hours incident to the operation of the Morgan plant.

Basil Phillips testified, in substance, of living in Dallas, Texas, and said that his experience had been confined to Dallas and adjoining cities. That his experience is that the effect of manufacturing establishments being

constructed in residential districts materially detracts from the property's desirability in that particular section for residential purposes and materially damages the value of the property therefor. Has noted that the construction of ice plants in residential districts materially affected the value of the property for residential purposes. It reduced the place to a very undesirable section, and the houses were all turned into tenements and apartment sites, which did not bring the best of rent. He buys and sells property as a broker. If property is growing into a business section, then in the course of time it would be valuable. In modern city building ice plants are called industries, and their location near residence districts, or retail business sections, is always avoided, and if this ice plant were erected in the vicinity of the business houses, in retail districts of the city, the business property adjoining would be depreciated by its erection. He knows nothing of local conditions in the city of Texarkana.

W. W. Rogers testified, in substance, that he had been in the ice business as a manufacturer, and had kept up with the improvements in ice machinery. There is no such thing as an absolutely noiseless ice plant. There is always some noise attendant upon moving machinery, and, with the very latest machinery, you would have some noise. You have the clicking of the valves of the ice machines and hum of motors and noise of that character. It would be annoying to a person living within six feet of the plant. Ice plants are ordinarily located in industrial centers and not in residential districts. However, in recent years, quite a number of ice plants have been built in residential districts of the city.

M. B. Morgan, for the defendant, testified as follows: That he was president of Morgan Utilities Company, and has been in the ice business for twenty years, having experience both practical and technical. The company owns 16 ice plants. Two in Little Rock, one at El Dorado, one at Conway, one at Jonesboro, and plants at other points in Texas. Two plants of the character of

the one proposed here were constructed by them in Little Rock last year, but different building construction, one being at Sixth and Main, North Little Rock, and the other on the Nineteenth Street Pike, or Asher Avenue. The North Little Rock plant is completely surrounded by residences on the north, east and south sides, and the plant on the Nineteenth Street Pike is strictly in a residential district, with the exception of one store adjoining the plant. Have had no trouble in these communities. They consider the plant an asset. That they are erecting in Texarkana a raw water synchronous motor-driven ice plant, the latest thing in a motor-driven job. The ice crane as well as the hoist is motor driven. The loading of the ice will be done in a vault inside of the building, so as to avoid undue noise from that part of the job. Loading of the trucks will be done on the company's property. The loading dock for retail trade will be in a 30-foot space at the back, housed and inclosed at both ends. The opening on the east side is principally left for putting in the machinery. The storage vault is on Third Street, without opening, the machinery being directly behind the vault. No window openings at the rear. The 32-foot space at the rear will be housed in with brick, and there will be 8-foot rolling doors through which the trucks will come in from the alley up to the dock, loading under cover approximately 150 feet from any house. The retail dock is seldom used after 8 o'clock at night. The plans call for a flower garden in front of the building and flowers on the side. On the top of the building are the cooling spray pumps, instead of a cooling tower. The sprays will not be within 30 feet from the edge of the building on either side, and will be hid from the street; there will be no noise, grease, dirt or anything objectionable on the outside of the building, and the only thing one could hear ten feet away from the plant is the blower. There will be a scoring machine, which will be the next noisiest machine, located in a vault, and you cannot hear the noise from that. Wholesale deliveries are begun ordinarily in the morning at 5 o'clock. The

drivers will be at the plant in time to serve the residents from 6:30 until noon. The wagons for the residential sections load about 6:30 in the morning, and the ones loading at five o'clock serve the wholesale trade, such as restaurants, hotels, etc. The noise of trucks and drivers depends on the kind of employees, whether noisy men or good men. There is no reason why there should be unnecessary noise or confusion in loading the ice. It only takes about ten minutes to load an ordinary ice-truck at this particular plant. By the modern method there is little noise from the ice-can, and they are raised by an electrical device and that is practically noiseless in operation. The only noise you can hear from the dumping of the ice is about equal to that of a man stepping on a hardwood floor. The ice falls from the can to the floor.

Witness here introduced a picture of the ice plant at Little Rock, and also a picture of the plant at Breckenridge, Texas.

The Powers plant was a scrap or junk plant, which had been built for a gasoline engine and later changed to a motor plant. It is a belt-driven plant, which in itself is noisy. Little Rock, in the State Hospital for the Insane, has an ice plant, one in the insane asylum, the Confederate Home, the Runyan Hospital. In the insane asylum the plant is in the basement, in the others the plants are located in the building adjoining the patients' rooms. Expect to operate the plant full 24 hours.

The blower is the noisiest thing in this plant. You can, of course, hear the compressor and the clicking of the valves as they seat themselves. The number of trucks used in the business will depend on the amount of the business. The retail trucks will come into the building probably fifteen minutes of six and the wholesale trucks will be there before five o'clock in the morning. If you were to drive by the plant at Sixth and Main in North Little Rock you couldn't hear it running from the sidewalk. The same is true of the other two plants which we have recently put in. Near the plant at Sixth and

Main there is an elevator, and half a block from the plant a lumber yard. There is nothing on the other side of the building. On the south side there is a block of residences; west, a lumber yard and elevator. The plant on Nineteenth Street Pike is about three miles from the main part of town. There is an ice plant of the Southern Ice & Utilities Company and a store within 100 feet of us on the pike. We are 6 or 8 blocks outside of the city limits. We sell the ice to retail trade, and do not deliver any at all. Ammonia fumes depend on the operators. The stuff being put in this plant will last a lifetime. If you have the inclosed type of compressors, you won't have the fumes. The scoring machine makes the noise of an ordinary buzz saw, but is inclosed in the ice vaults, and the noise from that would not penetrate outside. Got a permit for the plant from the city of Texarkana.

L. C. Lewis, a mechanical engineer, testified, in substance, he is familiar with the machinery proposed to be put in and has driven up in front of a similar plant in Little Rock and had to look inside to see if the plant was being operated. Eight feet from the door you can't hear the plant being operated from the sidewalk. You can hear the hum of the motor and the machine turning over, which is not objectionable when you get 8 feet away. The pump makes no noise, but you might hear the swishing of the water four or five feet from it, but not outside the building. The plant is so constructed as that ammonia may be transferred from one part of the system to another so the fumes cannot escape to any great degree, even if a break occurs. All hotels have ammonia plants such as this. In the General Hospital at Little Rock they have an ice plant making a ton and a half a day, and the machinery is in the main building, the cooling system being on top of the one-story part, with the water running over breakers day and night, and patients' rooms are above that. At the Hospital for Nervous Diseases the plant is installed thirty feet from the wall; and in St. Vincent's Infirmary the machinery is in the same

building, and they have no objectionable escape of ammonia. Powers' plant is no plant at all, though he is now operating it with electricity. Southern Ice & Utilities Company is a steam plant, not modern. Everybody knows how much noise a truck makes. It depends on how they are equipped. At filling stations the cars drive in just about the same as in a place like this one.

Dan Dewberry testified, in substance, he has been in the real estate business in Texarkana for ten years. The buildings erected on Third Street the last ten years have been business buildings, and no residences within that time, and considers Third Street the next business street. Third Street is rapidly growing into a business street. As to whether he would consider a filling station or garage an asset to a residence district, he said it would depend altogether upon the type of the filling station, and said that he would consider a high class one an asset.

This action was begun in the chancery court to restrain the operation of an ice plant in the residential district in the city of Texarkana. The undisputed proof shows that the ice plant is located in a thickly populated section of the city; a section devoted to residences almost exclusively, and within six feet of the bedroom window of one of the plaintiffs. There is some conflict in the testimony as to the noise and fumes caused by the operation of a modern ice plant, but there is no dispute about the place being a residential district, and there is no dispute about its close proximity to some of the residences. It is also undisputed that there will necessarily be some noise; that the loading and unloading and operation of the plant will create some noise, and many of the witnesses testify that it would greatly reduce the value of property, and some of them testify that it would be impossible to live in the homes they have occupied for many years if the ice plant is operated there.

The operation of an ice plant is a lawful business, and the only question here is whether, from the evidence in this particular case, the operation of said ice plant should be restrained, and a fair test, under the circum-

stances, as to whether its operation would constitute a nuisance is the reasonableness or unreasonableness of operating the ice plant in the particular locality and under the circumstances of this case. The locality is to be considered in determining whether it is a nuisance, for what might be a nuisance in one locality might not be in another. Operating an ice plant might be perfectly proper in a business or manufacturing neighborhood, and a nuisance when carried on in a residential district. And it makes no difference how lawful a business may be in itself, or how suitable the location may be, these things cannot authorize the carrying on of a business that directly, palpably and substantially injures another's property or causes unnecessary annoyances to persons in the vicinity, especially when there is no showing that a suitable and convenient location might not be had in the city of Texarkana where there would be no injury done to residential property or to the residents. No definite rule can be given to govern all cases, but each case must depend on the particular circumstances which characterize it, and it is proper to consider the nature of the business, the kind of annoyance, the location, the surroundings, and all the attending circumstances.

In this case the proof shows not only that the operation of the ice plant would materially injure the property, but it also shows that the residents would be annoyed and suffer very great discomfort if the ice plant was permitted to operate at this place.

This court, in the case of *Durfey* v. *Thalheimer*, 85 Ark. 584, 109 S. W. 519, said:

"It is the duty of everyone to so use his property as not to injure that of another, and it matters not how well constructed or conducted a livery stable may be, it is nevertheless a nuisance if it is so built as to destroy the comfort of persons owning and occupying adjoining premises, creating annoyances which render life uncomfortable, and it may be abated as a nuisance."

And it may be said here that it matters not how well constructed or conducted an ice plant may be, it is

nevertheless a nuisance if built and operated in a residential district so that it destroys the comfort of persons owning and occupying adjoining premises, creating annoyances which render life uncomfortable. Certainly it cannot be said that the erection and operation of an ice plant within six feet of a bedroom window would not very greatly annoy the persons occupying the room, in addition to the fact, as shown by the proof in this case, that the property itself would be greatly damaged, worth much less than if the ice plant was not operated there.

Consideration of the testimony in this case leaves no escape from the conclusion that the operation of the ice plant in the residential district where located would not only injure the property but would be a serious annoyance to the residents in the locality.

This court, in deciding a case where the industry was established before the residences were built, said:

"The case affords, perhaps, an example where a business established at a place remote from population is gradually surrounded and becomes part of a populous center, so that a business which formerly was not an interference with the rights of others has become so by the encroachment of the population. Under these circumstances private rights must yield to the public good, and a court of equity will afford relief, even where a thing, originally harmless under certain circumstances, has become a nuisance under changed conditions." *Ft. Smith* v. *Western Hide & Fur Co.*, 153 Ark. 99, 239 S. W. 724.

If it is true that, where an industry is established at a place remote from population and is afterwards surrounded and becomes part of a populous center, the industry becomes a nuisance so that it will be restrained by the court, certainly, when the place selected is in a residential district, and the persons proposing to establish the ice plant are notified before any material is placed on the ground, it is the duty of the court to prevent the nuisance, if the proof shows it to be such.

This court has also said:

"The maxim, 'use your own property so as not to injure another,' is peculiarly applicable in nuisance cases. If one does an act, in itself lawful, which yet, being done in that place, necessarily tends to the damage of another's property, it is a nuisance; for it is incumbent on him to find some other place to do that act, where it will be less offensive. * * * That is a nuisance which annoys and disturbs one in possession of his property, rendering its ordinary use or occupation physically uncomfortable to him. For such annoyance and discomfort the courts of law will afford redress by giving damages against the wrongdoer, and, when the causes of annoyance and discomfort are continuous, courts of equity will interfere and restrain the nuisance." *Yates* v. *Mo. Pac. Rd. Co.*, 168 Ark. 170, 269 S. W. 353, 38 A. L. R. 1434.

The operation of this ice plant in a residential district, under the proof in this case, would be a nuisance. The decree is therefore reversed, and the cause remanded with directions to enter a decree in favor of the appellants according to the prayer of the complaint, restraining the appellee from maintaining a nuisance.

Justices KIRBY and MCHANEY not participating.

Mr. Justice SMITH dissenting.

BRIGHT v. STATE.

Opinion delivered May 9, 1927.

1. CRIMINAL LAW—CONCLUSIVENESS OF VERDICT.—It is the province of the jury to weigh the testimony, and, when there is substantial evidence, the finding of the jury is conclusive on appeal.
2. WITNESSES—CROSS-EXAMINATION OF WITNESS.—In a liquor prosecution, the prosecuting attorney could cross-examine a witness, jointly indicted with defendant, as to statements made before the grand jury.
3. CRIMINAL LAW—QUESTIONS NOT RAISED BELOW.—Where the appellant did not object to questions asked at the trial, such questions will not be considered on appeal.

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

M. E. Dunaway and *John D. Shackleford,* for appellant.

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

MEHAFFY, J. The appellant, Bob Bright, was indicted and convicted in the Pulaski Circuit Court of the crimes of manufacturing liquor, possessing a still, and manufacturing mash, and his punishment fixed at imprisonment in the State Penitentiary for a period of one year in each case, the sentences to run concurrently. Defendant filed his motion for a new trial, which was overruled, and appeal prayed to this court and granted. Appellant was given 40 days in which to file his bill of exceptions.

Bob Brown, a witness for the State, testified in substance that he is a deputy sheriff of Pulaski County, has lived in Little Rock about 15 years, and has been deputy sheriff three years. That he had known the defendant about 25 years. Witness was formerly in the sawmill business, and defendant lives back of the old mill place. He knew him long before he was a deputy. He found and destroyed a still out west of town a month or two ago. A deputy sheriff named Geyer was with him at the time. Both were active deputies. They located the still between 8 and 9 miles west of Little Rock, on Rock Creek. They went out there about the 14th of October and found the still. They had information that the still was out there. It was in operation when they got there. Gene Voque and the defendant were both standing in front of the still. He saw them when he was about 50 or 60 yards away, and watched them for a few minutes. Went up and told them not to run, hollered at them to stick up their hands, and Bright ran, and Voque stopped. Bright got away.

It was an 80-gallon copper still, full of mash. It was working and running off, and a fire was under it. That he didn't know how much mash there was, but they had

emptied two barrels of mash in the still. The still would hold a barrel and a half of mash, but did not know how much was in the still. It was running and cooking. They were using pine knots for fuel. The still was about three-quarters of a mile northwest of Bright's house. That they watched them about ten minutes before they came up. They were both standing there, laughing and talking. No one else was there but those two. There is a road from Bright's house to Red Bank, which is a little more than a fourth of a mile from the still. There was a good spring at the still. There was a trail leading from Red Bank where they drove the car up to the still. Defendant had a car, a little Ford truck. The road crosses the creek, and there was evidence of car-tracks crossing the creek and stopping. There was a regular turning-around place. The road went up to Bright's house. Red Bank is about half a mile from Bright's house. Voque lives about a mile and a half from the still and about three-quarters of a mile from Bright. Witnesses brought Voque into town with them, and he was released on bond. They went next day to Bright's house, and he ran from Brown when he saw him. Went out the back way over the fence. Brown hollered to Geyer to stop him, and he ran back north through the woods. They went over to Voque's house to serve summons on him, and, while Geyer was in the house and witness was sitting in a car outside, Bright drove up in a car with Voque's brother, and, when he saw witness, he jumped out of the car before it stopped, and ran. They never arrested Bright. He afterwards came in and gave up. Bright's house is the last house on the road to Red Bank.

Witness testified that he was put on pay as a deputy when Mike Haynie went out. Before that he was in the timber business, but served as a deputy, and got paid once in a while. He served papers a time or two and several times on several occasions. He helped them make raids. The main thing he was interested in was the whiskey proposition. He is very antagonistic to it. He

was interested in breaking up the whiskey business. In the last three years he has probably made 40 or 50 raids. Had been on pay 35 days and has captured 10 stills and made 18 arrests. When he went out there he was looking for a still. They had information there was one in that locality. They got within about three-quarters of a mile of the still, and then walked the rest of the way. They first discovered the still about 60 yards away. That when he first saw it he did not know who was operating it. He got up about 20 or 30 steps and watched them, and hollered at them not to run. At that time they were not over 15 steps from them. Witness testified that this was not the first time Bright had run away from him. He stated he never had anything against Bright and never had any trouble with him. Witness said that he knew Bright was guilty of some violation of the law. Witness knew it was Bright. As long as he had known him he could not be mistaken. He did not shoot at him. He shot up in the air. He said that he could have hit him if he had wanted to. He saw Bright in the court room this morning, but did not point him out to Geyer. Voque ran only about ten feet from the still. Both started to run, and Voque stopped, and the other fellow did not stop.

Witness said he knew Voque, and was positive about it. Had known him ever since he was a kid. Never tried to arrest Voque before. Arrested his brother one time.

W. F. Geyer, another deputy sheriff, testified to substantially the same facts testified to by Brown. He stated that he did not know Bright's name at the time, but knew that the defendant was the man he saw at the still. This witness did not know Bright before, but saw him once before when Bright ran for Voque's house. When witness saw these men at the still he saw their faces; they turned and looked at the officers, and then started to run.

Gene Voque, witness for the defendant, testified that he had known Bright all his life; that Brown and Geyer

arrested him at the still. Witness is 22 years old, and lives with his father. The still is about two miles from his home. It was an 80-gallon copper still. They found him with 10 gallons of whiskey. Officers were about 20 or 25 yards away when they were first discovered. He knew Brown, but did not know the other fellow. When the fellow that was with Brown asked him who was with him, he told him Davis. He did not tell them it was Bright. He said it was Roy Davis with him.

This witness testified that Bright was not there, and he was cross-examined at length by the prosecuting attorney and asked about his testimony before the grand jury. He admitted that he testified that he went over to the still and got caught, and told them he went over there to get a drink, and had nothing to do with the still. That he told them that to defend himself. That he also told the grand jury that he had told the officers it was Bright when they caught him. That he did not know why he did that. Testified that he did not tell the officers it was Bright when they came out, but he told the grand jury that he had told them that. That he told the officers when they arrested him that it was Davis. When he stated before the grand jury that he told the officers it was Bright he was excited and did not know what to tell them. That he did not tell the truth about it before the grand jury. That the still belonged to him and Davis. Witness did not know where Davis stayed in town. Had never asked him. After witness met Davis in town he always came out there. Davis was to furnish everything and give witness $3 a gallon for his part. That this is the first whiskey he had made on that place. That he and his brother lived together. That when he testified before the grand jury he was trying to protect himself, and he was now telling the truth.

Frank Doll testified that he had some work for appellant, and thought that witness was at his place in the morning. That appellant was there all day the day he did the work. He was not there the next day. Could

not remember when he had the work, whether it was Wednesday, Thursday, or Friday.

The appellant testified about where he lived; that he had lived there for six years; born and raised out in that country, and lived there all his life. Runs a milk dairy, sells a little wood; that he is buying his own home, and has a wife and nine children. The oldest is 17, and the others are younger. Has lived on the place he is now trying to buy about a year. Knows nothing about the still, and was not there when the officers arrested Voque. That he was over on the Hot Springs road that day, getting his car fixed. Exhibits of bills for repairs showed that he was correct, and that he paid it on October 14. The first appellant knew about him being charged with it was when he saw it in the paper the day afterwards, and the day before he was at the garage all day having his car fixed. His wife asked the officers if they had a warrant, and he was figuring on coming to town to make his bond, because he did not want to be locked up in jail. That Brown had been gouging after him. Had him in court three or four times, telling what he was going to do to witness. Has known Brown 35 years. Brown told him some of the boys would fix him up for causing him to go four or five miles around with his logs. Had witness arrested two or three times, and testified against him. Had no idea how far the still was from his house. He figured it about a mile or a mile and a quarter where they said it was. He did not think there was any way to go to the still from his house. You could not go to Red Bank. They are going by his house every day to Red Bank. He never had any connection with Voque in the whiskey business. Has known him 20 or 25 years. Witness and his wife run a dairy. Most of the time his wife brings the milk to town. Brown never caught him at the still. Never caught him close to the still. Never knew there was a still there. Walked up on the officers chopping up the still, and came back where Brown and two revenue officers were chopping up the still. Witness told them he was hunting cows.

He did not run then. That he was not the one that ran away. He was fishing, and the officers asked him to show them the way out of the woods, and he showed them. He was down there fishing at night. Was never convicted in Federal court. Pleaded guilty one time, and was fined $25 for possessing liquor. They did not stick him for selling liquor to a butcher. He did not sell it to him. When Brown and Geyer came next day the reason he ran he did not want to be locked up, but wanted to make bond. Did not aim to be arrested. Does not know anything about Sexton coming after him. Did not remember the date that he heard about the arrest of Voque. Did not remember whether it was the day he had his car fixed or the day before. Never saw Geyer before. Saw Brown point witness to Geyer in the court room this morning.

John M. Whitfield testified, in substance, as follows: That he knew the appellant well. They lived near each other, and he saw him every day. That appellant operated a dairy, and that he was a farmer, and bore a good reputation as a law-abiding citizen. That he had never heard of him operating a still or being connected with it.

The appellant contends, first, that the testimony was not sufficient to sustain the verdict, and argues that the testimony of the character introduced should be weighed very carefully. This is true. It is, however, the province of the jury to weigh it, and, when there is substantial evidence, this court has many times held that the finding of facts by the jury is conclusive. We think there was sufficient evidence to sustain the verdict.

It is next contended by the appellant that it was error to permit the prosecuting attorney to examine a witness as to his testimony before the grand jury in a matter in which the witness and the defendant on trial are jointly indicted. The questions asked the witness were with reference to statements made before the grand jury, and it is earnestly contended that the case ought to be

reversed because the court permitted these questions to be asked.

"The first assignment of error upon which the defendant relies for a reversal of the judgment is that the court erred in allowing the prosecuting attorney to read to Elton Holwell and Mrs. Sarah Hopper extracts from their testimony before the grand jury and ask each of them if he had not made such statements. The extracts from the testimony before the grand jury were read to the witnesses for the purpose of refreshing their memory, and each one stated that he had given the testimony before the grand jury as read to him. In making this contention counsel for the defendant relies upon the case of *Browne* v. *State,* 168 Ark. 433, 270 S. W. 537. We do not think that case has any application. There the witness denied that he had testified differently before the grand jury from the testimony being given by him at the trial. Therefore the court held that it was improper to admit the purported evidence of the witness before the grand jury for the purpose of impeaching him, without first proof that the testimony offered was the correct testimony of the witness before the grand jury. In the case before us each witness admitted that the extract of the testimony before the grand jury had been given by him before that body, and stated further that such testimony was true. Thus it will be seen that the testimony was admissible, either for the purpose of contradicting the testimony given by the witnesses at the trial or as substantive testimony given by them at the trial, after refreshing their memory from the testimony given by them before the grand jury." *Crafford* v. *State,* 169 Ark. 225, 273 S. W. 13.

In the above case the witnesses were shown what was claimed to be their statements before the grand jury, and the contention was made that that was error. But in this case the prosecuting attorney simply questioned the witness about his statements before the grand jury, and the witness answered all the questions, telling how

he testified and giving his reasons for it. It was a proper cross-examination of the witness.

The appellant next argues that it was error to ask defendant certain questions, but he does not seem to have objected to these questions when asked. Appellant, in his motion for new trial, objects to two instructions, one on the question of reasonable doubt, and the other as to what constitutes possession of a still. Each of these instructions has been approved many times by this court, and there was no error in giving them. There was sufficient testimony to require the submission of the case to the jury, and the jury's finding is conclusive. The judgment is therefore affirmed.

LAYNE-ARKANSAS COMPANY v. SEEMAN.

Opinion delivered May 9, 1927.

1. SALES—DEFECTIVE MATERIAL FOR REPAIRING.—Where the buyer of a pump himself furnished the material which was used to make the seal, he could not recover from the seller for damage to his rice crop, resulting from insufficiency of water supply, on the ground that the material used in making the seal was defective.
2. SALES—DUTY TO MINIMIZE DAMAGES.—Where the seller of a pump for water for a rice crop refused or neglected to repair it as required by its contract, the buyer was bound to have the repairs made by others in order to minimize the damage to his crop.
3. SALES—DAMAGES FOR DELAY OF MAKING REPAIRS.—The seller of a water pump who agreed to keep it in repair was not liable for damages to the buyer's rice crop, resulting from the seller's delay in repairing the pump where the buyer did not give any notice to the seller that he would suffer special damages from delay, if such damages were not within the contemplation of the parties.
4. SALES—DAMAGES RECOVERABLE UNDER CONTRACT.—Under a contract for the sale and installation of a water pump and motor, providing that any material proving defective would be replaced, and that no claim for labor or damages would be allowed, the buyer could not recover damages for delay in repairing the pump resulting in injury to the rice crop.

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

A. G. Meehan and *John W. Moncrief,* for appellant.

Joe Morrison and *George C. Lewis,* for appellee.

McHANEY, J. This is an action to recover special damages for the alleged breach of a contract for the sale and installation by appellant of a pump and motor to operate on the rice farm of appellee. The written contract is as follows:

"Layne-Arkansas Company
Irrigation Well Contractors Irrigation Supplies
State Agents Bessemer Crude Oil Engines
Stuttgart, Arkansas.
We guarantee Water or no Pay.

A duplicate in all cases to be retained by the customer.

"All orders accepted by us subject to delay in fulfillment on account of strikes, unavoidable accidents, or other causes beyond our control. Any material proving defective when used for the purpose specified will be replaced during the pumping season of 1925, but no claim for labor or damages will be allowed. All contracts and deliveries are subject to the acts of the Government in times of war or national emergency, or other causes beyond our control.

"Date 3/27/1925.

"Layne-Arkansas Company:

"Please ship me ct.

"One type LC-15-in. 4 stage Layne pump bowls

"One 30 HP. Westinghouse motor 3 phase

"220 volt-1160 R.P.M. 40° set and wired in and hand starter

"For which I will pay the net price of fifteen hundred sixty-eight 28/100 ($1,568 28/100) dollars.

"The terms of payment being 1/3 cash with order, 1/3 cash when set, cash and title-retaining note due 12-1-25 for remaining 1/3 all note to bear interest from date of invoice at rate of 8 per cent. per annum.

"Agreements regarding delivery and erection.

"I agree to.....Layne-Arkansas Company agrees to set pump in well, motor set and wired and guaranteed pump to show an efficiency of 60 per cent. or better and meet condition of the Ark. Light & Power Co.

"This order contains all agreements concerning this sale.

"The express conditions of sale and purchase of the property for which the contract is given is such that the title, ownership and right of possession does not pass from the said Layne-Arkansas Company until the note or notes or any account that is given or made in connection with such machinery as described herein to said Layne-Arkansas Company are paid in full.

"Signed O. E. Seeman.

"Signed Fred T. Thayer, salesman.

"Notice to customers—Read this carefully, as this is the complete understanding regarding this order, and no verbal representations not written here are binding on either party."

Thereafter, in accordance with said contract, appellant installed said pump and motor, appellee paying for same in accordance with said contract, $500 with the order, $500 on the 8th day of June, 1925, the day said pump was installed, and executed on said date his note for the balance in the sum of $568.20 due December 1, 1925, with interest from date at 8 per cent. per annum. A necessary part of the pump is a seal, the installation of which is said to be sealing the pump. This is done by fastening a joint in the piping through which the pump brings the water, and consists of coarse sacking which goes down inside the joint upon which it rests, by means of which a vacuum is created. If the pump is not properly sealed it will leak air and thereby reduce the quantity of water. The seal in this case was made by appellant from old sacking material furnished by the appellee, who testified that he was present when the seal

was installed, and that he is familiar with the purpose of a seal, knows the importance of it, and knew what the effect of a defective seal would be, but did not know whether the seals are guaranteed or not. The pump was properly installed, and, when started up, it furnished an ample supply of water. But, after a few days operation the output was decreased, and appellee says that he advised an officer of appellant concerning the falling-off of the supply of water, and that such officer promised to attend to it, but did not do so. On the 26th day of June appellee had the Arkansas Light & Power Company make a test, as provided in the contract, and found that it was delivering about 30 per cent. efficiency instead of 60 per cent. as provided in the contract. He then notified appellant's manager at Stuttgart, Mr. Woodburn, on the 27th day of June, of the test made, and Mr. Woodburn sent a crew out at once and fixed the well up, put on a new seal without making any charge therefor, and that the pump has been working satisfactorily ever since. He thereafter, on the 28th day of January, 1926, brought suit against appellant for damages which he claimed he suffered by reason of the diminished production of his rice crop on account of the insufficient water supply for about two weeks, from the 14th to the 29th days of June, based on the alleged negligence of appellant in the installation of a seal when the pump was originally installed. Appellant demurred to the complaint, and, it being overruled, answered, denying the allegations of negligence and loss, and filed a cross-complaint on the above-mentioned note, asking judgment against appellee for the amount of the note and interest.

The case was tried by a jury, which resulted in a verdict and judgment against appellant in the sum of $1,200 less the unpaid note and interest, amounting at that time to $598.37, or a judgment over in the sum of $601.63. From the judgment against it the appellant has appealed.

At the conclusion of the testimony appellant requested the court to instruct the jury peremptorily in

its favor, both on the complaint and cross-complaint, which the court refused to do, and this assignment of error is brought forward in the motion for a new trial. Inasmuch as we are of the opinion that this assignment of error is well taken, it becomes unnecessary to discuss the other questions raised in the briefs. By the terms of the contract above set out, appellant agreed that "any material proving defective when used for the purpose specified will be replaced during the pumping season of 1925, but no claim for labor or damages will be allowed." The contract further contains this provision: "Layne-Arkansas Company agree to set pump in well, motor set and wired, and guarantee pump to show an efficiency of 60 per cent. or better and meet condition of the Ark. Light & Power Co." This action is based on a breach of the contract in that the material proved defective. The only material which proved defective was material furnished by appellee himself for the making of the seal, but he says he was present at the time and advised the employees of appellant that they were cutting the seal too small. The evidence conclusively shows, in fact it is undisputed, that a rice man of any experience will know immediately when the seal on a pump is taking air; that there are several tests by which this can be determined, one being by the bubbles of air in the water. Another is that, by throwing a shovelfull of dirt in the well, if the seal is leaking, muddy water will come back through the pump. It is undisputed that appellee is an experienced rice farmer, having been engaged in that business for many years, and testified himself that he was familiar with the seals on pumps, their purpose, importance, and the effect of a defective seal. Therefore, by the exercise of ordinary diligence, he could and must have known that the seal on his pump was leaking air. When he advised appellant that his water supply was diminished, instead of having a test made by the Arkansas Light & Power Company to determine whether the efficiency of the pump was 60 per cent. or better, and instead of telling them that there was a leak in the seal, he simply

told them that he was not getting enough water. He does not contend that he gave them any notice at that time that his rice crop would be damaged unless the supply was increased, nor did he advise them that he would suffer special damages if immediate attention was not given it. He says Mr. Thayer, officer of appellant, told him the water level was low in all wells on account of the extreme dry weather in 1925, but appellee did not tell Mr. Thayer that the seal was defective. Shortly after this he had the test made, in accordance with the contract, and agrees that appellant immediately repaired same at its own expense, and that he thereafter had no trouble with said pump. Moreover, the undisputed evidence shows that it would not have cost exceeding $80 to have pulled the pump and had same repaired. There were a number of competent people available to appellee for this purpose. It was his duty, if appellant had refused or neglected to repair the pump, to have engaged others to do so and thereby prevent or minimize damage he might sustain to his rice crop. As was said in the case of *Johnson* v. *Inman,* 134 Ark. 345-349, 203 S. W. 836:

"Unless the repairs required of appellant under the contract were extensive and costly in comparison with his rents, it was the duty of appellee to make them and prevent or reduce the damage under the rule announced in the case of *Young* v. *Berman, supra.*" The rule in that case, quoting from the syllabus, is as follows:

"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."

In *Selig* v. *Botts,* 128 Ark. 167, 193 S. W. 534, the court, in the opinion on rehearing, on page 172, used this language:

"We take occasion to say that the court properly refused to allow appellee to prove damages alleged to have been sustained to his rice crop as being indirect,

and not within the contemplation of the parties under the terms of the contract."

This case was tried, as was the case of *Johnson* v. *Inman, supra,* on the theory that appellant breached the covenant for repairs, and that, without any effort on his part to make the necessary repairs, he was entitled to recover the difference between the value of the rice crop he raised and the value of the rice crop he might have raised but for the breach, and in that case this court said:

"The element of doubt is inherent in future profits in almost any character of business, and, on that account, courts are slow to adopt the profit rule as a measure of damages on account of contractual breaches, and will never do so if a more certain and definite rule can be fixed, and in no event will allow purely speculative damages. This court is committed to the doctrine that only compensatory damages will be allowed, and that one injured by the breach of a contract must prevent or reduce the damages by the exercise of reasonable effort or the expenditure of reasonable sums."

The facts in this case are entirely different from those in *Harrington* v. *Blohm,* 136 Ark. 231, 206 S. W. 316, where the contract provided that Harrington should dig a well and install a pumping machine by June 1, and, on account of his failure to do so, he was held liable for the damages to the rice crop caused by his failure so to do. But in this case the pump was properly installed within the time agreed upon, and this action arises out of the alleged negligence in failing to repair, where the clause in the contract, with reference to such repairs, specifically provides that "no claim for labor or damages will be allowed." This case also differs from the case of *Beeble* v. *Arkansas Light & Power Co.,* 172 Ark. 262, 287 S. W. 766, in which the alleged breach of contract was failure to furnish a motor of sufficient horse-power to pump necessary water to irrigate a 120-acre tract of growing rice. But in this case the contract is wholly different, as heretofore explained. The only guarantee appellant made was

that it should test out 60 per cent. efficient, and that, if any repairs were needed during the pumping season in 1925, it would make them, which it did immediately after being informed of the failure of the pump to meet the test agreed upon. There is therefore no evidence in the record to justify the submission of this case to the jury, and the judgment against appellant will therefore be reversed, and appellee's cause of action dismissed.

On the cross-complaint there is no dispute about the amount due on the note which remains unpaid, and judgment will be entered here for the amount of the note and accrued interest. It is so ordered.

COTNER v. ALLINDER.

Opinion delivered May 9, 1927.

WILLS—FEE SIMPLE INTEREST.—Under a will authorizing defendant's wife, as executrix, to sell all testator's realty to liquidate all his debts, and to retain the balance arising from said sale for her own benefit, *held* that the executrix had absolute power to convey the fee in the whole and to retain any balance arising from said sale for her own benefit after discharging the testator's debts.

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

Kincannon & Kincanon, for appellant.

Evans & Evans, for appellee.

McHANEY, J. Appellants are the children and grandchildren of a former wife, and appellee is the widow of J. C. Cotner, who died testate in the Southern District of Logan County on November 15, 1920. The pertinent parts of his will, which was duly probated, are as follows:

"First. I hereby constitute and appoint my wife, Ethel Cotner, to be the sole executrix of my last will, directing my said executrix to pay all my just debts and funeral expenses, and the legacies hereinafter given out of my estate.

"Fourth. I devise to my said executrix all my real estate, with remainder thereof, on her decease, to my said children and their heirs, respectively, share and share alike, excepting as follows, in fifth of this will.

"Fifth. I direct my said executrix to sell any and all of my realty, so far as the settlement of my mortgage debts demand, and with the funds of said sale liquidate all liens against said realty. Should my executrix choose to sell all my realty, then I direct her to liquidate all my debts and retain any balance arising from the said sale for her own benefit. The sale of my realty and settlement of my debts shall be left wholly to the direction of my said executrix."

At the time of his death the testator owned about 240 acres of land and five or six lots in the town of Booneville, and on the acreage there was a mortgage indebtedness of approximately $4,000. This was substantially all the property owned by him. The widow, appellee, with her own funds paid off and satisfied this indebtedness. In December, 1924, she entered into a written contract with L. P. Hewett for the sale of the acreage for $4,000, and tendered him a deed therefor. He declined to accept said deed and pay for said land, on the ground that, under the above provisions of the will of J. C. Cotner, the appellants were claiming some interest in said land, and that she acquired only a life estate in the remainder of said property after the payment of the debts. She thereupon instituted this action against Hewett for specific performance and against the appellants for a construction of the will. The court decreed title in fee simple in appellee and specific performance against Hewett, from which comes this appeal.

The validity of the will is not questioned. In the language of counsel for appellant, "there is only one question involved: what interest have the appellants and the appellee in the lands in controversy?" The chancellor answered this question for appellants by holding they had no interest therein. We agree that this decision is correct. The "fifth" paragraph above quoted gives

appellee the absolute power to sell the whole of said real estate, provided she paid all the testator's debts. If she did this, and there is no contention to the contrary, then she had absolute power of sale to convey the fee in the whole and "retain any balance arising from the said sale for her own benefit." The "fourth" paragraph is entirely dependent upon the fifth.

This case is ruled by the decisions of this court in *Archer* v. *Palmer,* 112 Ark. 527, 167 S. W. 99; *Thurman* v. *Symonds,* 126 Ark. 216, 190 S. W. 106; and *Union & Merc. Trust Co.* v. *Hudson,* 143 Ark. 519, 220 S. W. 820. Appellants rely upon *Patty* v. *Goolsby,* 51 Ark. 61, 9 S. W. 846, but, as said in *Union & Merc. Trust Co.* v. *Hudson, supra,* "the case of *Patty* v. *Goolsby,* 51 Ark. 61, 9 S. W. 846, and *Douglass* v. *Sharp,* 52 Ark. 113, 12 S. W. 202, relied upon by counsel for defendant, are not applicable. There is nothing in either case to indicate that the testator intended to give the life tenant the absolute power to dispose of the fee in the estate. Such intention is clearly indicated by the unrestricted power of disposal expressly granted by the second clause of the will under consideration, and this view is materially strengthened when we consider the language in the first part of the third clause."

We do not deem it necessary to review these cases, showing their applicability to this case, as a careful consideration of them leads inevitably to the conclusion that they are decisive of this case. The decree is therefore affirmed.

SPEARS v. STATE.

Opinion delivered May 9, 1927.

1. INDICTMENT AND INFORMATION—DUPLICITY.—An indictment charging defendant with fraudulently entering on his employer's time-book the names of four persons not in the company's employ does not charge four separate offenses, but the commission of the crime of false pretense through each of the parties.
2. FALSE PRETENSES—DESIGNATION OF PARTY INJURED.—The use of the hyphen in place of the "&" in employer's name in the indict-

ment of a foreman for false pretenses, by designating the party defrauded as the "Wisconsin-Arkansas Lumber Company," instead of the "Wisconsin & Arkansas Lumber Company," *held* not a fatal defect, under Crawford & Moses' Dig., § 3014, providing that no indictment is insufficient for a defect not affecting the substantial rights.

3. FALSE PRETENSES—ERROR IN DESIGNATION OF PARTY DEFRAUDED.—Omission of the word "Arkansas" from Wisconsin-Arkansas Lumber Company in one of several designations of the party defrauded, in an indictment of a foreman for false pretenses *held* immaterial, under Crawford & Moses' Dig., § 3014, providing that no indictment is insufficient for error not affecting substantial rights.

4. FALSE PRETENSES—SUFFICIENCY OF EVIDENCE.—Evidence in a prosecution for false pretenses *held* sufficient to take the case to the jury.

5. CRIMINAL LAW—JURY QUESTION.—Where there is any substantial evidence tending to show guilt of the accused, it is a question for the jury, and not for the court, to determine the matter of his guilt.

6. FALSE PRETENSES—DESCRIPTION OF MONEY.—On an indictment of a servant for false pretenses charging that he caused his employer to pay to him $300 "lawful money of the United States," it was unnecessary to prove whether the money was gold, silver or paper.

7. CRIMINAL LAW—EVIDENCE OF FRAUD.—On an indictment of a foreman for false pretenses in entering on the timebook names of four persons who were not employees, testimony of one not named in the indictment, that he had worked for accused, but had received his pay from accused's employer, tending to prove a general scheme to defraud, *held* admissible.

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

D. D. Glover, for appellant.

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

McHANEY, J. Appellant was indicted, tried, convicted, and sentenced to one year in the penitentiary on a charge of false pretenses, and from the judgment against him he has appealed to this court.

He has urged for our consideration four errors of the trial court, which are properly set up in the motion

for a new trial, which was overruled. The first is that the court erred in overruling his demurrer to the indictment. The first ground of demurrer is that the indictment charged four separate specific offenses, in that it charged that he, as foreman of the Wisconsin-Arkansas Lumber Company, fraudulently entered on his timebook that "Joe Morgan, Sam Wiggins, Robert Haymon and Rufus Williams were in the employ of said Wisconsin-Arkansas Lumber Company, and were entitled to their pay from said company, when in truth and in fact" they were not in the employ of the said company, and not entitled to be paid by it. This assignment of error is not well taken, for the reason that it does not charge four separate offenses, but charges the commission of the crime of false pretense through each of these parties. A conviction could have been had by proof of the offense through either one or all of said parties, but there could have been only one conviction, even though there had been sufficient proof to establish guilt as to each. Separate indictments might have been had as to each, but the pleader chose to put them in one case, and appellant cannot complain.

The next ground of demurrer was that the indictment alleged the name of the company to be the Wisconsin-Arkansas Lumber Company, whereas the true name of said company is the Wisconsin & Arkansas Lumber Company. While this is true, it was simply an error that could not in any way have prejudiced appellant's rights. He had for many years been in the employ of the Wisconsin & Arkansas Lumber Company, and knew what company he was charged with defrauding. Section 3014 of C. & M. Digest provides: "No indictment is insufficient, nor can the trial, judgment or other proceeding thereon be affected by any defect which does not tend to the prejudice of the substantial rights of the defendant on the merits." The indictment several times uses the name of the company as above stated, and concludes by the statement that the false pretenses were made

"with the unlawful and felonious intent to then and there cheat and defraud the Wisconsin-Lumber Company," leaving out the word "Arkansas" as it had theretofore been used in the indictment. It is manifest that the omission of the word "Arkansas" after the hyphen was a mere clerical error, and that the failure of the scrivener to put it in the indictment could not possibly work to the prejudice of appellant's rights. In *Hyde & Smith* v. *State,* 168 Ark. 580, 271 S. W. 330, on an indictment for robbery, the indictment left out the word "did" in the clause alleging that, "by force and intimidation, did take from the person of Sam Blevins," etc. The word "did" as above used was omitted and assigned as error. This court said:

"The omission of words in an indictment which would not mislead the accused as to the nature and character of the charge will not vitiate an indictment, as such omissions do not prejudice his substantial rights." Citing *State* v. *Ward,* 48 Ark. 36, 2 S. W. 191, 3 Am. St. Rep. 213; *Rinehart* v. *State,* 160 Ark. 129, 254 S. W. 351; *Jackson* v. *State,* 160 Ark. 198, 254 S. W. 531

The second ground urged for reversal of this case is that the evidence is not sufficient to sustain the verdict. After a careful consideration of the evidence we must overrule appellant on this point. However, we deem it proper to say that there is no evidence in the record sufficient to support a conviction on the charge in connection with Joe Morgan or Sam Wiggins, but as to the charge in connection with Rufus Williams and Robert Haymon there is a dispute in the testimony, and, while the testimony is quite meager, we think it was sufficient to go to the jury. Robert Haymon testified that he worked for Mr. Spears at his house and at the farm; that Mr. Spears told him that he wanted him to work for him at the house and the farm, and would allow him straight time at the mill, and that he drew his money at the mill. The time-book of appellant showed that he worked for the mill regularly through January to the last of July, in 1925, and the witness testified that he did not think he worked at

the mill in 1925, but, on cross-examination, he may have virtually destroyed the effect of his testimony, but this was a question for the jury.

Andrew Holman testified that he, at the direction of the appellant, cashed a number of identification slips for Rufus Williams, given to him by the appellant, and took the money back to the appellant. Appellant denies this. The same witness testified that appellant wanted him to swear that he knew Rufus Williams, and that he boarded at the witness' house; said appellant told him he would give him $50 if he would say that, and that, if the witness did not swear that he gave the money that he got on the identity slips to Rufus Williams, appellant would blow his head off. This conversation is not denied by appellant.

Another witness, S. R. Nolan, was permitted to testify, over appellant's objection, that he had worked for appellant and had received his pay from the mill. This evidence was permitted by the court, for the reason that it tended to show a scheme on the part of the appellant to defraud the lumber company in this manner, and it was competent for this purpose.

The only other evidence in the record of any substantial value against appellant was his own letter written to Mr. A. B. Cook, manager for the lumber company, after he had been discharged, which letter reads as follows:

"Malvern, Arkansas.

"Mr. A. B. Cook,
Malvern, Arkansas.

"Dear Mr. Cook: I am urging and begging on behalf of my family that we settle the matter that we discussed yesterday without any process of law. There never was a little woman who has worked harder in order that we might have a happy home, and we are working together to give all of our six children an education, and if this matter is carried into court we will be ruined and our hopes will be destroyed.

"As I stated yesterday, I have no money. I owe $1,100 on this place and $1,000 on the property in town and $3,300 on the bottom farm. I have placed that property in town on the market, but as yet have had no bids on it. I will be willing to give this company a second mortgage on this place, or the one in town preferably, and when it sells you will get your part.

"Mr. Cook, I know you feel that I have not acted square, and perhaps feel that I should be prosecuted, but please let this be the one time that you let mercy for a little woman and six children have the right-of-way in your decision in this matter, and I assure you that I will always be a friend of the company's as I am now.

"You have in your power to prosecute or prevent me from getting another place of employment, but I sincerely hope in all earnestness that you will at this time show mercy and be willing to settle this out of court.

"Yours very truly,

"Grover C. Spears."

This evidence was sufficient to take the case to the jury, under the rule of this court that, where there is any substantial evidence tending to show the guilt of the accused, it is a question for the jury and not the court to determine the matter of his guilt.

Appellant urges, under this assignment also, that the indictment charges that, as a result of the false pretenses alleged, he caused the lumber company to pay to appellant more than $300 "lawful money of the United States," and that there is no proof that the money so paid was of the character alleged. While it is true that there is no proof of the kind of money, whether gold, silver or paper money, and while there are some decisions of this court apparently sustaining appellant's contention (*Value* v. *State,* 84 Ark. 286, 105 S. W. 361, 13 Ann. Cas. 308; *Marshall* v. *State,* 74 Ark. 415, 75 S. W. 584; *Silvie* v. *State,* 117 Ark. 108, 173 S. W. 857, yet the trend and substantial holding of the later decisions of this court are against appellant's contention. *Cook* v. *State,* 130 Ark. 90, 196 S. W. 922, where the court defines the word

"dollars" as the money unit of the United States, and further states that "if any word has a settled meaning at law and in the courts, it is this. It can only mean the legal currency of the United States, not dollars invested in lands or stocks," and the charge in this indictment is that the lumber company was defrauded out of more than $300. To the same general effect see *Kent* v. *State,* 143 Ark. 439, 220 S. W. 814; *Hall* v. *State,* 161 Ark. 453, 257 S. W. 61.

The next assignment of error relates to the admission of the testimony of S. R. Nolan, which has already been mentioned. It was objected to on the ground that he was not charged in the indictment with having defrauded the company through Nolan, but, as we have already stated, it was admitted on the theory that it tended to show a general scheme on the part of appellant to defraud the lumber company, or show design, intention and knowledge, and was admissible for this purpose. *Norris* v. *State,* 170 Ark. 484, 280 S. W. 398.

It is finally insisted that the court erred in giving and in refusing to give certain instructions. We have examined these assignments carefully, and have reached the conclusion that the court fully and fairly submitted this case to the jury on correct and proper instructions. No useful purpose could be served by setting them out and arguing them, as it would unduly extend this opinion.

We find no error, and the judgment is accordingly affirmed.

SCOTT v. MAGAZINE SPECIAL SCHOOL DISTRICT NO. 15.

Opinion delivered May 16, 1927.

1. SCHOOLS AND SCHOOL DISTRICTS—AUTHORITY OF DIRECTORS.—Directors of a school district possess such power only as is conferred on them by a statute, either in express terms or by necessary implication.
2. SCHOOLS AND SCHOOL DISTRICTS—AUTHORITY OF SCHOOL DIRECTORS TO SELL PROPERTY.—Where the sale of school property is within the scope of the powers of school directors as described by Crawford

& Moses' Dig., §§ 8942, 8972, they are the exclusive judges of the necessity of making the sale and the application of the proceeds.

3. SCHOOLS AND SCHOOL DISTRICTS—AUTHORITY OF DIRECTORS.—Under Crawford & Moses' Dig., §§ 8942, 8972, relating to the authority of school directors selling property belonging to the district, the sale of school property partially in consideration of an agreement that the purchasers would maintain a school and receive pupils sent by directors of school districts is authorized, since the statute expressly authorized directors to make sales, and the purchaser is not concerned with the application of the proceeds nor responsible for the directors' action in that respect.

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

STATEMENT OF FACTS.

Magazine Special School District No. 15 and the directors thereof brought this suit in equity against C. E. Scott, A. P. Blaylock and E. M. Bartlett, to cancel and set aside a deed executed by the school district to them for certain school property and to enjoin said defendants from in any way interfering with their plans in conducting the school in said district. Scott had instituted an action in the circuit court against said school district and the directors thereof for damages for breach of contract conveying him the property involved in the chancery suit. The suit for damages in the circuit court was transferred to equity and consolidated with the suit in the chancery court to cancel the deed to said property. The chancery suit was defended on the ground that the defendants had acquired title to the property under a valid contract, which was binding upon the school district.

The record shows that the directors of said school district first entered into a written agreement with C. E. Scott, A. P. Blaylock and E. M. Bartlett to convey them the building and campus known as the Magazine Academy, for the consideration that said parties should maintain a school for five years and receive pupils which should be sent them from the public schools, at a stipulated sum. Pursuant to the provisions of this contract, on the 14th day of March, 1922, the directors of said spe-

cial school district executed a deed to Charles E. Scott, A. P. Blaylock and E. M. Bartlett to blocks 36 and 37 in the town of Magazine, Logan County, Arkansas. The schoolhouse referred to in the written contract is situated on these blocks of ground. The deed recites a consideration of $1,600, and, in addition, the following: "A further agreement is made that Chas. E. Scott, E. M. Bartlett and A. P. Blaylock are to maintain a school for a period of five years. If, in the event they fail to maintain the school for a period of five years, the property reverts back to the district. It is agreed that the property is to always remain for school use, but at the end of five years the sale title will be in Chas. E. Scott, E. M. Bartlett and A. P. Blaylock."

The $1,600 was paid by private subscription given to Scott and his associates. It was the purpose of the directors to maintain a school whereby pupils who could not be taught the high school branches in the public schools, on account of a shortage in the public school funds, might receive such instruction from Scott and his associates. The money received as the purchase price of the school property was used by the directors in the payment of whatever school warrants were presented. In other words, the money was deposited with the common school funds of the district and used by them indiscriminately to pay warrants for the payment of teachers and other indebtedness against the district. Scott and his associates made several improvements upon the school building, and received pupils sent to them by the directors of the school district, as agreed upon.

The chancery court found the issues in favor of the school district, and canceled and set aside the deed to the defendants to said property. A perpetual injunction was granted against Scott and his associates, restraining them from in any way interfering with the school district in the management and control of the property. The case is here on appeal.

U. C. May and *Hill & Fitzhugh,* for appellant.

Kincannon & Kincannon and *Evans & Evans,* for appellee.

HART, C. J., (after stating the facts). The record shows that the action at law for damages was begun by Scott on the 9th day of September, 1925. The chancery suit was begun by the directors of the district against Scott and his associates on the 12th day of September, 1925. The matters which caused the differences between the school directors and Scott and his associates are not deemed pertinent by us to the legal questions raised by the pleadings, and we have omitted any reference to them.

The principal issue raised by the pleadings and proof is whether or not the school directors have power to sell property which they deem no longer necessary for the district to hold for school purposes. In this connection it may be stated that it is well settled that the directors of a school district possess only such power as is conferred upon them by statute, either in express terms or by necessary implication. Therefore their power in respect to selling or otherwise disposing of the public school buildings of the district must be sought from the statute.

Section 8972 of Crawford & Moses' Digest provides that the title of all real estate belonging, for school purposes, to any city or town organized as a separate school district, shall vest in said city or town as a school district and shall be under the management and control of the board of school directors.

Section 8942, in defining the powers, in general, of the board of directors, gives them, when, in the opinion of a majority of the members of the board, the best interests of the district demand a sale or exchange of any real estate or schoolhouse site belonging to the district, the express authority to sell or exchange the same and the power to execute a deed to the purchaser.

We all agree that, under this section of the statute, the directors of the school district would have a right to sell the schoolhouse for a money consideration, and that the purchaser would not have to look to the application of the proceeds of sale and see to it that the directors

applied the purchase money to a legal school purpose. The authorities generally establish the proposition that, when an act is within the scope of the corporate powers of the school directors, they are the exclusive judges of the necessity of making the sale and the application of the proceeds. The directors may err in their judgment, but an abuse of power by them cannot take away express authority conferred by statute. Therefore we could not take into consideration whether the contract was beneficial or judicious in the absence of a showing of fraud in the making of it. These were questions for the consideration of the directors, to be determined by them, according to their best judgment in the premises. The directors had the power to sell the schoolhouse and to determine the best means of doing it. The purchaser has nothing to do with the determination of the directors in selling the property, and is not responsible for their action. He is only required to pay the purchase price as agreed upon. If there was nothing in the case except a money consideration and an allegation and proof of the misapplication of the proceeds of sale by the directors, we would all agree to a reversal of the judgment under the principles of law above announced. In short, if the sale is within the scope of the powers of the board of directors, they are the proper judges of the necessity of selling the property, and it would not be competent in this suit to inquire whether or not their discretion in the premises had been abused.

Justices KIRBY, MEHAFFY and I think the deed under consideration has one clause which is contractual in its nature and which renders the contract of sale and the deed based on it illegal. Our statement of facts shows that, as a part of the consideration, Scott and his associates agreed to maintain a school for a period of five years, and, in case they failed to do so, the property should revert to the district. It also provides that the property is always to remain for school use, but, at the end of five years, the title will be in Scott and his associates. When this clause of the deed is considered in

connection with the written contract of sale, it seems that the purpose of making the sale was to enable Scott and his associates to operate a private school and to receive certain pupils sent to them by the board of directors at a stipulated price. We believe that this was contrary to the spirit, if not the letter, of art. 14, § 2, of our Constitution, which provides that: "No money or property belonging to the public school fund, or to this State for the benefit of schools or universities, shall ever be used for any other than for the respective purposes to which it belongs." The substance of the transaction in question was that the board of directors sold the schoolhouse to Scott and his associates for a sum of money, and the further consideration that Scott and his associates should operate a private school for the benefit of the school district, which agreement, we think, renders the whole transaction illegal. In short, we believe that the directors of the public school district, and they alone, had a right to provide for the operation of public schools, and they must do this in a manner provided by statute.

As above stated, however, a majority of the court think that, the right of selling the schoolhouse being expressly conferred by statute upon the board of directors, it had the right to sell, and the purchaser was not concerned with the application of the proceeds of sale and was not in any wise responsible for the action of the directors in that respect.

There is no pretense of any fraud in the sale, and the majority of the court, as above stated, think that the wisdom or expediency of the sale has been left by statute to the directors of the district, and that the purchasers have no concern whatever with what was done with the proceeds of the sale or what consideration prompted the directors to make the sale. They were the judges of whether it was necessary to sell the property, and their action is conclusive, in absence of fraud between the contracting parties. Therefore the decree will be reversed, and the cause will be remanded with directions to dismiss the complaint of the special school district and the directors thereof for want of equity. It is so ordered.

HART v. WIMBERLY.

Opinion delivered February 28, 1927.

1. EXECUTORS AND ADMINISTRATORS—SALE OF MINOR'S HOMESTEAD.—Under the Constitution of 1874, art. 9, §§ 6, 10, sale of homestead of a minor by order of the probate court for payment of debts of the decedent is void for want of jurisdiction in the probate court.
2. COURTS—JURISDICTION OF PROBATE COURT.—Probate courts have only such special and limited jurisdiction as is conferred upon them by the Constitution and statutes, and can exercise only the powers expressly granted or necessarily incident thereto.
3. COURTS—JURISDICTION OF PROBATE COURT.—The Legislature cannot confer jurisdiction on the probate court to order the sale of the homestead of a minor to pay decedent's debts.
4. EXECUTORS AND ADMINISTRATORS—SALE OF MINOR'S HOMESTEAD.—An administrator has no power to sell a minor's homestead, subject to homestead rights.
5. EXECUTORS AND ADMINISTRATORS—SALE OF MINOR'S HOMESTEAD.—An order of the probate court authorizing the sale of a minor's homestead for payment of debts of the decedent is void *ab initio* and open to collateral attack.
6. EXECUTORS AND ADMINISTRATORS—SALE OF HOMESTEAD.—In the sale by an administrator, under order of the probate court, of land of the decedent, where the record fails to show that the land is not a homestead, the absence of such showing is sufficient to advise the purchaser that he acquired no title to a minor's homestead.
7. EXECUTORS AND ADMINISTRATORS—SALE OF MINOR'S HOMESTEAD.—An order of sale and confirmation by the probate court stating that the land to be sold was at the late residence of decedent is sufficient notice to the purchaser that the land was decedent's homestead.
8. EXECUTORS AND ADMINISTRATORS—SALE OF DECEDENT'S LAND.—In the sale of lands of a decedent, for the payment of his debts, the record must affirmatively show that the land is not the homestead of minors, before the probate court can have any jurisdiction to order a sale.
9. EXECUTORS AND ADMINISTRATORS—SALE OF MINOR'S HOMESTEAD.—One who purchases a minor's homestead at a sale for the payment of decedent's debts, is not protected because the proceedings appear regular for the sale of lands other than the homestead.
10. EXECUTORS AND ADMINISTRATORS—SALE OF MINOR'S HOMESTEAD.—The sale of a minor's homestead by the administrator to pay debts for the decedent, being void as not within the jurisdiction of

the probate court, was not cured by Crawford & Moses' Dig., § 181, as the Legislature cannot cure a proceeding made void by the Constitution.

11. LIMITATION OF ACTIONS—RECOVERY OF HOMESTEAD BY MINORS.—The right of action of a minor heir to recover his homestead sold by the administrator during his minority is not barred by Crawford & Moses' Dig., § 6946, where such minor was only 22 years old when the suit was brought; the seven years' statute providing that action may be brought within three years after arriving at majority being applicable.

12. INFANTS—ESTOPPEL.—Acceptance of minor heirs of their share of the money left from the sale of a homestead, after paying the debts of decedent, does not estop them from setting aside the sale made during their minority as void.

Appeal from Clark Chancery Court; *C. E. Johnson,* Chancellor; affirmed.

J. H. & D. H. Crawford and *McMillan & McMillan,* for appellant.

J. O. A. Bush, for appellee.

McHANEY, J., (on rehearing). Since this case was originally submitted there has been a change in the personnel of this court, which has necessitated a reconsideration of the whole case on petition for rehearing, and a majority of the court as now constituted agree to the opinions herein expressed. The principal question arising herein is the jurisdiction, or power, of a probate court to order a sale of the minors' homestead for the payment of debts.

In September, 1910, J. H. Wimberly died, a widower and intestate, in Clark County, the owner of a rural homestead, with three minor children, Vivian, Dexie, and R. W. Wimberly, age 14, 12, and 8 respectively, and owing some small debts of no considerable amount. On October 10 following, a neighbor, W. E. May, was appointed administrator, and duly qualified. He thereafter, on October 19, 1911, applied to the probate court for an order to sell the lands of his intestate, incorrectly describing them, for the payment of debts probated against said estate, in which petition he stated "that the personal property belonging to the said estate is not sufficient to pay the

debts." It is nowhere stated that the land described, for which a sale was asked, was the decedent's homestead, nor is any mention made of said minor children, but we assume that the application for letters of administration, which is not found in the record, correctly sets out the names and ages of such children. On the next day after the application was filed, October 20, the court granted the petition, and made an order directing the administrator "to sell the said land at the late residence" of deceased, on November 29, 1911, and to report his sale. Sale was had pursuant to the order, report was filed December 23 and approved, and deed ordered made to purchaser on payment of purchase price of $332.46 on January 15, 1912. Deed was made to M. B. Mullins, and, through mesne conveyances, to appellant, W. S. Hart. On a trial the court found all the facts against appellants, and decreed a cancellation of the sale above described and all subsequent deeds and deeds of trust in that chain of title as being void, and that appellees are the owners of said land; that appellants, Hart and Arkadelphia Milling Company, should pay R. W. Wimberly $100 for one-third value of timber cut, with interest, and that Evans, Stone and Wimberly recover from Hart and Nowlin-Carr Company $200, with interest, for oak timber cut, and that the said heirs recover from Hart $192 for pine timber sold to Marlar Lumber Company. The court set-off all claims of appellant Hart for taxes and improvements against the rents and profits. From the judgment against them Hart, Arkadelphia Milling Company and Nowlin-Carr Company have appealed.

The sale of the homestead of a minor by order of a probate court, for the payment of debts of the decedent, is void, as the probate court has no such jurisdiction. Such a sale is void for lack of jurisdiction under both the Constitution of 1868 and 1874. See art. 9, §§ 6, 10, Const. 1874; art. 12, §§ 3, 4, 5, Const. 1868. In the case of *Bond* v. *Montgomery*, 56 Ark. 537, 20 S. W. 525, 35 Am. St. Rep. 119, it is said:

"Under the Constitutions of 1868 and 1874 the probate court had and has no jurisdiction to order the sale of a homestead of a deceased person for the payment of his debts, during the minority of his children, or so long as his widow remains unmarried or does not abandon it, or shall not be the owner of a homestead in her own right. During this time the homestead is exempt from sale for the payment of the debts of the deceased owner. The order of sale in this case was therefore an absolute nullity."

In *Slayton* v. *Halpern,* 50 Ark. 330, 7 S. W. 304, Chief Justice COCKRILL said:

"The policy of exempting the homestead from sale after the death of the debtor for the benefit of the widow and minor children was continued by the Constitution of 1874, without abating the right as it existed under the Constitution of 1868 and the act of 1852."

In *Ex parte Tipton,* 123 Ark. 392, 185 S. W. 799, it is said:

"(4). A minor, being under disability, cannot waive his right to a homestead during minority. He can neither waive nor abandon his homestead rights. So that, at the time *Merrill* v. *Harris* was decided, it was settled in this State that, under the Constitutions of 1868 and 1874, the probate court had no jurisdiction to order the sale of a homestead of a deceased person for the payment of his debts during the minority of his children, or so long as his widow remains unmarried and does not abandon it, or shall not be the owner of a homestead in her own right. During this time the homestead is exempt from sale for the payment of the debts of the deceased owner. The order of sale in such cases is void."

Probate courts have "only such special and limited jurisdiction as is conferred upon them by the Constitution and statutes, and can only exercise the powers expressly granted and such as are necessarily incident thereto," as was said in *Lewis* v. *Rutherford,* 71 Ark. 218, 72 S. W. 373; *Beakley* v. *Ford,* 123 Ark. 383, 185 S. W. 796; and neither by the Constitution nor the statutes

have they been given any such power. Indeed, the Legislature could not confer jurisdiction on such courts, as it would be in direct conflict with the Constitution.

In *Griffin* v. *Dunn,* 79 Ark. 410, 96 S. W. 191, the court said:

"The sale of the homestead by the administrator was void, because the court has no jurisdiction to order it."

There is no provision anywhere in the law of this State for an administrator to sell a minor's homestead while a minor, for any purpose. The guardian may sell his minor ward's homestead for support and education, when necessary (*Merrill* v. *Harris,* 65 Ark. 355, 46 S. W. 538, 41 L. R. A. 714, 67 Am. St. Rep. 929), but the administrator cannot do so. The administrator cannot sell the homestead subject to the homestead rights. *Griffin* v. *Dunn, supra; McCloy* v. *Arnett,* 47 Ark. 445, 2 S. W. 71; *Stayton* v. *Halpern, supra; Nichols* v. *Shearon,* 49 Ark. 75, 4 S. W. 167; *Bond* v. *Montgomery,* 56 Ark. 563, 20 S. W. 525.

In *Neely* v. *Martin,* 126 Ark. 6, 189 S. W. 104, it is said:

"At the time of the sale of the land in suit by the administrator of Jesse Martin, to pay the debts of his estate, these lands constituted the homestead of his minor children, and the sale was therefore void." *Rushing* v. *Horner,* 130 Ark. 26, 196 S. W. 468; *Johnson* v. *Taylor,* 140 Ark. 106, 215 S. W. 162; *Turner Heirs* v *Turner,* 141 Ark. 51, 216 S. W. 44.

Counsel for appellants substantially concede that the foregoing is correct, but contend that, the statute for the sale of *land* to pay debts having been complied with, and the sale approved by the court, the order of the probate court is not open to collateral attack. A complete answer to this is that there is no statute and could not be for the sale of land which is a homestead for the payment of debts. The order of the probate court is void *ab initio.* It is *coram non judice,* and is therefore open to collateral attack. A void judgment or order may be attacked col-

laterally *Waggener* v. *Lyles,* 29 Ark. 47; *McDonald* v. *Ft. S. & W. Rd. Co.,* 105 Ark. 5, 150 S. W. 135; *Dalton* v. *Bradley Lumber Co.,* 135 Ark. 392, 205 S. W. 695. There is some authority for holding that an action to obtain a decree declaring a judgment void *ab initio* is not a collateral attack. *Hooper* v. *Wist,* 138 Ark. 294, 211 S. W. 143, citing 15 R. C. L. 838, par. 311; *Stumpff* v. *Louann Provision Co., ante,* p. 192. Moreover, this contention of counsel is contrary to the decision of this court in *Beakley* v. *Ford, supra,* where it is said:

"The order of the probate court under review contains no recitals that would bring it within the exercise of the jurisdiction conferred upon it by the statute. The probate court having no such common-law jurisdiction, and proceeding solely by virtue of statutory authority, its jurisdiction to exercise such authority must appear from the record, and will not be presumed. *Gibney* v. *Crawford,* 51 Ark. 34, [9 S. W. 309]; *Hindman* v. *O'Connor,* 54 Ark. 627-43, [16 S. W. 1042]; *Morris* v. *Dooley,* 59 Ark. 483-87, [28 S. W. 30]; *St. L. I. M. & S. R. Co.* v. *Dudgeon,* 64 Ark. 108-10, [40 S. W. 786]. See also *Willis* v. *Bell,* 86 Ark. 473, [111 S. W. 808]."

In the case of *Ex parte Tipton,* this court said:

"In the application of this rule we think the record of the probate court in the matter of selling the minor's homestead upon the application of the guardian should show the fact that there were no debts, and, the record being silent on that point, the order of sale was void."

It must therefore appear from the record that the land of the decedent which is to be sold to pay debts is other than the homestead, and, this not appearing, was sufficient to advise a purchaser that he acquired no title. It appears from the order of sale and confirmation that the land to be sold was "at the late residence of J. H. Wimberly," which would be notice that it was his homestead. But that is unimportant, since it must affirmatively appear on the record that the land proposed to be sold for debts is not the homestead of the minor before the probate court can have any jurisdiction at all. A pur-

chase of a minor's homestead at a sale for the payment of debts cannot be protected because the proceedings appear regular for the sale of lands other than the homestead.

The main contention of counsel for appellant seems to be that this case comes within the curative provisions of the act of March 12, 1919, § 181, C. & M. Dig., as construed in *Day* v. *Johnson,* 158 Ark. 478, 250 S. W. 532, and *Collins* v. *Harris,* 167 Ark. 372, 267 S. W. 781. Neither of these cases involved the sale of a minor's homestead for the payment of debts. In *Day* v. *Johnson* the minor's homestead was not involved, as the land sold was not his homestead, and the effect of the holding in that case is that irregularities in the sale of a minor's lands for his education, when the sale is confirmed, are not open to collateral attack, and will be cured by the above statute. In *Collins* v. *Harris* the sale of the minor's homestead was involved, but by the guardian and not the administrator, and was "for the support, education and maintenance" of the minor, and not to pay debts, and it was there held that the act of 1919, above referred to, cured the defect in the petition in failing to allege that there were no debts due and unpaid by the deceased parent at the time of sale, as had been the ruling of this court prior to the passage of said act. It will therefore be seen that these decisions in no way conflict with the former decisions of this court on the jurisdiction of the probate court to order the sale of a minor's homestead to pay debts. The act of March 12, 1919, could not have the effect of amending the Constitution, as would be the result if the contention of counsel is correct. The Legislature cannot cure a proceeding made void by the Constitution, and no act that it passes can breathe vitality into a thing that is dead. The Legislature cannot do indirectly a thing directly prohibited by the Constitution.

The next question is the period of limitation, the contention being this action is barred by the five-year statute, § 6946, C. & M. Digest. The exact question was

before this court on a like state of facts in *Kessinger* v. *Wilson*, 53 Ark. 400, 14 S. W. 96, 22 Am. St. Rep. 220, where Mr. Justice BATTLE, for the court, said:

"The land was set apart by the law to appellants, when their father died, as a home and means of maintenance during their minority. Until the younger of them reached the age of twenty-one years it could not have been lawfully sold to pay the debts of their father's estate or partitioned between them. *Nichols* v. *Shearon*, 49 Ark. 75, 4 S. W. 167; *Kirksey* v. *Cole*, 47 Ark. 504, 1 S. W. 778. It was not subject to sale, but might have been rented to raise means for their support. Until the younger reached his majority, it remained set apart as 'a place, a sanctuary, to which he or she might return to find shelter, comfort and security of a home' during his or her minority. As an entire homestead it remained the home of both. Although the land constituting it descended to them subject to be sold to pay the debts of their father's estate, it could not have been lawfully severed or diverted from the full occupancy and enjoyment by both of them as a home during the minority of either of them. Their homestead right was like a joint tenancy with right of survivorship. As each of them arrived of age, his interest in it expired. After the older reached her majority, the younger was entitled to the exclusive use and enjoyment of the land as a home until he became twenty-one years old, and then both became entitled to have and to hold as tenants in common, subject to the right of the administrator of Daniel Kessinger to have it sold to pay Kessinger's debts. *Kirksey* v. *Cole*, 47 Ark. 504, 1. S. W. 778. The homestead right or estate and the estate inherited in addition thereto were like two separate and distinct estates vested in different persons and following in immediate succession. Their right to the enjoyment and possession of the same did not exist at one and the same time, and neither merged in the other. The former did not merge in the latter; for, in that event, the minor children would have lost the right to enjoy the homestead during their minority, and the land constituting it would have imme-

diately become subject to sale for the payment of the debts of their father's estate, it being insolvent, and the quality of the homestead, like unto a joint tenancy, would have been changed by severance to tenancy in common. Greenleaf's Cruise on Real Property, vol. 6, marginal page 484, and cases cited. And the estate inherited from their father, being the larger, could not merge in the homestead. So they remained separate and distinct. As they could not have been held otherwise, appellants necessarily had two rights of entry upon the land, one when they became entitled to the homestead, and the other when the younger was twenty-one years old.

"The homestead right has expired, and the right to the possession of the estate inherited in addition thereto has accrued. The time which expired before the last right of entry accrued did not affect it. The statute of limitations did not commence running against it until John Kessinger was twenty-one years old. The rule is, where there are two separate rights of entry, the loss of one by lapse of time does not impair the other. It has often been held that 'a remainderman expectant on an estate for life or years, who had a right to enter because of the forfeiture of the tenant, is not bound to avail himself of the forfeiture, and his neglect to enter at the time does not bar him of his entry on the limitation of the estate of efflux of time or the death of the tenant.' According to Plowden, in *Stowell* v. *Lord Zouch,* 1 Plowd. 374, where there were three separate rights in the same person, he was entitled to the benefit of all of them the same as though they existed in three different persons. The maxim of the law is, '*Quando duo jura concurrunt in una persona, aequum est acsi assent in diversis.*' "

Again he said:

"What statute prescribes the time within which an action for the recovery of the land must be brought after the last right of entry accrued? Appellees pleaded the five years' statute. That statute, as enacted, provides: 'All actions against the purchaser, his heirs or assigns, for the recovery of lands sold by any collector of the

revenue for the nonpayment of taxes, and for lands sold at judicial sales, shall be brought within five years after the date of such sale, and not thereafter; saving to minors, persons of unsound mind and persons beyond seas, the period of three years after such disability shall have been removed.' Is it applicable to this case?''

After a lengthy discussion of the authorities he answered the question as follows:

''The words of the statute are, 'All actions * * * shall be brought within five years after the date of such sale, and not thereafter.' It is clear that it commences to run from the date of sale, and not thereafter, as it declares. As it begins to run at the date of the sale, it is difficult to understand how it can bar an action when the cause of it did not arise until more than ten years after the sale had elapsed. The sustainment of a contention to that effect would lead to the absurd conclusion that all rights of action against the purchaser of land sold at a judicial sale, arising after the lapse of five years from the date of sale, are barred at the very instant the cause of action accrues. This would be equivalent to a denial of the right to be heard at all in the vindication of such rights. It is manifest that the statute was never intended to be applied in such cases, but that its object was to require all parties to bring suits against purchasers at judicial sales within five years after the date of sale, for the enforcement of only such rights to recover the land sold as can be enforced in an action brought within that time, and to bar the recovery of such rights in any suit brought thereafter. It has no application to this action. The only statute of limitation at all applicable to this case is the seven years' statute.''

This case has been cited with approval in the following cases, many of them relating to sale of the minor's homestead: *Duke* v. *State*, 56 Ark. 468, 20 S. W. 600; *Gates* v. *Kelsey*, 57 Ark. 526, 22 S. W. 162; *Finley* v. *Hogan*, 60 Ark. 502, 30 S. W. 1045; *Killeam* v. *Carter*, 65 Ark. 70, 44 S. W. 1032; *Collins* v. *Paepcke-Leicht Lbr. Co.*, 74 Ark. 87, 84 S. W. 1044; *Gavin* v. *Ashworth*, 77 Ark.

244, 91 S. W. 303; *Griffin* v. *Dunn,* 79 Ark. 411, 96 S. W. 190; *Martin* v. *Conner,* 115 Ark. 365, 171 S. W. 125; *Krow & Neumann* v. *Bernard,* 152 Ark. 110, 238 S. W. 19.

Since the youngest child, R. W. Wimberly, was only 22 years old when this suit was brought, it necessarily follows, from what we have said and from the foregoing authorities, that the action is not barred as to any of the heirs for the recovery of the land, the seven-year statute being applicable, which provides the action shall be brought within three years after arriving at age of twenty-one years.

Neither can the doctrine of estoppel be invoked by appellant from the fact that, while yet minors, two of them were paid their share of the money left from the sale of the homestead after paying the debts, and deposited with the clerk by the administrator. It would be a weak safeguard of the minor's homestead rights if the constitutional and statutory protection thrown around such rights could be destroyed by estoppel, as is claimed here.

We have examined the other questions raised, including the claim for betterments, and have reached the conclusion that the chancellor's decision is not against the preponderance of the evidence. He offset the taxes and improvements against the rents and profits, on conflicting evidence, and we are unable to say he was wrong in so doing. No error appearing, the decree is affirmed.

SMITH, J., (dissenting). With all deference to the opinion of the majority, it appears to me that they proceed from the fundamentally false premise that the probate court is a court of special jurisdiction, acting in the discharge of special powers, which makes it necessary that its right to act affirmatively appear from the face of its proceedings.

One of the landmark cases in our reports is that of *Borden* v. *State,* 11 Ark. 519, 44 Am. Dec. 217. After there laying down the rule, which has since been consistently followed, declaring the presumption of verity to be indulged in favor of the judgments and decrees of supe-

rior courts, the learned judge who wrote that opinion said: "The remaining question before us in this case is whether or not the probate court is to be regarded as a superior court within the principles laid down. We answer emphatically that in our opinion it must be so considered. Because it is not only a court of record, but a constitutional court of fixed and permanent character invested with general jurisdiction and plenary powers over the matters committed by law to its peculiar cognizance and open to review by appeal. There is abundant authority thus to hold as to this court, and, if there was not, it would be a matter of serious public concern. Because, while in point of law it is equal, in point of fact it is a more important court to the people of this State than the circuit court. And this will be manifest at once when it is considered that it only requires a period of about forty years to pass every atom of property in the State, real and personal, and many choses in action, through the ordeal of the probate court; while it is estimated that the whole would not be passed through the circuit court in an entire century. We feel freely warranted therefore, not only on the score of authority, but for cogent reasons of public policy, to fix this court upon the footing of superior courts. 11 Serg. & Rawle 429; 5 Cranch 173; 2 Howard S. C. R. 340; 6 Peters R. 220."

The doctrine of that case has been many times since recognized, and the opinion in the case of *Apel* v. *Kelsey*, 52 Ark. 341, 12 S. W. 703, was based upon the recognition of the fact that the probate court was a superior court in favor of whose judgments a presumption of verity must be indulged when collaterally attacked.

The facts in the Apel case were that, in disregard of the mandatory provision of the statute that an administrator give notice of the sale of his interstate's lands in accordance with the provisions of law, an administrator had sold these lands at a private sale. There was no authority in the law for this action. On the contrary, it was done in violation of the provisions of a mandatory statute, yet the sale was confirmed, and when collaterally

attacked it was upheld for the reason there stated that: "It is impossible upon principle to distinguish the question here presented from those so often decided heretofore; and in obedience to the settled doctrine of this court, fixing the character of the probate court, and the effect of its judgments, we hold that a private sale of land by an administrator, upon order of that court, is not void when confirmed."

Full recognition was thus given to the impervious character of probate judgments and orders against collateral attack, for the reason that those courts were superior courts, which exercised a jurisdiction conferred by the Constitution.

The case of *Day* v. *Johnston,* 158 Ark. 478, 250 S. W. 532, reviews the legislation which resulted from that decision. It was there pointed out that, in delivering the opinion in *Apel* v. *Kelsey, supra,* Justice SANDELS had deprecated the state of the law growing out of the prior decisions of the court, which had become rules of property, and the aid of the Legislature was invoked to change the rule giving the same verity to the judgments of probate courts as was given to the judgments of other courts of record. Acting upon this suggestion the next session of the Legislature passed an act entitled, "An act to protect the estates of minors from loss" (Act 106, Acts of 1891, page 189), which provided that "All probate sales of real estate, made pursuant to proceedings not in substantial compliance with statutory provisions, shall be voidable."

In the case of *Mobbs* v. *Millard,* 106 Ark. 563, 153 S. W. 821, the word "voidable" appearing in this act was construed to mean void.

While this act was the law, the cases of *Beakley* v. *Ford,* 123 Ark. 383, 185 S. W. 796; *Ex parte Tipton,* 123 Ark. 389, 185 S. W. 798, and *Rushing* v. *Horner,* 130 Ark. 21, 196 S. W. 468, were decided.

The case of *Day* v. *Johnston, supra,* pointed out that the act of 1891 had changed a rule of property announced

in the *Apel* v. *Kelsey* case, and that the act of March 12, 1919 (General Acts of 1919, page 193), entitled, "An act to render conclusive judgments and decrees of the probate court in guardians' and administrators' sales," had re-enacted the rule of property as announced in the Apel case, and the right to change the rule by act of the Legislature was declared in the *Day* v. *Johnston* case, where we said: "We gave effect to one act, and we perceive no reason why we should withhold giving effect to the other; and, when we have given it effect, we must hold that the judgments of probate courts become impervious to collateral attack, if they contain the jurisdictional recitals which the General Assembly has determined are essential to constitute a valid sale against collateral attack."

The question here presented is not, whether the homesteads of minors are exempt from sale for the payment of the debts of their ancestors, but is, whether it is within the power of the General Assembly to clothe the judgments of probate courts with an incontrovertible presumption in cases where the Constitution has conferred jurisdiction.

The probate court is a superior court, with a jurisdiction defined by the Constitution, giving it the control of the estates of deceased persons, and the Legislature has the power to clothe the judgments of that court with absolute verity on collateral attack where it has acted within its jurisdiction. Such is the essence of the opinions in the cases of *Apel* v. *Kelsey* and *Day* v. *Johnston,* and the other cases to which they refer. See also *Collins* v. *Harris,* 167 Ark. 372, 267 S. W. 781.

It is not questioned by the majority that the provisions of the act of 1919 apply to the sale here under review if they can be made to do so. The sale here attacked contains the recitals required by the act of 1919 to make the curative quality of that act applicable, but the majority say the act cannot cure a sale of a homestead for the payment of the intestate's debts because the Constitution exempts the homestead from such sale.

It does not appear from the face of the record before us that the land sold comprised the homestead of the debtor and was sold in payment of his debts. It does appear that the court order fixed the place of sale at the "late residence" of the intestate, but it does not affirmatively appear that this residence was a part of the land ordered to be sold. Besides, a residence is not necessarily a homestead. The presumption, therefore, might well be indulged that in ordering the sale the probate court had found that the land ordered to be sold did not comprise a homestead, and such a presumption must necessarily be indulged if we are to give the same presumption of verity in favor of probate judgments as is indulged in favor of the judgments of other superior courts.

The majority recite and rely upon *Waggener* v. *Lyles*, 29 Ark. 47, and other similar cases. In the Waggener case it was said: "The objection to the validity of the proceedings of the probate court are not that the court has acted in excess of its powers, or that some act necessary to perfect its jurisdiction has not been complied with; but that the subject-matter submitted to it was one of which it could take no jurisdiction whatever; and when such is the case, whether in collateral or direct proceedings, the fact being apparent upon the record, such orders and proceedings are treated as nullities."

There is no question about the jurisdiction of the probate court over the estate. It not only had jurisdiction, but it had exclusive jurisdiction, and upon the proper showing could have ordered a sale of the land. It may have improperly ordered the sale of the land. It might erroneously have found that the land was not a homestead, or that the minors had come of age, but it had the jurisdiction to determine these facts and its finding was not in excess of its jurisdiction.

In the case of *Blanton* v. *Forrest City Mfg. Co.*, 138 Ark. 508, 212 S. W. 330, it was said: "In determining the validity of a judgment upon collateral attack, a distinction must be observed between those facts which involve

the jurisdiction of the court over the parties and subject-matter and those *quasi* jurisdictional facts without allegation of which the court cannot properly proceed and without proof of which a decree should not be made."

Here the probate court had jurisdiction of the parties and of the subject-matter. It should not have ordered the sale of the homestead to pay debts, but it does not appear from the face of the record that it did so. The presumption should therefore be indulged that the court made such a finding of fact as warranted the order made, although it now appears that the court was in error in its finding upon the facts upon which the jurisdiction was exercised.

The testimony in the record now before us does not show that the probate court acted upon a matter in connection with a subject of which it could not take jurisdiction, but only that its action was premature or upon an erroneous finding of fact, but neither the prematurity of its action nor the error in the finding of fact affirmatively appears from the order attacked. The action of the court in prematurely exercising its jurisdiction or in erroneously finding the facts was an error to be cured on appeal, and was not such an inherent defect or lack of power as to render the order of the court subject to be collaterally questioned, as it emanated from a court of superior jurisdiction, acting within its jurisdiction.

It does not appear therefore that the action of the court in ordering the sale of the land was *coram non judice*.

The majority say that the youngest child of Wimberly, the intestate, was only twenty-two years old when the suit was brought, and he was not therefore barred by limitation. The exact age of this youngest child, as shown by his own testimony, at the time of the institution of this suit, was twenty-two years and five months. Five months more than one year had therefore elapsed after this youngest child came of age before the institution of this suit, and he, as well as the other heirs, should be held barred by the act of 1919.

Section 1 of this act reads as follows: "That, in all guardians' and administrators' sales heretofore or hereafter made, the finding and recital in the judgment or decree of the probate court authorizing and ordering any such sale, that the guardian or administrator was duly and legally appointed and qualified, that the sale was conducted according to law, and that the facts set forth in the petition entitled the said guardian or administrator to make the said sale, shall be conclusive and binding on all parties having or claiming an interest in the said sale, save upon direct appeal to the circuit court, made in such cases as are now provided by law; and such finding and judgment or decree of the probate court shall not be open to collateral attack, save for fraud or duress. Provided that, as to sales heretofore made, all parties having any interest therein shall have twelve months after the passage of this act in which to attack such sales."

In the case of *Day* v. *Johnston, supra,* we said that: "The act, in so far as it relates to sales heretofore made, might well be sustained as a statute of limitations, as a reasonable time (one year) was allowed after the act was passed in which an interested party could prevent the consequences of the act falling upon him. *Towson* v. *Denson,* 74 Ark. 302, 86 S. W. 661, and cases there cited to this point. *Cottonwood Lumber Co.* v. *Hardin,* 78 Ark. 95, 92 S. W. 1118."

Because of the fact, as was there pointed out, that the act applied to future as well as to past sales, we considered and passed upon the constitutionality of the act in the Day case, and held that it was constitutional.

The instant suit was not brought until long after the year had expired which the act allowed for suits to be brought to attack sales under orders and judgments of the probate court which contained the recitals declared by the act to be essential and sufficient to constitute a valid judgment, and, as there is no saving clause in favor of infants, they, as well as all others, would be barred after one year. But, in any event, it would appear that

the strictest construction of this act possible would be to hold that the year of limitation did not commence to run until the homestead estate had expired. *Kessinger* v. *Wilson,* 53 Ark. 400, 14 S. W. 96. But, as has been said, more than one year expired after the termination of the homestead estate before the institution of this suit, and, as the heirs and their vendees did not avail themselves of the saving clause in the act, they should be held barred by it.

For the reasons herein stated, I think the decree of the court below should be reversed; and I am authorized to say that Justices WOOD and KIRBY concur in the views here expressed.

HINES *v.* CONSUMERS' ICE & LIGHT COMPANY.

Opinion delivered May 16, 1927.

1. ELECTRICITY—NEGLIGENCE.—In an action for personal injuries, whether a light company was negligent in failing to keep properly insulated its wires near where plaintiff was engaged in repairing a telephone wire *held* for the jury.
2. ELECTRICITY—DUTY OF LINEMAN TO USE CARE.—Where a telephone company had the right to use poles of a light company for stringing and operating its wires, and its employees could climb upon light poles for that purpose, plaintiff, a lineman, was required to use ordinary care for his own safety while engaged in the performance of this work.
3. ELECTRICITY—KNOWLEDGE OF TELEPHONE LINEMAN.—A telephone company's lineman, engaged in stringing a telephone wire on the light company's poles, is charged with knowledge of defective insulation on light wires, which was in plain view near where he was working.
4. ELECTRICITY—CONTRIBUTORY NEGLIGENCE OF LINEMAN.—Negligence of a telephone lineman engaged in stringing wire on light poles, in jerking a telephone wire (which was in rolls and which he knew would have a tendency to recoil when not stretched) off of a limb of a tree, and bringing it in contact with defendant's live wire, barred a recovery for personal injuries.

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

E. A. Upton and *Henry Stevens*, for appellant.

McKay & Smith, for appellee.

HART, C. J. Ross Hines brought this action against the Consumers' Ice & Light Company to recover damages for injuries which he alleges to have been the result of the defendant's negligence in failing to keep properly insulated its wires near where he was engaged in repairing a telephone wire.

This is the second appeal in the case. *Hines* v. *Consumers' Ice & Light Company,* 168 Ark. 914, 272 S. W. 59. Upon the former appeal it was held that, although an electric light (wire) company is not required to insulate all of its wires, a telephone lineman having a joint right to use its poles may recover for injuries sustained through failure of the light company to have the wires with which he might reasonably come in contact properly insulated. It was held further that a complaint, which alleges that a joint right to use a pole for transmitting electricity existed between an electric light company and a telephone company, and that, by reason of the negligence of the former in failing to insulate its wires properly, a servant of the latter company was injured, states a cause of action.

Upon the remand of the case the evidence for the plaintiff to sustain charges that the light company was guilty of negligence was, in substance, this:

E. G. Pettus wished to establish a telephone line from Magnolia to McNeil, in Columbia County, Arkansas. He made arrangements with the manager of the Consumers' Ice & Light Company to string his telephone wires on its light poles between its plant in Magnolia and some point in McNeil. The light company had formerly operated a private telephone line on its light poles as an adjunct to its own business. It made arrangements with Pettus whereby his telephone company would deliver the long distance messages of the ice company in consideration of the use of its light poles for stringing his telephone wires. In order to operate his telephone line from Magnolia to McNeil, it became necessary for Pettus

to make connection between his offices and the wires of the ice company in the two towns, and also to repair and reconstruct the old telephone line on the light poles of the ice company. A. G. Huckaby and Ross Hines were employed by Pettus for the purpose of repairing and reconstructing the telephone lines. While making the repairs the telephone wire came in contact with a highly charged electric wire of the defendant, about six feet above where the telephone wire was to be strung. The electricity from the highly charged wire knocked Hines unconscious and severely burned his hand in which he held the telephone wire. The electric wire contained 2,300 volts, and the insulation on it had all worn off, and this defective condition had existed for quite a long time.

Under this state of facts the question of the negligence of the defendant was properly submitted to the jury. The plaintiff had a right to work on the light pole while constructing and repairing the telephone line, and the company might have been charged with knowledge that the defectively insulated wire would cause injury to any one engaged in work in close proximity to it. *Texarkana Telephone Co.* v. *Pemberton,* 86 Ark. 329, 111 S. W. 257, and *Morgan* v. *Cockrell, ante,* p. 910.

This brings us to the question of the contributory negligence of the plaintiff as a bar to his right of recovery. While the telephone company had the right to use the poles of the light company for stringing and operating its wires, and its employees might climb upon the light poles of the defendant for that purpose, still the plaintiff was required to use ordinary care for his own safety while engaged in the performance of his work. At the outset of the discussion on this branch of the case, it may be said that the plaintiff was charged with knowledge of the defective insulation of the light wires. His fellow-workman was a witness for the plaintiff, and testified that the insulation had all worn off of the electric light wire at the place where the plaintiff was injured, and that this defective condition had existed for a long time. There were 2,300 volts of electricity in the exposed

light wire. The plaintiff was working about six feet below the live wire and about one hundred feet from the bare wire or place where it was defectively insulated at the time he was injured. The plaintiff and Huckaby were working together at the time. Huckaby did not climb poles, but hired the plaintiff to do this part of the work. The plaintiff was a mature man, and must be charged with the knowledge of the defective insulation on the light wire, which was in plain view near where he was working. At the time he was injured the plaintiff was climbing the electric wire poles and tying the telephone wire on them. He had tied the telephone wire on three poles, and was hurt while he was engaged in tying it on the fourth pole, on West Main Street, in the town of Magnolia. Huckaby was handling the wire on the ground so that the plaintiff could pull it up and tie it on the poles. The wire on the ground was a part of a roll, which was kept in front of Huckaby. In tying the wire on the pole they would have to pull the slack out of the telephone wire, that is, the slack between the pole the plaintiff was on and the one which he had previously tied the wire on. In taking up this slack the wire got caught in a limb. Huckaby pulled the wire out from under the limb and turned it loose. The plaintiff then jerked the wire, and a kink formed in it. The telephone wire formed a loop, and, when Huckaby released it from the limb, and the plaintiff jerked it, it flew up and came in contact with the light wire of the defendant about half-way between the poles. The electric wire was not insulated at that point, and, as above stated, was about six feet above where the telephone wire was to be strung. In short, the telephone wire was to be strung on the electric light poles about six feet below the electric light company's primary wire. The limb spoken of was about seven feet from the ground, and the electric-light wire was about thirty feet high. The plaintiff should have anticipated that the telephone wire would coil up unless it was stretched, and that, when he jerked it, it was likely to do so and fly up and come in contact with the electric-

light wire, which was highly charged with electricity. The plaintiff and his fellow-workman should have used ordinary care to see that the telephone wire was kept stretched and see to it that it did not come in contact with the live wire of the defendant.

While the plaintiff's hand was severely burned on account of the telephone wire which he was holding coming in contact with the highly charged wire of the defendant, still his own fault and carelessness in the matter produced his injury and bars his right of recovery. He is charged with knowledge that the telephone wire was in rolls and was being unrolled for the purpose of stringing it along the light poles under the primary wire of the light company. He knew that the tendency of the wire could be to recoil itself when it was not stretched. He is bound to have known that, when the wire was jerked off of the limb, which was about seven feet from the ground, it would begin to coil or kink, and, when the plaintiff jerked it, he is charged with knowledge that he was likely to bring it in contact with the live wire of the defendant and bring about the very injury of which he now complains. Under these circumstances the court erred in not directing a verdict for the defendant on the ground that the plaintiff was barred of recovery under the facts proved by himself on account of his own contributory negligence in the matter.

The judgment must be affirmed. It is so ordered.

DORR, GRAY & JOHNSTON v. HEADSTREAM.

Opinion delivered May 30, 1927.

1. APPEAL AND ERROR—CONCLUSIVENESS OF VERDICT.—Where evidence, though conflicting, is sufficient to support a verdict, the Supreme Court cannot invade the exclusive province of the jury nor determine where the weight of the evidence lies.

2. EVIDENCE—EXPERT TESTIMONY AS TO INJURIES FROM X-RAY.—One may, by study, observation and experience as to the effect of the X-ray upon the human body, become competent to testify as an

expert witness in an action for injuries due to burns from the X-ray, notwithstanding he is not a physician.

3. TRIAL—ADMISSIBILITY OF REBUTTAL TESTIMONY.—In an action for injuries due from X-ray burns, a refusal to allow defendant in rebuttal to show details of the process of administering treatment *held* not error where it is in conflict with the original testimony of the witness and not offered to show actual conditions that existed.

4. EVIDENCE—ADMISSIBILITY OF EXPERT TESTIMONY.—In an action for X-ray burns it was not error to allow expert witnesses to testify that, in their opinion, it constituted negligence for defendant to turn an X-ray of certain voltage on plaintiff for twenty or thirty minutes during the absence of the operator of the machine from the room, since the purpose of expert testimony is to get the conclusion of a witness based on facts assumed to be true.

5. DAMAGES—ADMISSIBILITY OF EVIDENCE.—In an action for X-ray burns, an instruction authorizing damages arising from an ulcer developing ten months after X-ray treatment *held* not error, where there was testimony showing that the burn was the source of the ulcer.

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

John B. McCaleb and *J. J. McCaleb,* for appellant.

S. M. Bone, Watkins & Pate and *Emerson, Donham & Fulk,* for appellee.

HUMPHREYS, J. This suit was brought by appellee against appellants, partners engaged in the practice of medicine and surgery at Batesville, Arkansas, to recover damages in the sum of $50,000 for negligently, carelessly and unskillfully burning his left arm with an X-ray while treating a small place thereon diagnosed by them as eczema. It was alleged in the complaint that appellants applied the X-ray to the affected part, placing the machine within less than two inches thereof, and negligently, carelessly, and unskillfully permitting the application of the X-rays to continue for thirty minutes, while out of the room, as a result of which his arm was seriously and permanently injured. There were other allegations of negligence in the complaint, of which no mention will be made, as appellee introduced testimony in support only of his allegation of negligence of appellants in applying the treatment.

Appellants filed an answer, denying all of the material allegations of the complaint, and interposing the further defense that the burn received from the X-ray treatment was slight, from which appellee completely recovered under their treatment, and that the burn did not result from negligence or lack of care on their part, but was caused solely from the inherent uncontrollable nature of the rays and the fact that appellee was constitutionally hypersensitive to the X-ray, which condition was not and could not have been known to them.

The trial of the cause resulted in a judgment against appellants for $5,000 in favor of appellee, from which is this appeal.

The record is so voluminous that it is entirely impractical to incorporate the substance of the testimony of each witness in this opinion. Lay and expert witnesses were introduced by both sides and examined at length. Suffice it to say that the testimony introduced by appellee tended to support the allegations of his complaint with reference to the negligent application of the X-ray to the affected part, which caused great pain and suffering for a long time, necessitating two major operations by a noted physician in Chicago, an outlay of large sums of money, financial losses, deficiency in arm strength and power; whereas the testimony introduced by appellants tended to show skill and proper application of the X-ray treatment to the affected part, resulting in a slight burn, which they could not prevent on account of the uncontrollable character of rays generated by the X-ray machine, and the constitutional hypersensitiveness of appellee to the X-ray.

The jury found against appellants on the disputed questions of fact, and, as there is sufficient testimony to support the verdict, this court cannot invade the exclusive province of the jury and determine where the weight of the evidence lies. We can only review the record where any reversible errors were committed in the trial of the cause.

Appellants' first contention for a reversal of the judgment is that the trial court erred in allowing Dr. L. M. Hill, a chiropractor, to testify as an expert witness in the case. Dr. Hill did not qualify as a physician and surgeon, but testified that he was a graduate of the X-Ray School at Davenport, Iowa, and that he had taken courses in the E. O. Thompson School at Baltimore, Maryland; that he had made between seventeen and twenty thousand exposures with X-ray machines for diagnostic purposes, but not as a therapeutic remedy; also that he was a graduate of Carver School of Chiropractic, of Oklahoma City, Oklahoma. X-ray specialists who apply the X-ray to the human body as a therapeutic remedy, as well as for purposes of diagnosis, are not always graduate physicians. Indeed, according to the record, the operator of the X-ray machine at Mayo's is not a physician. The X-ray is largely a scientific field unto itself, and any one who, by study, observation and experience in that particular branch of science, possesses knowledge and skill therein beyond that of persons of common knowledge, is competent to testify as an expert witness. *Newport Manufacturing Co.* v. *Alton,* 130 Ark. 542, 198 S. W. 120.

This court is committed to the doctrine that it is not necessary for one to be a physician in order to be an X-ray specialist and entitle him to testify as an expert. *Runyan* v. *Goodrum,* 147 Ark. 481, 228 S. W. 397, 13 A. L. R. 1403. In speaking of the application of X-ray and the competency of the testimony of one versed and skilled in the use thereof, the Supreme Court of Minnesota said:

"The so-called X-rays, discovered by Roentgen have been recognized and known to scientists, both in and out of the medical profession, for some eight years. During the time the apparatus for the generation of the X-rays, together with the fluoroscope, has been used very generally by electricians, professors of physics, skiagraphers, physicians and others, for experimental and demonstrative purposes. It is a scientific and mechanical appli-

ance, the operation of which is the same in the hands of the college professor, or the physician of the allopathic, homeopathic, or any school of medicine. It may be applied by any person possessing the requisite scientific knowledge of its properties, and there would seem to be no reason why its application to the human body may not be explained by any person who understands it."

From his study and experience Dr. Hill was qualified to testify as to the amount of dosage it would take to burn the human body and whether the dosage was properly or whether negligently administered.

Appellant's next contention for a reversal of the judgment is that the trial court erred in refusing to allow appellant to show by their witness, Dr. Gray, who administered the treatment in question, the details of the process of administering the X-ray treatment. This testimony, to the effect that the X-ray machine could be adjusted to the body and be running without generating X-rays, was offered to rebut the evidence of appellee that Dr. Gray turned the X-ray machine on him for a period of twenty or thirty minutes and left the room during that time. Dr. Gray had testified, in his direct and cross-examination, that he only administered the treatment for five minutes by the watch, and remained in the room during the entire time. The rebuttal testimony was in conflict with Dr. Gray's original evidence, and was not offered to show the actual condition that existed. It was not offered in the nature of an admission that he had left the room and that, during his absence from the room, the tube in which the rays were generated was lighted and the motor running, yet no X-rays were being generated. The rebuttal testimony was not responsive to the issue of negligence joined and not a good faith offer to change the defense. We think the court was correct in excluding it.

Appellant's next contention for a reversal of the judgment is that the trial court erred in allowing appellee's witnesses, Doctors Ruff and Hill, to state that certain alleged facts constituted negligence on the part of

appellants. They were permitted to testify that it would be negligence for an X-ray technician or practitioner to turn an X-ray of 4 milliamperes voltage on a patient for twenty or thirty minutes while absent from the room. The purpose for introducing expert testimony is to get the judgment or conclusion of the witness based upon facts assumed to be true. Expert witnesses could not answer a hypothetical question otherwise than by expressing an opinion or announcing a conclusion. We can see no difference in saying that certain acts or omissions constitute negligence in the treatment of a disease and saying that the acts hypothetically detailed show improper treatment. The court did not err in letting the two expert witnesses testify that, in their opinion, it constituted negligence for appellant to turn an X-ray on appellee of the voltage described for twenty or thirty minutes during the absence of the operator of the machine from the room. This court stated in the case of *Durfee* v. *Dorr,* 131 Ark. 376, 190 S. W. 376:

"Objection is made by appellant also to the action of the court in permitting practicing physicians, who qualified as experts, to testify as to the character of attention a patient should receive in a hospital. We think this evidence was competent, as it related to a subject upon which the average juror would have no information or experience upon which he would be in position to formulate an intelligent conclusion unless he based his conclusion upon the opinion of one qualified to speak as an expert."

Appellant's next contention for a reversal of the judgment is that the trial court erred in giving instruction number 2, which is as follows:

"You are further instructed that if you find that plaintiff's arm was burned by defendant's X-ray machine on account of defendant's negligence, as above explained, and that the place so burned became infected without the negligence of the plaintiff, and while he was exercising due care to protect his injury, and that the plaintiff's injury was aggravated and increased by said infection,

defendants would be liable to plaintiff for such aggravated or increased injury."

One objection made to the instruction is that the undisputed proof showed that the burn completely healed under the treatment of Dr. Gray during the month of August, 1922, and the diseased condition of the arm necessitating the operations developed later from other causes not connected with the burn. It is true that Dr. Gray testified to the facts just detailed, but appellee testified to the contrary, which made the issue of fact a disputed one. Another objection made to the instruction is that it ignored the defense of the appellants that the burn had been entirely cured under Dr. Gray's treatment. It is true that instruction number 2 only covered appellee's theory of the case, but instruction number 6 requested by appellants and given by the court covered their theory of the case with reference to treating and curing the burn. Instruction number 6 is as follows:

"You are instructed that, even though you should find from the evidence, under other instructions herein given, that the X-ray burn received by the plaintiff was caused by or through the negligence of the defendants in their manner of administering same, still, if you find from the evidence that, when such burn was reported by plaintiff to the defendants, they treated him therefor, and effected a cure thereof within a reasonable time, and that, after such cure was so effected, the arm of plaintiff became diseased and developed into a worse condition than it was before such cure, then defendants cannot be held liable for such second or subsequent condition, nor are they required to prove the cause of such second or subsequent diseased condition in order to be exonerated from liability therefor."

Appellants' next and last contention for a reversal of the judgment is that the trial court erred in giving instruction number 3 upon the measure of damages applicable to the facts in the case, which is as follows:

"If you find for the plaintiff, in determining his damages you should take into consideration the nature

and permanency of his injury, if any; the mental and physical pain and suffering, if any; the money expended in treatment of his injury and hospital expenses, if any; the diminished earning capacity of plaintiff, if any, as you may find from the evidence were occasioned by the negligence of the defendants, and award him such sum as you may find from the evidence will fairly and reasonably compensate him for said injuries so received."

The objection made to the instruction is that it covered damages arising from the ulcer, which developed ten months after the X-ray treatment. There is testimony in the record tending to show that the burn was the source or origin of the ulcer which resulted in damage to the arm. It was proper for the jury to render a verdict compensating appellee for the injury to the arm if the burn was the proximate cause of the injury. This was a disputed fact for determination by the jury.

No error appearing, the judgment is affirmed.

LETZKUS v. LETZKUS.

Opinion delivered June 27, 1927.

DIVORCE—CONDONATION.—A decree allowing a wife temporary alimony for the maintenance of herself and child will not be set aside on the ground of condonation, where the husband subsequently entered and remained in his wife's home by force, occupying rooms separate from her, and not conversing or eating with her.

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

Ben F. Reinberger, for appellant.

HUMPHREYS, J. This is an appeal from a decree of the chancery court of Pulaski County annulling a temporary allowance of $75 per month in favor of appellant against appellee for the support and maintenance of herself and their child, which the chancery court rendered upon complaint and notice on the 28th day of July, 1926,

and dismissing her complaint alleging sufficient grounds for alimony for the support and maintenance of herself and their child. The decree which was annulled also restrained appellee from selling or disposing of a certificate of stock in the Arkansas Abstract Guaranty Company until he should give bond to perform the decree of the court requiring him to pay alimony.

A response was filed to the motion to set aside the decree. The issues joined in the motion and response were submitted to the court for adjudication upon the following agreed statement of facts, filed October 7, 1926:

"In the Pulaski Chancery Court.—Ida M. Letzkus, plaintiff, v. Anton Letzkus, defendant.

"The parties in the above entitled and numbered cause agree on the following statement of facts, upon which judgment shall be rendered therein, the controversy being submitted to the court upon same as such agreed statement of facts:

"That Ida M. Letzkus of Little Rock, Arkansas, instituted a suit for maintenance and support from Anton Letzkus, her husband, alleging that he left and abandoned the plaintiff, and for other causes. That the defendant was duly served with process and a notice for temporary maintenance, and also for an injunction restraining the defendant from assigning and transferring his certificate of stock in the Arkansas Abstract and Guaranty Company, of Little Rock, Arkansas. On the ———day of August the matter came on to be heard, decreed, ordered and directed before final hearing that the defendant, Anton Letzkus, do pay to the plaintiff on the 28th day of each month $75 as temporary support for herself and child, and the further sum of $50 as attorney fee and $15 court costs. That the defendant has paid to the plaintiff the first month's support and the attorney fees. The court further ordered and enjoined the defendant from selling or transferring his certificate of stock, unless security was given to pay for the monthly support

of the plaintiff and her child. That, after said temporary order was entered, the plaintiff, Ida M. Letzkus, continued to live at her home at 1411 Center Street, Little Rock, Arkansas. During his absence she caused locks to be changed on the premises so that she could have exclusive possession of the premises and be free of the harassment of her husband. That thereafter and before the final hearing the defendant entered said premises against the will of the plaintiff, and would not leave, but continued to live there, and during that time the plaintiff and defendant did not live together as husband and wife, but did live in the same house, but that she had a small and separate room in the house for herself and child; that the defendant did not eat at the home of the plaintiff, and that they did not converse with each other, but the defendant did sleep in his room in the residence, against the wishes of the plaintiff, but which she could not control. That, a short time after the order was rendered for support and after the injunction was issued, as stated, the defendant filed a motion in the chancery court to set aside the temporary order, without giving written notice, although the decree stated that he was served with summons and notice for support and injunction. That no answer was filed in said action denying anything stated in the complaint, and more than twenty days had elapsed since the service of summons and notice. That the court dismissed the complaint of the plaintiff on account of the fact that the defendant, since the said order, lived on the premises, under the conditions as herein stated, and the plaintiff lived in a small room on the premises with her child, and never spoke to each other; and the court further stated that, although the defendant failed to support the plaintiff, no action can be had against a defendant if he lived at the home of the plaintiff, after the action was instituted by the plaintiff, and that she must not live in the same house with her husband before she could ask for support for herself and child through the courts of Arkansas, under the action of maintenance and support. Witness our hands by the attorneys of record this the 25th day of

August, 1926. Prayed an appeal to the Supreme Court of Arkansas, which was granted.

(Signed) "Ben F. Reinberger,
(Signed) "T. E. Helm."

It appears from the agreed statement of facts that the decree annulling the order for temporary alimony and restraining the sale of appellee's certificate of stock in the abstract company until he should give a bond to perform the order of the court, and in dismissing appellant's complaint, was made upon the ground that the parties had been residing in the same house since the rendition of the original decree. Living under the same roof or in the same house by consent, either express or implied, would warrant a court in finding that the charge made the basis for a claim for alimony had been condoned; but, where a husband entered and remained in his wife's home by force, occupying a room therein separate and apart from her and not conversing or eating with her, as the record reflects was done in this case, there was no condonation of the charge. The trial court erred therefore in annulling the original decree on the ground that the parties had resided together since the rendition thereof in the same house, or under the same roof. It affirmatively appears that their marital relations were not resumed, and that appellant did not consent or acquiesce in appellee entering her home and remaining therein. According to the agreement of facts, he entered and remained in appellant's home by force.

On account of the error indicated the decree is reversed, and the cause is remanded for further proceedings not inconsistent with this opinion.

COX v. STATE.

Opinion delivered May 30, 1927.

1. INDICTMENT AND INFORMATION—POSSESSION OF STILL.—An indictment charging the possession of a still in statutory language *held* not defective for failure to allege a felonious possession, since an indictment for a statutory offense need use only the language of the statute, unless it is apparent that there are elements of the offense not described in such language.
2. CRIMINAL LAW—REPETITION OF INSTRUCTIONS.—Where an instruction which the court refused to give was covered in other instructions, there was no error in the refusal.
3. CRIMINAL LAW—FAILURE OF DEFENDANT TO TESTIFY—INSTRUCTION.—In a prosecution of a felony, refusal of an instruction that defendant's failure to testify was neither evidence nor presumption of guilt, and should not be considered in determining guilt, *held* reversible error in view of Crawford & Moses' Digest, § 3123.
4. INTOXICATING LIQUORS—SUFFICIENCY OF EVIDENCE.—Evidence *held* sufficient to support a conviction of possessing a still.

Appeal from Pike Circuit Court; *B. E. Isbell,* Judge; reversed.

T. W. Rountree and *Tom Kidd,* for appellant.

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

MEHAFFY, J. The grand jury of Pike County returned the following indictment, accusing Horace Cox of the crime of possessing a still:

"The grand jury of Pike County, in the name and by the authority of the State of Arkansas, accuse Horace Cox of the crime of possessing a still, committed as follows, to wit: The said Horace Cox, in the county and State aforesaid, on the 15th day of June, 1924, did unlawfully have and keep in his possession a still and stillworm, without registering the same with the proper United States officer, against the peace and dignity of the State of Arkansas. Geo. R. Steel, prosecuting attorney."

Defendant filed the following demurrer:

"Comes the defendant, Horace Cox, and for his demurrer to the indictment states: (1). That the indictment does not state facts sufficient to constitute an offense against the laws of Arkansas. (2). That the indictment

does not state facts sufficient to constitute a felony. (3). That the indictment fails to allege that the defendant did 'feloniously' have in his possession the alleged still and stillworm. (4). That the indictment fails to allege that he had possession of the still and stillworm feloniously.

"Wherefore he prays that the court sustain the demurrer and for all other just and proper relief."

The court overruled the demurrer.

R. W. Stell testified, in substance, that he was in the hardware business at Delight, and has lived in Pike County about 56 years. That he knew the defendant, Horace Cox, and knew Ed Kirkham. He said he went in company with Mr. Kirkham, acting on information, and made an investigation some time in the year 1924, along in the spring. He stated that he went to where Mr. Cox lived, and commenced, about 9 o'clock at night, to search around the place, up and down branches and creeks, and finally, between twelve and one in the night, they decided that it might be closer to his home, and got over in the pasture and found where he had the branch dammed up to hold the water. The still was put up, and two barrels of mash or beer were sitting there near the still. He said they decided it would be ready to run in two or three days, and they fixed everything back like they found it, and went away. While there they found a funnel and a quart cup. Witness said he did not go back with them any more. The place where they found the still was about a quarter of a mile from where the defendant lived. There was a little path, but it did not lead right up to the still. The still was on defendant's premises, inside his pasture, and was right at the place where the dam was across the branch. It was a box still, made out of lumber. Witness does not think it had a metal top, but it had a metal bottom.

Ed Kirkham testified, in substance, that he had lived in Pike County since 1915, the last time; was raised there, and is now in the telephone business. He was deputy sheriff of Pike County during the year 1924. He testified that he knew defendant, Cox, and knew R. W. Stell.

He is also acquainted with Mr. Chaney, former sheriff of the county. Some time in the spring of 1924, witness thinks it was in April, witness and Stell went to the place where Cox lived and searched there until they located a still in the field or woods lot back of his house, something near two hundred yards from the house, on a little stream. Defendant's house faces east, and the still was west or a little northwest of the house, back in the field. It is in the inclosure, but in a patch of woods. He said they found a box still with a metal bottom and the rest wood, and two barrels of beer, with some other stuff. Witness said they then returned to Delight and informed the sheriff, Chaney, and witness and the sheriff went out, two or three nights after that, and found the still just like they first located it, but did not stay long that night. They decided to return again. They went away, and returned several times for the purpose of telling when there would be some whiskey made and when it would be run off. The last time witness and sheriff went about daylight in the morning and stayed until four or five in the afternoon. They were expecting some one to come and run the beer off. Mr. Cox came, and, when they heard him coming, they did not want to be discovered right then, so they tried to make a get-away, but he had a dog that chased them. Mr. Cox ran to their grub-bags, and then he turned and went to his house, and they followed him. When they got to his house, he was sitting there talking to his wife, and said to them he was just telling his wife he was caught, and that Chaney was looking at him while he was drinking beer out of the barrel. Cox then said they might as well go down and pour it out. They went down to the still and made a bonfire out of the whole thing. They found a lye can, and the sheriff asked Cox if he had put lye in the stuff, and he said yes, a little. When witness was looking for the worm, Cox said he would never find it, and he motioned to a hole of water. He went to the water, and pulled the worm out of there. The sheriff told Cox that he could remain with his wife and children, and for him to come to Murfreesboro the next morning and make

bond. Cox said, "If a man can be that good to me, I certainly will be there."

Witness did not see Cox at the still directly. It was about 200 yards from the house to the still. Witness had assisted in capturing wildcat stills prior to that time, and indications were that there had been a run made previous to this and preparation for another one.

When they first discovered Cox he was coming from the house towards the still. Witness said there were no other houses near the still; he presumed the nearest one was about a mile. There are other houses in the community. He did not examine to see how close anybody else lived.

J. E. Chaney testified, in substance, that he had served as sheriff about eight years, and was sheriff in 1924. He was acquainted with the defendant and with Ed Kirkham. He went with Ed Kirkham to the place where Cox lived and found a box still and several barrels of mash. Witness had had considerable experience as sheriff in capturing and destroying stills. The still was not in operation. If they were ready to run they would have a cap and worm and fire. Mr. Cox showed witness where the worm was sunk in the branch, but witness does not remember anything but a water-keg that could be used as a cap. He has seen them used that way. They discovered nobody else at the still, and found the defendant near the still. Witness and Kirkham followed defendant on to the house, and, when they got there, he was at the gate, talking to his wife, and he said he had told his wife that witness had caught him; told her that witness was watching him while he drank beer out of the barrel. Cox said they had just as well go down there and pour it out.

There was a path leading from his house in the direction of the still. Defendant told witness where the worm was. Witness said there was a cloud coming up, and he told defendant he could stay with his wife and baby if he would promise to come to Murfreesboro the next morning, and Cox said he would be there. He did not come.

Witness did not see him any more for nine months or a year. The still was located in Pike County.

Ode Cox, a witness for the defendant, testified, in substance, that he was a brother of the defendant, and moved him to the place where he lived some time in the spring of 1924. Mr. Reynolds was within a quarter of a mile; Mr. Hamby lived within one-half mile, and Haynes lived about half a mile and witness lived about a mile. Witness said he had been convicted in a liquor case and had served time, and got home some time last November.

Defendant was convicted, filed a motion for a new trial, which was overruled, and has appealed to this court.

Appellant's first contention is that the indictment was defective because it did not allege that he feloniously had and kept in his possession a still. That is, he claimed it was defective because it did not use the word felonious.

The rule is well settled in this State that, in indictments for statutory offenses, it is only necessary to use the language of the statute, unless it is apparent that there are elements of the offense not described in that language. As early as the 12th Arkansas the court said, in speaking of statutory offenses of marketing, branding, or altering the mark or brand of any animal:

"The felonious intent is no part of the description, as the offense is complete without it. The felony is the conclusion of the law from the acts done, with the intent described, and makes part of the punishment, as, under our statute, the prisoner is rendered infamous and also disfranchised. The objection to the indictments therefore is not well founded in law, and consequently the circuit court erred in sustaining the demurrer." *State* v. *Eldridge,* 12 Ark. 609.

This rule has been announced and adhered to in the following cases: *State* v. *Seawood,* 123 Ark. 565, 186 S. W. 72; *Burrough* v. *State,* 166 Ark. 138, 265 S. W. 642. The indictment in this case charges the offenses in the words of the statute, and it was therefore not defective

because the word "feloniously" was omitted. The indictment does charge that defendant unlawfully had in his possession a still, stillworm, etc.

The appellant next contends that the court erred in giving instruction No. 1 on its own motion and refusing to give Nos. 2, 3, and 7½ requested by the defendant. We think that the instructions that the court refused to give were covered in other instructions of the court, and there was no error in refusing to give those mentioned. However, the court refused also to give instruction No. 11, requested by the appellant, which is as follows:

"You are instructed that it is the privilege of the defendant to either testify in this own behalf or decline to so testify. The failure to testify is neither an evidence of his guilt or a presumption of law or fact of his guilt. Such fact is not to be considered by you in determining his guilt or innocence in this case."

The statute itself provides:

"On the trial of all indictments, informations, complaints, and other proceedings against persons charged with the commission of crimes, offenses and misdemeanors, the person so charged shall, at his own request, but not otherwise, be a competent witness, and his failure to make such request shall not create any presumption against him." Crawford & Moses' Digest, § 3123.

This court has said with reference to the above section of the digest:

"In order to give the defendant the benefit of this election, it is the duty of the trial court, when requested at the proper time, to inform the jury that a failure to testify in his own behalf shall not raise any presumption against him. Otherwise a jury might regard the defendant's silence as an admission of guilt and thereby deprive him of the election accorded him by the statute." *Martin* v. *State,* 151 Ark. 365, 236 S. W. 274; *Threet* v. *State,* 110 Ark. 152, 161 S. W. 139; *Lee* v. *State,* 145 Ark. 75, 223 S. W. 373.

The evidence in this case was sufficient to justify the jury in finding defendant guilty, and the instructions

correctly submitted the case to the jury. But, as we have already said, the court erred in refusing to give instruction No. 11 requested by the appellant, and for this error the case is reversed, and remanded for a new trial.

SHROLL v. NEWTON COUNTY.

Opinion delivered May 2, 1927.

1. EVIDENCE—COLLATERAL ATTACK.—The judgment of the county court awarding a bridge contract is not open to collateral attack to show that it was rendered during vacation.
2. COUNTIES—CONCLUSIVENESS OF JUDGMENT RECITAL.—The convening order of the county court on the date when a bridge contract was awarded reciting that the court met pursuant to adjournment *held* conclusive on collateral attack to show that the order awarding the contract was not a vacation order.
3. COUNTIES—RATIFICATION OF CONTRACT.—An order ratifying a county bridge contract will be presumed, on collateral attack, to have been made by court pursuant to adjournment.
4. COUNTIES—COLLATERAL ATTACK ON JUDGMENT.—An attack on a judgment of the county court is collateral when the judgment might have been appealed from.
5. BRIDGES—EXECUTION OF CONTRACT BY COUNTY.—Omission to sign a county bridge contract did not render the contract voidable, since filing it, though unsigned, constituted an execution thereof.
6. BRIDGES—COLLATERAL ATTACK ON ORDER ALLOWING PAYMENT.—Where an order allowing payment on completion of a county bridge construction contract was collaterally attacked, irregularities in publishing and posting of the contract *held* not subject to question.
7. BRIDGES—AUTHORITY TO MAKE CONTRACT.—Where a quorum court made an appropriation for building bridges, the county court may make contracts for its expenditure so long as the fund remains unexpended wholly or in part.
8. APPEAL AND ERROR—PRESUMPTION AS TO COUNTY COURT.—The Supreme Court will not presume that the county court exceeded its authority in the construction of two bridges and allowing payment after completion according to the contract.
9. CONSTITUTIONAL LAW—CONSTITUTIONAL AMENDMENT.—Amendment No. 11 to the Constitution, prohibiting the expenditure of more than the income of the county for any fiscal year, *held* not to

affect a bridge contract awarded by a county court before the amendment became effective.

10. BRIDGES—LIABILITY OF COUNTY.—Though the quorum court appropriated only $20,000 for bridge construction, the county will be obligated to pay the entire price for a contract calling for greater expenditure, there being no evidence that the county court understood that the highway department or improvement district was obligated to contribute.

Appeal from Newton Circuit Court; *J. M. Shinn,* Judge; reversed.

Ben E. McFerrin, M. A. Hathcoat, Jno. E. Miller and *Cul L. Pearce,* for appellant.

Woods & Greenhaw, for appellee.

HUMPHREYS, J. This is an appeal from the judgment of the circuit court of Newton County, rendered in a trial *de novo,* disallowing the claim filed by appellant against said county on January 28, 1926, for $29,907.55, alleged to be the balance due for constructing two bridges pursuant to a contract entered into by and between the county court and appellant on the 18th day of October, 1924. One of the bridges was constructed across Buffalo River and the other across Beech Creek, in the western part of the county, where the highway in Road Improvement District No. 6 of said county, created under the Alexander Road Law in 1922, intersected said streams. The purported contract upon which the claim was based provided that the cost of the construction of the Buffalo River bridge was to be $22,000 and the Beech Creek bridge $16,500, with the further stipulation that the price of construction might be increased or decreased in the quantity of the material used in the bridges, as per specifications and plans furnished by the Highway Department of the State.

W. P. Spears, a citizen and taxpayer of the county, intervened for the purpose of appealing from the allowance of the claim by the county court and testing the validity thereof.

In 1922 the quorum court appropriated $20,000 to construct the two bridges in question. On April 24, 1924, the county court appointed the commissioners to select a

location and prepare plans for the construction of the bridges. They made a report and filed plans and specifications in cooperation with the Highway Engineer, which were approved by the county court. On September 17, 1924, the county court published and posted notice for bids, and appellant filed a sealed proposal for the construction of the two bridges. On the 18th day of October, 1924, the bids were opened, and the contract was publicly let to the appellant, who was the lowest bidder. The following order appears in county court record L with reference thereto:

"Be it remembered that on this 18th day of October, 1924, at nine o'clock A. M., court met pursuant to adjournment, when present and presiding were the Honorable Frank Griner, county judge, E. C. Shinn, clerk, and Sam Hudson, sheriff of Newton County, when the following proceedings were had and done, to-wit:

"*In re* Letting contract for construction of Buffalo River bridge and Beech Creek bridge, Newton County, Arkansas.

"Now on this 18th day of October, 1924, the same being the day advertised and set out in notice for the letting of the contract or contracts for the construction of the above and foregoing bridges, and the court ascertaining and being advised that said notice had been posted and advertised as the law directs for the letting of bridge contracts, and after publicly announcing that court was ready to receive bids for the construction of said bridges, and after receiving all bids submitted, it appearing to the court J. E. Shroll of Ponca, Arkansas, was the best and lowest bidder, it is therefore considered, ordered and adjudged by the court that said bid for both the construction of the Buffalo River bridge and the Beech Creek bridge be and the same are hereby accepted in accordance with the proposal submitted, and the said J. E. Shroll is given ten days from this date to execute his formal contract for the construction of said bridges, and that he be and is required to file a personal bond or bond with some reputable surety company that he will well and faithfully

carry out the terms of said contract as set out in his proposal, said bond to be in the sum of the amount of the contract award.

"Ordered that court adjourn until the 21st day of October, 1924, at 9 A. M."

Within the time permitted a contract and bond were filed, but the contract was not signed, through an oversight. Appellant then proceeded to construct the bridges under the supervision of the commissioners and said highway engineer, in accordance with the plans and specifications, as changed or modified from time to time by them. After the bridges were partially completed, $20,000 in scrip was issued and paid to appellant under the following order made on December 31, 1924, appearing on page 374 of county court record L:

"*In re* Bridge across Buffalo River, near Boxley, and bridge across Beech Creek.

"On this day the report of the commissioners for Boxley and Beech Creek bridges was filed in open court and by the court examined and approved. Whereupon the court, after heretofore entering into contract with J. E. Shroll to build and construct said above mentioned bridges, and after having examined said report of commissioners as to work already done and materials on hand and contracted for, doth this day allow to the said J. E. Shroll, contractor, the sum of $20,000, and the clerk is ordered to issue his warrant on the county treasurer for amount herein specified."

The record of the court showed adjourning orders from October 21 to October 22, then to October 23, then to November 10, then to November 13, but did not show an adjourning order to December 31, 1924, the date the order for $20,000 in scrip was made. Neither did it show an adjournment until court in course on December 13, 1924.

Appellant completed the bridges within the time allowed in the contract, and they were accepted by the commissioners, who made their final report to the county court on October 21, 1925, which contained the following recommendations:

"Therefore we, as such commissioners, recommend that the increase and decrease in quantities be credited and charged to the respective parties to the contract for the construction of said bridges, and that the same be paid and settled for as per contract; that the contractor be released, as all work has been done, and we find faithfully, efficiently, and completed and performed as provided by the terms of the contract for the construction of said bridges."

The county court adjusted the various increases and decreases in the kind and quantity of materials used in the bridges, and on that basis allowed appellant $29,907.55 in addition to the allowance of $20,000 in scrip on December 31, 1924. This is the order of allowance from which appellees took an appeal to the circuit court. There is a conflict in the oral testimony as to whether the 18th day of October, 1924, and the 31st day of December, 1924, were adjourned days of a regular term of court.

The main question involved in this appeal is whether the order or judgment of date October 18, 1924, awarding the contract for the construction of the bridges to appellant, was a vacation order, or whether it was an award of the contract by the county court during term time, and, if not, whether the order of December 31, 1924, constituted a ratification of the contract by the county court.

The appeal by appellees herein from the order of the county court making the allowance was a collateral attack upon the orders or judgments of the county court of dates October 18 and December 31, 1924. The validity of those orders or judgments cannot be assailed by oral testimony on collateral attack. This court said, in the case of *Woodruff County* v. *Road Improvement District No. 14,* 159 Ark. 374, 252 S. W. 930, (quoting syllabus 5): "While parol evidence may be introduced in a direct attack on a judgment of a court to show it was rendered in vacation, the rule is otherwise upon a collateral attack." The convening order of date October 18, 1924, being the date the contract was awarded

to appellant, recites that court met pursuant to adjournment, and such recital is conclusive on collateral attack. The order of December 31, 1924, ratifying the contract, must be presumed, on collateral attack, to have been entered when the court was convened pursuant to adjournment. Either one of the judgments might have been appealed from, which is a certain test that this proceeding is a collateral attack upon them. According to the undisputed evidence, a formal contract and bond were filed conforming in every particular to the order or judgment of date October 18, 1924, awarding the contract to appellant. The omission to sign the contract was an oversight, and the failure to do so did not render it void or voidable. All of its terms complied with the proposal of appellant and the acceptance of the county court, and the filing, though unsigned, constituted an execution thereof. It is suggested that the letting of the contract was not published and posted as required by law, but these irregularities cannot be questioned on collateral attack.

Appellees attempted to sustain the judgment disallowing the claim upon the ground that only $20,000 was appropriated by the quorum court to construct the bridges, and that the county court was without authority to make a contract for a larger sum than the amount appropriated. Leaving out of the equation the effect of Amendment No. 11 to the Constitution prohibiting the expenditure of more than the income of the county for any fiscal year, the authority of the county court for letting the contract for the building of the bridges cannot be questioned. This court said, in the case of *Watkins* v. *Stough*, 103 Ark. 468, 147 S. W. 443, that "when the levying court makes an appropriation for the purpose of building bridges, the statute authorized the county court to make contracts for its expenditure and to continue to make such contracts as long as the fund remains unexpended, wholly or in part." None of the fund appropriated for these bridges had been expended when the county court let the contract. There may have been other unexpended

bridge funds on hand, for aught the record discloses, which would have authorized the letting of the contract. This court cannot presume that the county court exceeded its authority. *Howard County* v. *Lambright,* 72 Ark. 330, 80 S. W. 148. The contract in the instant case was not affected by Amendment No. 11 to the Constitution, because that amendment did not go into effect until December 7, 1924. *Matheny* v. *Independence County,* 169 Ark. 925, 277 S. W. 22. The contract in the instant case was awarded on October 18, 1924, and the contract and bond were filed on October 28, 1924.

Appellees attempt to sustain the judgment upon the theory that the county court entered into the contract with the understanding that the cost of the bridges in excess of $20,000 should be paid either by the Highway Department or by Improvement District No. 6. Neither the Highway Department nor Road Improvement No. 6 obligated itself in a legal way to pay any part of the contract price. They were not parties to the contract, and appellant had no notice of any private understanding or agreement between the county court and Ben McFerrin relative to what proportion of the contract price should be paid by Road Improvement District No. 6. Neither the notice of the letting, the proposal and acceptance of the contract, nor the contract itself, contained any provision to the effect that the county should pay only $20,000 of the contract price. On the contrary, the county court obligated the county to pay the entire contract price for the construction of the bridges.

On account of the error indicated the judgment is reversed, and the cause is remanded with directions to the circuit court to enter a judgment directing the county court to enter an order allowing appellant the balance due him of $29,907.55.

BRACE v. OIL FIELDS CORPORATION.

Opinion delivered May 2, 1927.

1. CORPORATIONS—CONTRACTS OF PROMOTERS.—The general rule is that, since the promoters of a corporation are not in any legal sense its agents before it comes into existence, a contract made by them is not binding on it when formed unless it is then ratified.
2. CORPORATIONS—CONTRACTS OF PROMOTERS.—Where the formation of a corporation was in contemplation, and the promoters of the corporation were taking steps to perfect its organization, and obtain a charter, and provide the means necessary for its successful operation, contracts made by such promoters for the benefit of the corporation, which were reasonable and proper to put it into operation, and the benefits of which were afterwards accepted by the corporation, become binding on the corporation without any form of contract.
3. CORPORATIONS—CONTRACT OF PROMOTER.—Employment of a geologist by the promoter of an oil company which was being organized, *held* binding upon the corporation subsequently organized.
4. EVIDENCE—MATTER OF COMMON KNOWLEDGE.—It is a matter of common knowledge that an association of persons for the purpose of locating the oil and gas territory cannot operate successfully without a geologist.
5. DAMAGES—BREACH OF CONTRACT.—The measure of damages for an oil company's breach of its contract to pay its geologist a bonus of $10,000 in stock, was the value of the stock at the time of the breach.
6. FRAUDS, STATUTE OF—CONTRACT TO PAY SALARY.—A verbal agreement to pay a geologist a stated salary and bonus in stock for services for one year was not invalid under the statute of frauds.
7. FRAUDS, STATUTE OF—EMPLOYMENT FOR MORE THAN YEAR.—An oral agreement for more than one year, whereby a corporation agreed to pay to a geologist a certain amount of money and stock at the end of each year in consideration of services, would be enforceable by the geologist at the end of the first year as to services performed, the statute not being applicable thereto.
8. APPEAL AND ERROR—CONFLICT IN RECORD.—In the case of a conflict between the recitals of a decree and those of the bill of exceptions, the former will prevail.

Appeal from Ouachita Chancery Court, Second Division; *George M. LeCroy*, Chancellor; reversed in part.

STATEMENT OF FACTS.

Frank Lowe brought this suit in equity against Gordon Ingalls and Oil Fields Corporation to ask for an accounting and the appointment of a receiver to take charge of and wind up the affairs of four trusts which were operated by the defendant, Gordon Ingalls, as trustee for himself and others beneficially interested. After the receiver was appointed, O. L. Brace filed a claim for services performed by him as geologist for the benefit of the trust property.

O. L. Brace is a petroleum engineer by profession, and had worked in practically all of the oil fields in the western part of the United States and in Mexico before he was employed by Gordon Ingalls for himself and the various syndicates which he operated. Brace first commenced to work for Ingalls on the 3d day of March, 1923, at the sum of $250 a month and what he termed a "carried interest" and his expenses. Ingalls and Brace agreed that the "carried interest" should be $10,000 worth of stock a year in addition to his salary during the time in which he was with the organization. His salary was raised on November 1, 1923, to $450 a month. After Brace began work with Ingalls, he received an offer from a company in Mexico to work for it as geologist at a salary of $12,000 per year and expenses. There had been no definite time beyond the period of one year that Brace was to work for Ingalls. It was then agreed that Brace should work for Ingalls for five years, and that he should have a bonus of $10,000 a year in stock in the Oil Fields Corporation, which was being organized to take over the other companies in which Ingalls was interested. This was in addition to his monthly salary and expenses. Geologists employed by promotion companies are paid larger salaries than those working for the large companies, because, where a geologist associates himself with a promotion company, he runs the risk of losing his reputation if he makes mistakes in locating oil and gas territory.

A receiver was appointed for the companies represented before the written contract between Brace and Ingalls was executed, and the receiver notified Brace that his services were ended about the 11th or 12th of March, 1924. During the year he worked for Ingalls and his associates Brace gave his entire time to this work. He filed a claim with the receiver for something over $2,000, and he has been paid $500 on the claim. The testimony of Brace is corroborated by that of Gordon Ingalls and contradicted by that of the attorney for the company.

Other evidence will be stated and discussed in the opinion.

The chancellor allowed the claim of Brace for salary in the sum of $1,566.59, but found that his claim for $10,000 on account of the alleged stock bonus was not a proper charge, and that he was not entitled to recover anything on it. Brace has appealed from that part of the decree refusing to allow his claim on account of the alleged stock bonus.

Gaughan & Sifford, for appellant.

Albert L. Wilson, for appellee.

HART, C. J., (after stating the facts). The record shows that O. L. Brace was employed as a geologist by Gordon Ingalls in behalf of himself as trustee for those who were beneficially interested with him in locating and developing oil and gas leases and selling interests in the same. After the employment of Brace, he devoted his entire time to his work as geologist for Ingalls and his associates. It was finally determined to organize the Oil Fields Corporation to take over the interests of Ingalls and his associates in all the companies which he was representing. Before the organization of that corporation Brace had performed most of his services as geologist. He did not know whether the terms of his employment had ever been stated by Ingalls to his associates or whether or not they had ever ratified his employment. He relied entirely upon the word of Ingalls in the premises. Ingalls testified that he informed his

associates and the directors in the Oil Fields Corporation after it was organized that he had employed Brace as geologist and of the terms upon which he had employed him. This was denied by the attorney for Ingalls and his associates. He testified that they knew nothing whatever about the employment of Brace as geologist, and that his employment was never ratified at all. The attorney was himself a director and was present at all meetings of the board. Under these circumstances it is earnestly insisted that Brace was not entitled to any bonus whatever. His right to the amount allowed by the chancellor is not contested, and it is only sought to uphold the decree of the chancellor in the matter.

It is true the general rule is that, since the promoters of a corporation are not in any legal sense its agents before it comes into existence, a contract made by them is not binding on the corporation when formed unless it it is then ratified. To prevent fraud and imposition and in order to do substantial justice, courts of equity have ingrafted an exception on the general rule, which, as stated in *Little Rock and Fort Smith Railway Co.* v. *Perry,* 37 Ark. 164, amounts to this: "That, where the formation of a corporation was in contemplation and the promoters of the corporation were taking initiatory steps to perfect its organization and obtain a charter, and provide in advance the means necessary for its successful operation, all contracts made by such promoters, for the benefit of the future corporation, and which were reasonable and proper to put it in operation, and the benefits of which were afterwards accepted by the corporation, became binding on the corporation without any formal contract to pay."

In *Perry* v. *Little Rock & Fort Smith Ry. Co.,* 44 Ark. 383, the court said:

"The services performed must be intended at the time to inure to the benefit of the future corporation, must be made or done in its behalf, and with the expectation and confidence that the company will be bound, and not the credit of the individuals."

To the same effect see *Bloom* v. *Home Insurance Agency*, 91 Ark. 367, 121 S. W. 293. In that case the court said that, where all parties, after the organization of the corporation, recognized and acted on the original contract, all parties to it are bound by its terms.

In the application of this principle to the facts as disclosed by the record, we think the chancery court erred in not allowing Brace what he calls his stock bonus of $10,000. It is a matter of common knowledge, as well as implied from the circumstances in evidence in this case, that an association of persons for the purpose of locating oil and gas territory suitable for their purpose cannot operate successfully without a geologist. The attorney of the company recognizes that his services inured to the benefit of the company and were necessary in behalf of the promoters. He contends, however, that the services of the geologist were not necessary and should not be paid.

It is apparent, from the very nature of the business, that the companies could not operate at all, with any degree of success, if they did not have some one with sufficient experience to advise them as to whether the territory selected by them could be successfully explored for oil and gas. The companies were organized for this very purpose, and, unless they intended to act in a fraudulent manner, the promoters could not act with any intelligence without the services of a geologist or some one who had practical knowledge of the surface indications of oil and gas. Besides this, Ingalls testified that he made known to the directors of the Oil Fields Corporation the fact that he had employed Brace, and they ratified his action. According to the testimony of Brace, it was the custom of those promoting ventures of this sort to give the geologist a bonus in the way of an interest in the property. This was done because the geologist stood a chance to lose his reputation if he could not successfully locate oil and gas territory for those who employed him.

It is next insisted by counsel for appellees that, even if the stock bonus of $10,000 be allowed Brace, he should only be entitled to recover its value. On the other hand, it is the contention of Brace that the measure of damages for breach of the contract to pay a fixed sum in a particular commodity should prevail, and that his measure of damages would be the sum stated, and that the value of the property at the time of the breach would not be material. We do not agree with counsel for Brace in their contention, which, we think, is contrary to the settled rule of this court on the subject under the particular facts of this case.

In *Johnson* v. *Dooley,* 65 Ark. 71, 44 S. W. 1032, 40 L. R. A. 74, and in *Burnside* v. *Union Sawmill Co.,* 92 Ark. 118, 122 S. W. 98, it is held that, where the contract is not for a sum stated in property but for a specific property, the measure of damages is the value of the property at the time of the breach.

Without reviewing the testimony on this point or stating it in detail, we are of the opinion that it was the intention of the parties that Brace was to be paid a bonus of $10,000 in the stock of the companies which he represented. As stated by him, it was all a speculative venture and promotion scheme, and a bonus was usually given to geologists in cases of this sort because they stood a chance of injuring their reputations if they did not successfully locate oil and gas territory for those whom they represented. In other words, Brace was to exchange his work for stock, and monetary terms were necessarily used, not for the purpose of expressing value, but as the only mode of expressing quantity. The amount of stock to be given to him was not a money indebtedness, but was a stock indebtedness. Consequently he would benefit from any increased value of the stock and would suffer loss by its depreciation. When Ingalls and his associates failed or refused to issue him the stock, he became entitled to recover the value of it, and, according to the evidence in the record, at the time of the breach the value of the stock was only ten cents on the dollar.

Hence the chancellor should have allowed his $1,000, for he had worked for Ingalls and his associates for one year and was to receive an extra compensation in stock of $10,000 for each year he had worked for the company.

It is next contended that the agreement was for five years, and was void under the statute of frauds. According to the testimony of Brace and of Ingalls, it was contemplated that the employment should be for five years, and a contract to that end, which was to be reduced to writing, was agreed upon. It was never entered into because of the appointment of the receiver. However, Ingalls had already made a verbal agreement with Brace to work for him and his associates as a geologist for one year, and was to pay him a stated salary per month for that work and to give him a bonus of $10,000 in stock for that year. Under this verbal agreement, Brace was entitled to recover. Besides, even if the agreement had been for a longer period of time and void under the statute of frauds, it had been completely performed for the first year. Brace had performed the contract for one year and was entitled to the remuneration for his services agreed upon for one year. In this respect the contract was completely executed, and the statute of frauds would not apply. The services performed by Brace called for payment of stock in the sum of $10,000 for each year's work. The substance of the transaction was an exchange of work for stock, and the contract provided for a certain amount of money and stock to be paid Brace at the end of each year, and the contract had been completely performed between the parties for one year at the time the receiver was appointed. Hence appellees could not rely upon the statute of frauds to defeat the contract in so far as it had been fully executed between the parties.

It is next insisted that the evidence is not properly in the record, and for this reason the decree must be affirmed. The transcript shows that the decree in the main case was entered of record on the 27th day of November, 1925, and that the decree allowing the claim

of O. L. Brace was entered of record on the 18th day of December, 1925. It is true that the chancellor, in signing the bill of exceptions, recites that the intervention of O. L. Brace was heard on the 27th day of November, 1925, but this amounted to nothing more than a clerical mistake. Where there is a conflict between the decree itself and the bill of exceptions, the recitals of the decree will prevail. *Kansas City S. Ry. Co.* v. *Akin,* 138 Ark. 10; 210 S. W. 350, and *Rural School Districts Nos. 2, 3 and 4* v. *Lake City Special School District,* 144 Ark. 362, 222 S. W. 732, 223 S. W. 381.

The record inferentially shows that the evidence was heard orally by the chancellor by agreement of both parties, and was reduced to writing by a stenographer appointed for that purpose. The bill of exceptions seems to have been filed as a precautionary measure in the matter. In this view of the case it will not make any difference whether the special practice act of the chancery court in question was complied with or not.

Finally, it is insisted that the appeal should be dismissed on account of the failure to serve appellees with summons. As we have already seen, the decree was entered on the 18th day of December, 1925, and the decree recites that the appeal was prayed in and was granted by the chancery court. The transcript was filed on February 23, 1926, with the clerk of this court. Hence this contention is without merit.

The result of our views is that the chancellor erred in not allowing Brace the value of the $10,000 in stock as damages for the breach of his contract. Under the proof in the case the value of the stock should have been fixed by him at $1,000. The decree will therefore be reversed, with directions to the chancery court to allow Brace the sum of $1,000 additional, and in all other respects it will be affirmed. It is so ordered.

MILLS NOVELTY COMPANY v. MILLSAPS.

Opinion delivered May 2, 1927.

1. PLEADING—REFUSAL TO STRIKE PARAGRAPHS.—Refusal of the court to strike paragraphs in answer and cross-complaint, which were merely statements of matters of defense in greater detail than necessary, *held* no error.
2. SALES—MEETING OF MINDS.—In an action on a contract of sale whether there was a meeting of minds as to the terms of payment was a question for the jury.
3. APPEAL AND ERROR—CONCLUSIVENESS OF VERDICT.—A verdict upon conflicting evidence is conclusive.
4. PRINCIPAL AND AGENT—AUTHORITY OF AGENT AS QUESTION FOR JURY.—Whether an agent, who inserted a clause in the contract of sale as to payment from receipts was acting within the scope of his authority *held* for the jury.
5. TRIAL—REPETITION OF INSTRUCTIONS.—It was not error to refuse correct instructions fully covered by other instructions given by the court.
6. REPLEVIN—CROSS-COMPLAINT.—Under Crawford & Moses' Dig., § 1195, a defendant may recover by way of counterclaim only when plaintiff's action is for the recovery of money, but a counterclaim cannot be asserted where a plaintiff's cause of action is merely for the recovery of specific property.

Appeal from Garland Circuit Court; *Earl Witt*, Judge; affirmed.

Sydney S. Taylor, for appellant.

C. T. Cotham, for appellee.

WOOD, J. The Mills Novelty Company, plaintiff, instituted this action against R. L. Millsaps, the defendant, to recover the possession of a musical instrument called a violano. The plaintiff alleged that it had a special ownership in the instrument, having retained title under a sales contract made with the defendant. It was alleged, in substance, that the plaintiff entered into a contract with the defendant to sell the latter the musical instrument for the sum of $3,000, the sum of $250 to be paid in cash, $200 on installation of the instrument, and the balance of $2,550 in twenty-five installments of $102 each, the first payment to be made on September 25, 1924, and the balance on the 25th of each month thereafter

until the full amount was paid. The plaintiff was to retain title until the full amount of the purchase money was paid. The instrument was delivered under the contract of purchase, and the sum of $450 was paid, and a note for $2,550 was executed on May 15, 1924, by defendant to the plaintiff, to be paid in installments as indicated. The plaintiff set up the contract and note, alleged that the defendant had failed to make the payments in accordance with his contract, and, after repeated demand made upon him so to do, upon failing to make the first payment all deferred payments became due, and that, under the terms of the contract, the plaintiff had the right to the possession of the instrument and to retain all payments that had been made to cover the expense of repossession, wear and tear on the instrument. The plaintiff made the sales contract and note exhibits to his complaint. The plaintiff prayed judgment for the possession of the instrument.

The defendant, in his answer, admitted that he had executed a written contract for the purchase of the violano as alleged in the complaint, but denied that the exhibit attached to the complaint was a true copy of the contract. He admitted that he had refused to pay the account demanded of him by the plaintiff, and he refused to return the violano. He alleged that he had made a total payment on the deferred purchase money note of $1,034.38, and had tendered the balance due of $27.25, according to the contract, on January 1, 1926, which the plaintiff refused to accept. He denied other allegations of the complaint, and alleged, by way of cross-complaint, that he did not enter into the contract, a copy of which he exhibits, but alleged that the agent of the plaintiff gave him a copy of the contract, which he signed, and a copy of which he made an exhibit to his answer. He stated that the contract he signed contained, among other things, the following: "This instrument is to take in sufficient money to meet monthly payments, or we to cut monthly rate to conform with the receipts."

In four paragraphs of his answer and cross-complaint the defendant set up certain correspondence with plaintiff and certain negotiations with W. H. Bickett, the soliciting agent of plaintiff, prior to and leading up to the contract which was executed between the plaintiff and the defendant. Defendant stated that, if plaintiff had accepted defendant's tender of January 1, 1926, the defendant would have paid the sum of $18.63 in excess of the receipts taken in by the machine since the same was installed in the defendant's place of business. He alleged that the plaintiff, on March 5, 1926, wrongfully took possession of the instrument and thereby destroyed the market value of thirty-two rolls of music, valued at $128, which the defendant had purchased to be used in connection with the machine; that he had been compelled to employ an attorney to defend the action of plaintiff against him, and had been deprived of the use of the machine at the height of the season in Hot Springs, when he would have realized a profit from the use of the machine, all to his damage in the sum of $500; that, by the wrongful act of plaintiff in taking the machine, he has been damaged in the further sum of $1,524.38, being the amount which he had paid the plaintiff on the purchase price of the machine; that the total amount of his damage by reason of plaintiff's wrongful act in taking his machine amounted to $2,152.38, for which sum he prayed judgment.

The plaintiff moved to strike from the answer and cross-complaint those paragraphs relating to the preliminary negotiations between the defendant and Bickett, plaintiff's agent, before the execution of the contract, on the ground that these were merged in the written contract and were irrelevant and immaterial. The court overruled the motion, and the plaintiff duly excepted. The plaintiff answered the cross-complaint, and alleged that Bickett, its soliciting agent, had no authority to bind plaintiff by any contract. His authority was limited to taking orders, and the contract sued on specifically stated that it was subject to the acceptance of

the plaintiff. The plaintiff entered a general denial to the other allegations of the cross-complaint.

Mrs. Chalder, the auditor of the plaintiff, testified that the plaintiff received the order of the defendant for the violano through the mail from W. H. Bickett, together with the note as set out in the complaint and the cash payment of $250; that Bickett was a salesman of the plaintiff to solicit orders on a commission basis. Witness introduced and exhibited the original contracts and the note which are set forth in the complaint. She introduced the report of Bickett on the defendant, and his letter accompanying the order, and also, by request of defendant, a letter of the defendant of May 22, 1924, to the plaintiff, in which the defendant states that he had received the letter of plaintiff accepting defendant's order for the violano through the plaintiff's agent, Bickett, and further states: "I presume you are aware of Mr. Bickett's representation with reference to service which I am to have on this instrument for two years." Also defendant's letter of May 28, 1924, in reply to plaintiff's letter of May 26, in which the defendant states that plaintiff's letter practically covers the guaranty as to the instrument, which is satisfactory; also defendant's letter of June, 1924, in which defendant states that the note should be dated June 14, 1924, and the first payment due July 14, 1924, and that the instrument had not been properly adjusted, and requested plaintiff to send its agent to correct the trouble, and concluded the letter, "when this matter is attended to and the note is changed to conform with Bickett's agreement, I will adhere to my part of the contract."

On July 7, 1924, defendant wrote to the plaintiff, in which letter he stated: "You had better send your Mr. Bickett here at once, as I want to see him in reference to statements he made to me before making this final payment" (referring to the payment of $200 to be made at installation). In another letter of the same date the defendant stated that he expected the plaintiff to live up

to Mr. Bickett's agreement, provided defendant fulfilled his part. In a letter of August 15, 1924, the defendant wrote, in reply to plaintiff's letter of August 5, in which the defendant stated that plaintiff's Mr. Bickett had made a "bunch of promises" which plaintiff was inclined to ignore; that Bickett first promised to give free service on the instrument for two years; that the receipts of the instrument were guaranteed to take care of the notes. In this letter is the further statement that defendant wanted a thorough understanding with the plaintiff with reference to Bickett's agreement, and asking plaintiff if it was going to adhere to that agreement, and stating, among other things, "I want your good will, and my good will certainly ought to be worth something to you—at least worth enough for you to adhere to your agent's agreement." Defendant further stated that, upon receiving a reply, he would finish up final payment and remit receipts since the instrument was fully installed.

On August 27, 1924, defendant, in answer to plaintiff's letter of August 23, refers to differences that had arisen between them, and reiterates the agreement that he had with Bickett, and said: "It seems that the contract sent you by Mr. Bickett must have been changed after leaving my hands. I will also state, for your information, that the writing in my contract by Mr. Bickett states that the receipts of the instrument must take care of monthly payments." In his letter of September 13, 1924, defendant, in answer to letter of plaintiff and a telegram, stated that he was not going to send the contract in his possession to the plaintiff, but that plaintiff was at liberty to have some one come down and inspect it, if plaintiff doubted what defendant stated. Defendant reiterated that he was willing to fulfill his part of the contract and pay the balance of $200 and what the instrument had taken in since installation, and that he had kept a correct account of the monthly receipts. On December 1, 1924, the defendant wrote that plaintiff's agent had been down and left a paper showing that the defendant

owed a balance of $2,500, and protesting that defendant only owed $2,450. In this letter defendant inclosed a check for $102.50, and stated: "I am not inclined to send anything further until you change your records accordingly." Other letters followed with reference to orders for music, etc., which are immaterial to this controversy, and on June 5, 1925, the defendant wrote the plaintiff as follows: "Referring to your letter of June 2, we regret that it is again necessary to call your attention to the fact that our violano contract clearly specifies that payments on the notes shall not be demanded except as receipts from the instrument are sufficient to take care of said notes. Since mailing you a check on May 1 our violano has taken in only $38.60." And again, on June 15, defendant wrote, in answer to a letter of plaintiff of June 10: "We are pleased to call your attention to the fact that there is a clause in our contract reading as follows: 'This instrument is to take in sufficient money to meet its monthly payments, or we to cut monthly rate to conform with receipts.' If your copy of our contract does not contain this clause it is because it was erased after leaving our hands."

The further testimony of plaintiff was to the effect that it received the order as set forth in its complaint; that the original order was in the same condition as when it was received through its salesman, Bickett; that Bickett had no authority to grant any special terms, and the plaintiff's contract with him provided that all orders taken by him were not binding on the plaintiff until accepted by plaintiff; that the plaintiff had never sold a machine on the terms claimed by defendant.

It was further shown by the plaintiff that the defendant made no other claim in regard to a definite agreement than that set forth in plaintiff's sales contract until August 15, 1924. When defendant began to fall behind on his installments and declined to make further payments, and plaintiff made all reasonable efforts to adjust the claim without litigation, upon the defendant failing to make further payments, the plaintiff declared

the whole amount due under the contract. There was testimony by a witness for the plaintiff to the effect that plaintiff sent its agents in the fall to adjust the differences with the defendant, if possible, and at that time, after plaintiff exhibited its contract to the defendant, defendant was to pay from October 21, 1924, on, the sum of $102 a month. In other words, he was to comply with the full conditions of the contract. Witness stated that he did not know why the defendant changed his attitude at that time with reference to the contract, unless it was because the instrument was paying and defendant wanted it, and the only way he could get it was to comply with the contract that witness laid down in front of him. It was further shown that the plaintiff sent the defendant a sworn statement on December 29, 1925, showing the payments that had been made by him and the balance due; that the defendant refused to pay, and the plaintiff demanded the return of the machine, and the defendant refused to deliver the same.

The defendant testified, in substance, that he became interested in the purchase of a violano through correspondence with the plaintiff, and that the plaintiff wrote defendant that its salesman, Bickett, would call on him, which Bickett did, and, after discussing the matter of the contract, he refused to make a contract unless Bickett would guarantee the receipts so that all the money he would pay out would be the original $450. The salesman made out two contracts, and left one copy with the defendant. Over the objection of the plaintiff, the defendant introduced the contract, which was precisely the same as the contract set forth in the complaint, except, after the order for the violano, describing same and giving its price and the $200 first payment to be made upon the installation of the instrument, is this clause: "This instrument to take in sufficient money to meet its monthly payments, or we to cut monthly rate to conform with receipts." The contract, as thus signed by the defendant, was sent to the plaintiff and accepted

by it. The salesman wrote the order which the defendant has in his possession first, and wrote the one he sent the plaintiff second. Both contracts, at the time witness signed the same, were precisely like the one the defendant offered in evidence. The contract which the plaintiff offered in evidence contained the defendant's signature, but defendant did not sign it as it is. Defendant was asked if he meant to say that the contract in suit had been changed, and answered, "Well, I mean to say that the instrument I signed had the same writing as mine, because I stood right over the man and saw him put it in there; it is not any supposition on my part." Witness had never received a copy of the contract from the plaintiff since he signed it, and had not asked for one, as he thought the plaintiff's was like the one defendant had.

Another witness testified for the defendant to the effect that he was present and saw Bickett fill out the contract offered in evidence by the defendant, and that the other instrument signed by the defendant was identical with it.

The plaintiff presented prayers for instructions which, in effect, would have told the jury that the burden was on the plaintiff to establish the contract on which the suit is based, and that, if the plaintiff established the contract and the defendant failed to comply with its terms, the plaintiff would have the right to retake the property. Also, that the defendant was bound to ascertain the nature and extent of the authority of Bickett, and that the contract on its face showed that Bickett had authority merely to solicit orders, and that the contract did not become complete until accepted by the plaintiff; that all negotiations preliminary to the signing of the contract were merged in the contract, and plaintiff would not be bound by any parol contemporaneous agreements not incorporated therein; that, if the defendant executed the contract in suit, he would be bound by its terms, even though the agent made a copy containing a different provision, on the ground that the loss must fall on the one

who contributed most to produce it; that, if the defendant signed the contract introduced by the plaintiff, the burden would be upon the defendant to show that it contained other provisions at the time he signed the same.

The plaintiff further asked the court to instruct the jury that, if the erasures were made by its agent Bickett without any authority, such an act on his part would be a mere spoliation, and would not be binding on the plaintiff; and, further, that, if the defendant, with knowledge of the previous alteration, made payments under the terms of the contract, such action on part of defendant would be a waiver of any claims of alteration and a ratification of the contract; and, further, that, under the terms of the contract, the plaintiff was entitled to retain all payments made to it by the defendant to cover usage, wear and tear on the machine.

The court refused plaintiff's prayers for instructions, and instructed the jury, on its own motion, to the effect that the issue is, what was the contract entered into by the plaintiff and the defendant, the only issue being the right to the possession of the instrument; that, if the contract was as claimed by the plaintiff, the plaintiff would have a right to the possession of the instrument, and the burden was on the plaintiff to establish the contract as alleged in its complaint; that, if the defendant did not execute the contract as alleged in the complaint, then plaintiff would not be entitled to the possession of the instrument.

The court further instructed the jury that the plaintiff would not be bound by the contract made by its representative if the representative exceeded his authority as plaintiff's agent; that the defendant, however, would have a right to rely upon the authority of the agent to enter into a contract and to make provisions as to how the instrument would be paid for, if that agent had been held out to him as being the agent of the plaintiff with authority to act for it in the matter of the purchase of the instrument; that it was for the jury to determine

from the evidence whether the agent did have authority to represent the plaintiff and to make the stipulation a part of the contract which the defendant says was made at the time he agreed to purchase the instrument.

The court further instructed the jury that, if the agent of the plaintiff exceeded his authority in making a contract that he was not authorized to make, the plaintiff would be required to rescind the action in that respect within a reasonable time after it had information that he had exceeded his authority, and, if the plaintiff waited an unreasonable time to rescind the action of its agent, it would be estopped to deny his authority to make the contract which the defendant claims he made.

The court further instructed the jury that, if the defendant, knowing that the contract was not as he claimed, afterwards ratified the same by making payments thereon, he would be bound on the contract as contended by plaintiff. On the other hand, if the plaintiff, knowing that the contract was as claimed by the defendant, afterward entered into an agreement with the defendant by which he could go ahead and make the payments on the instrument as the defendant claimed he had a right to do under the contract, then the plaintiff would not be entitled to recover.

The verdict was in favor of the defendant, and from a judgment entered in the defendant's favor the plaintiff duly prosecutes this appeal, and the defendant cross-appeals from the judgment of the court dismissing his cross-complaint.

1. There was no error in the ruling of the court in refusing to strike certain paragraphs of the defendant's answer and cross-complaint. These paragraphs were merely a statement in greater detail than was necessary of the appellee's contention that he did not enter into the contract as set up in appellant's complaint, and setting forth appellee's own version of the contract between him and the appellant.

2. We have set forth fully the substance of the material testimony in the case, and we are convinced,

from a consideration of this testimony, that it was an issue of fact for the jury, under the evidence, as to whether or not there was a meeting of the minds of the parties upon the instrument which is the foundation of this action, and which, appellant claimed, evidenced the contract between it and the appellee. The issue was submitted to the jury under correct instructions. The jury might have found, from the testimony for the appellee, that, although the instrument upon which the action was based bore his signature, nevertheless, at the time he signed the same it was not the instrument introduced in evidence by the appellant. On the contrary, that it contained the additional clause above set forth as testified by the appellee and an eye-witness who corroborated his testimony.

Even if it be conceded that the appellant's agent, Bickett, exceeded his authority in inserting the clause in the contract which the appellee claims was inserted therein before he signed the same, still the fact remains that, if appellee told the truth, he demanded that this clause be inserted in the contract, and it was inserted therein before he signed the same. Appellee testified that the contract containing this clause was sent to the appellant and that the violano was shipped on this order —the only order signed by him. If the appellant accepted the order as thus written, then it approved and ratified the contract as thus written by Bickett, even though he did not have authority to insert the clause. If the appellee told the truth, and the order or contract, when it was sent by Bickett to the appellant, had been altered so as to eliminate the clause which appellee claims it contained when he signed it, then there was no meeting of the minds of the contracting parties on the instrument which is the foundation of this action. The jury believed the testimony of the appellee, and its verdict is conclusive here.

Moreover, it occurs to us that it was likewise an issue for the jury, under the evidence, as to whether or

not Bickett, as the agent of appellant, if he inserted the clause in the contract as stated by the appellee, was acting within the scope of his authority as agent. The court likewise submitted that issue to the jury, under correct instructions applicable to the facts of this record, in harmony with the familiar principles of law often announced by this court. See *American Southern Trust Co.* v. *McKee, ante,* p. 147, 293 S. W. 50, where the authority of general and special agents is discussed. Likewise the issue as to whether or not there was a ratification by either of the parties was correctly submitted to the jury. Indeed, we are convinced that all issuable facts presented by the testimony in this record were fully and fairly submitted to the jury by the court's charge. Such of appellant's prayers as were correct and were refused by the court were fully covered by instructions given by the court on its own motion.

3. The appellee is not entitled to recover in this action on its cross-complaint, and the court therefore did not err in sustaining the appellant's demurrer thereto. The appellant did not ask for any money judgment against the appellee. It only set up the alleged contract of purchase and alleged its breach by the appellee, and prayed for judgment, under the terms of the contract, for the recovery of the violano. Under § 1195, C. & M. Digest, the defendant in an action may recover by way of counterclaim on any cause of action arising either upon contract or tort, where the action by the plaintiff against the defendant is for the recovery of money; but a counterclaim cannot be asserted where the cause of action by the plaintiff against the defendant is merely for the recovery of specific property. *Smith* v. *Glover,* 135 Ark. 531, 205 S. W. 981; *Coates* v. *Millner,* 134 Ark. 311, 203 S. W. 701; *Crawford* v. *Slayton,* 155 Ark. 283, 244 S. W. 32. See also *Commercial Credit Co.* v. *Stanley,* 164 Ark. 473, 262 S. W. 318.

The court correctly instructed the jury that the only issue for it to determine was the right to the possession

of the violano. The testimony adduced on the trial of that issue developed ancillary issues, such as alteration, spoliation and ratification, but these were only subsidiary and subordinate to the main issue. The appellee, in its cross-complaint, did not ask for any damage by reason of injury to the property by the appellant while in the latter's possession under the writ of replevin. The verdict of the jury and the judgment of the court awarded the appellee the right to the possession of the instrument. We find no errors prejudicial to the appellant in the rulings of the trial court, and its judgment is therefore affirmed.

J. T. FARGASON COMPANY v. DUDLEY.

Opinion delivered May 2, 1927.

1. TRIAL—TRANSFER TO EQUITY.—In an action for a balance due on an account refusal to transfer the case to chancery was not error where the amount was not in dispute, but the issue was whether the plaintiff had guaranteed a certain price.
2. PRINCIPAL AND AGENT—AUTHORITY OF AGENT.—A cotton factor, as a matter of law, *held* not to have guaranteed the owner of cotton a certain price where the owner relied on representations of the factor's soliciting agent, since such representations would not be within the apparent scope of the agent's authority.
3. PRINCIPAL AND AGENT—AUTHORITY OF AGENT.—One dealing with an agent without ascertaining his authority does so at his peril.

Appeal from Poinsett Circuit Court; *G. E. Keck*, Judge; reversed.

Horace Sloan, for appellant.

C. T. Carpenter, for appellee.

WOOD, J. This action was begun in the chancery court of Poinsett County by J. T. Fargason & Company, a corporation at Memphis, Tennessee, against W. A. Dudley and Robert Dudley, individually, and as a copartnership under the name of W. A. Dudley & Brother. It was alleged that, in March, 1920, during the existence of the partnership, it shipped to the plaintiff, cotton factors at Memphis, Tennessee, twenty-one bales of cotton

to be sold by the plaintiff for the defendant; that the partnership was afterwards dissolved and the business continued in the name of W. A. Dudley. Plaintiff alleged that it advanced to the defendant on such cotton the sum of $1,700 and that certain charges had accrued against the cotton in the way of interest, freight, storage and insurance, amounting in the aggregate to $376.70. It was alleged that the plaintiff sold the cotton during 1921 and received from the sale the sum of $595.41, which amount deducted from the amount due the plaintiff by defendant left a balance of $1,481.29, for which the plaintiff prayed judgment.

The cause, on motion of the defendant, was transferred to the circuit court, where the defendant, Robert Dudley, answered, disclaiming any interest in the partnership at the time of the alleged transaction between the plaintiff and W. A. Dudley, defendant. W. A. Dudley answered, denying all the allegations of the complaint except that the plaintiff was a corporation. He made his answer a cross-complaint, and alleged that he shipped the cotton to the plaintiff under a strict guaranty that the same should be sold by the plaintiff for at least 26 cts. per pound; that he was influenced by this guaranty to ship the cotton to the plaintiff. He alleged that the twenty-one bales of cotton shipped to the plaintiff contained 8,930 pounds; that, under the terms of the contract by which the cotton was shipped, the plaintiff was indebted to the defendant in the sum of $621.80, being the difference between the amount for which the cotton was actually sold and the guaranteed price. Defendant prayed that plaintiff be required to account to him for the surplus sum which would have been obtained by selling the cotton at the guaranteed price, amounting to $621.80, for which the defendant prayed judgment.

The plaintiff answered the cross-complaint of W. A. Dudley, denying its allegations. A motion was made by the plaintiff to remand the cause to the chancery court, which was granted. A motion was then made by the defendant to retransfer the cause to the circuit court,

which was granted, to which last motion the plaintiff duly excepted.

The testimony of plaintiff's bookkeeper during the transaction was to the effect that Dudley Brothers shipped to the plaintiff, in 1920, twenty-one bales of cotton. The plaintiff advanced to W. A. Dudley on this cotton $1,700, and the interest on this, together with the freight, storage and insurance charges, amounted to $2,076.70. The plaintiff sold the defendant's cotton during the year 1921 for the sum of $595.41, leaving a balance due the plaintiff in the sum of $1,481.29. The cotton was shipped to the plaintiff by the defendants to be sold by the plaintiff as a cotton factor; the plaintiff was not buying the cotton, but merely acting as a commission merchant or factor. The witness explained in detail the method of cotton factors in handling cotton, which we deem unnecessary to set forth.

W. A. Dudley testified that one C. C. Deyerle came to his place of business at Truman, Arkansas, in 1920, representing the J. T. Fargason Company. Witness shipped cotton on his solicitation to that company. Witness told Deyerle that he had some cotton that he wished to dispose of, and asked Deyerle what cotton of that grade would bring, and Deyerle stated from thirty cents up. Witness told Deyerle that he could get 26 cents for it, and Deyerle replied, "You ship that cotton to J. T. Fargason & Company and I guarantee that you get 26 cents or better for it." The plaintiff moved to exclude this testimony of Deyerle on the ground that there had been no showing that Deyerle had any authority to solicit cotton for the Fargason Company on which to make any price, or to guarantee any price. The court overruled the motion. The witness identified and introduced in evidence the correspondence between himself and the plaintiff. In a letter of defendant to the plaintiff dated February 24, 1920, the defendant stated, "as per conversation with your Mr. Deyerle, we are shipping you today eight bales of cotton as per the attached bill of lading, and we are drawing on the Bank of Truman

for $600. Please sell this cotton for our account and render statement." Plaintiff answered this letter on February 27 in which it thanked the defendant for the shipment and stated that the defendant's draft would be paid on presentation, and that, when the cotton arrived, it would place the samples on plaintiff's tables and sell the cotton as soon as possible. Witness further testified that Deyerle had solicited shipments of cotton from witness for the Fargason Company numbers of times before, and again told witness that, if the witness would ship this cotton to the plaintiff, he would guarantee that plaintiff would get 26 cents for the lower grade and more for the other. The plaintiff renewed its objection to the testimony, which objection the court overruled. Witness further testified that he was in Memphis in July, 1920, saw the plaintiff, and informed it that witness did not ship its cotton over there to keep—that he wanted it sold. Witness wrote plaintiff letters to that effect. He did not write them objecting to their holding it, but simply told the plaintiff that he shipped it to sell and not to hold. Later, in September, plaintiff sent witness a statement for storage and freight, which witness paid in October, 1920. Witness did not raise any question or say anything about the fact that the cotton was not sold, because witness was relying on his agreement with Deyerle. Witness received several reports of sales, beginning March 24, 1920, showing that plaintiff had sold his cotton at six cents per pound; after receiving several reports, witness wrote plaintiff a letter on June 9, 1921, in which he stated that the sales were not satisfactory; that he had advised the plaintiff at the time of shipment of his cotton to sell the same, and that, if plaintiff had sold when notified to do so, the cotton would have brought a much greater price, and he could not accept the sales as reported. In reply to the above the plaintiff wrote to the defendant stating, in effect, that it was impossible for it to sell the cotton at the time defendant wrote for it to sell, and that it had not been able to move it until the present time. It stated that defendant's letter had reached plaintiff in

time to stop the sale of one bale, and that the part of the cotton of defendant which plaintiff had sold had been delivered and placed to defendant's credit. The letter concluded as follows: "If you will send us your check to pay your account, we will hold the cotton as long as you say. We cannot hold cotton indefinitely, and especially so when there is no prospect of immediate advance in the market. Please write us what you want to do and what you want us to do. We are always glad to cooperate with you to the best interest of all concerned."

The witness further testified that he did not offer to pay the account and take the cotton because he did not have the money. The witness' testimony further shows that his brother had withdrawn from the partnership and had no interest in the business at the time this cotton was shipped and sold. Witness stated that the balance sued for by the plaintiff had not been paid by the witness, because witness did not owe the plaintiff.

G. E. Deyerle testified for the plaintiff, in rebuttal, to the effect that he was the son-in-law of D. B. Fargason, who was the vice-president and secretary of the plaintiff. Witness was in the employ, at one time, of the plaintiff. His duties were to solicit cotton shipments and attend to the outside business. Witness had had ten or twelve years' experience in the business of cotton factor, and knew the customs and usages of the business. Over the objection of the defendant, the witness testified that cotton solicitors for cotton factors in this territory ordinarily do not have authority, and it is not within the scope of their duties, to guarantee the price for which cotton is to be sold by the factors which such soliciting agents represented. The witness further testified that he did not state to the defendant that he would guarantee that his cotton would bring 26 cents or better. He had no such conversation with the defendant. Witness never attempted to guarantee the price of cotton to anybody. He would be very foolish to do such a thing. A conversation he had with the defendant was in the usual routine of the trade. Defendant agreed to ship the cotton to the

plaintiff, and there was no special agreement about it one way or the other. Witness did have the authority to tell the defendant how much the plaintiff would advance on his cotton, but that was as far as witness had any authority and as far as witness made any trade with him at that time, or tried to make any trade. Witness had no official position with the firm of plaintiff; he was just an employee.

D. B. Fargason testified that he was vice president and one of the managing officers of the plaintiff in 1920. Deyerle was employed by plaintiff to solicit shipments of cotton and to visit different places where the plaintiff had advanced money to see how the farmers were getting along with their crops and to make reports about those things. His authority and duty in the matter of soliciting shipments of cotton was simply to see the people and ask them to ship their cotton to the plaintiff to be sold on a commission basis. That was the extent of his authority. The plaintiff would tell him from time to time that he could advance certain amounts to shippers of the cotton.

Over the objection of the defendant, the witness testified that it was not the usual, ordinary or customary practice for soliciting agents of cotton factors to make any guaranty as to the price which would be obtained on a subsequent sale of cotton shipped. In witness' entire experience in the cotton business he had never heard of a case of that kind until the present case came up. Witness had never heard of the soliciting agent for a cotton factor guaranteeing the price for which cotton would be sold. The plaintiff did not give its soliciting agent, Deyerle, any power or authority to guarantee prices on cotton shipped. Witness had been in the cotton business for fifty years, and was thoroughly familiar with the usages and customs of the trade. Over the objection of the defendant, the witness stated that, in all his experience, he had never heard of a single case of a cotton factor guaranteeing the price of cotton on a shipment of cotton in the Memphis territory. Deyerle had

no authority to buy cotton for the plaintiff. Plaintiff never bought cotton. It simply sold cotton on a commission basis. There is no difference practically in buying cotton and making a guaranteed price on it. It would be better to buy cotton than to guarantee the price, because, if you bought and there was a profit by increase in the value, the buyer would get the profit, but, under a guaranteed price, there would be no profit and the factor would only suffer a loss.

The defendant, on being recalled, testified that, at the time Deyerle solicited the shipment of cotton, he did not inform witness what his authority was. Witness did not know anything about limitation on his power or duties. Witness relied absolutely on Deyerle's agreement for a guaranteed price, and supposed that Deyerle had explained to plaintiff. Witness never knew anything that led witness to believe there were any limitations on Deyerle's authority.

At the conclusion of the testimony the plaintiff and the defendant both prayed the court to instruct the jury to return a verdict in their favor. The court refused these prayers, and instructed the jury as follows: "The question for you to determine in this case is on the counterclaim. There are no issues of fact on the original claim of the plaintiff. The plaintiff says that this man, Deyerle, did not make any such contract of guaranty whereby he guaranteed to the defendant, Dudley, that he would get 26 cents a pound for the cotton, and further says that, if Deyerle did make such a contract, he had no authority to do it, and that it was without the apparent scope of his authority, and that therefore they are not bound by it, and that is one of the material questions you will have to determine in this case—whether or not the acts of this man Deyerle were within the apparent scope of his authority."

The court further instructed the jury, in effect, over the objection of plaintiff, that, if the jury found that the plaintiff had guaranteed the defendant that if the latter would ship the cotton in controversy to plaintiff it would

guarantee a price of not less than 26 cents per pound, their verdict should be in favor of the defendant for such sum as the jury found to be the difference between the actual price received for the cotton as credited on the account and 26 cents per pound.

The court further instructed the jury that there was no testimony to warrant submission to the jury of the issue as to whether or not Deyerle had actual authority, but that the question for the jury to determine was whether or not his actions were within the apparent scope of his authority.

The court further instructed the jury that "by the apparent scope of authority of an agent is meant 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 he does have; 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."

The court further instructed the jury that, unless they found that Deyerle was acting within the apparent scope of his authority when he made the guaranty, if he did make it, the defendant would not be entitled to recover on his cross-complaint, and, further, that the burden was on the defendant to establish the allegations of his cross-complaint by a preponderance of the evidence.

The jury returned a verdict in favor of the defendant in the sum of $561.68. Judgment was entered in favor of the defendant against the plaintiff for that sum, from which is this appeal.

1. The trial court did not err in refusing to transfer the case to the chancery court. There were no such complications of accounts as to justify the appellant in invoking the jurisdiction of the chancery court. There was really no dispute over the amount of appellant's account. The controversy was whether or not the appellant guaranteed the appellee a certain price for his cotton. The simple issue raised by the pleadings was

whether or not the appellee and the appellant had entered into such contract, and that issue of fact was one proper to be submitted to a jury and one which a jury could without difficulty determine. The undisputed testimony shows that the partnership between the Dudleys had been dissolved before the transactions involved arose. The appellant's remedy was adequate and complete at law, and we find nothing in the record that would have justified the trial court in transferring the action to the chancery court, and its ruling in refusing to do so is correct. See *Arkadelphia Milling Co.* v. *Barker*, 109 Ark. 171, 159 S. W. 208; *Cherry* v. *Kirkland*, 138 Ark. 33, 210 S. W. 344.

2. On the issue of fact as to whether or not the appellant guaranteed that the appellee should receive 26 cents per pound for the cotton shipped by appellee to the appellant for sale by the appellant, the testimony was not sufficient to support the verdict. The testimony of the appellee himself on this issue was that Deyerle said in the first conversation he had with appellee, "You ship that (cotton) to J. T. Fargason Company and I'll guarantee that you get 26 cents or better for it." Concerning another conversation Deyerle had with appellee, appellee testified as follows: "He (Deyerle) told me it was bringing around thirty cents for low grade, and I told him I would like to dispose of it, but wanted to realize as much as I could from it. Now, he solicited shipments from me numbers of times, and asked why I didn't ship cotton to Fargason & Company this time, and said, 'If you ship this cotton to J. T. Fargason Company I'll guarantee that you will get 26 cents for the lower grades and more for the other' "

The undisputed testimony was to the effect that Deyerle was employed by the appellant as soliciting agent to solicit cotton for shipment to the appellant to be sold by appellant as a factor. There was also testimony tending to prove that Deyerle had authority to promise those who, at his solicitation, shipped cotton to the appellant for sale by the latter as a factor, certain sums of

money by way of advancement to them on cotton shipped. There was further testimony tending to prove that it was within the scope of Deyerle's duties to make collections from customers and to look after and report the condition of the crops of farmers. But none of this testimony tended to prove that it was within the express, implied or apparent scope of Deyerle's duty and authority as an agent to guarantee that appellant, his principal, would sell his cotton for at least a certain fixed price. Therefore the testimony on the part of the appellee wholly failed to prove that it was within the scope of Deyerle's agency to guarantee the appellee that the appellant would pay him 26 cents a pound for his cotton, whether appellant sold the cotton for that price or not. On the other hand, the uncontradicted testimony of the witnesses for the appellant shows that Deyerle had no such authority, real, implied or apparent. The uncontroverted proof in the record is that it was the custom of the trade of cotton factors not to guarantee the price of cotton sent to them for sale as factors. The undisputed testimony shows that the appellee sent his cotton to the appellant and constituted the latter his sales agent to sell the cotton for him. The appellee, in his letter of February 24 to the appellant, among other things said, "Please sell this cotton for our account and render statement," and the appellant, in answer to this letter, said, "As soon as this cotton arrives we will place samples on our tables and sell as soon as possible." The testimony of Fargason and of Deyerle shows conclusively that the appellant, as a cotton factor, was the sales agent of the appellee. Appellant, as such sales agent, was to sell the appellee's cotton on a commission basis. Appellant was to receive compensation for its services by commission and not out of profits of the sale. Appellant did not buy appellee's cotton. It was not in the business of buying cotton.

Learned counsel for the appellee relies upon the doctrine announced by this court in a long line of cases to the effect that "a principal is not only bound by the

acts of an agent done under express authority, but he is also bound by all acts of a general agent which are within the apparent scope of his authority, whether they have been authorized by the principal or not, even if they are contrary to express directions;" and further, "in the absence of notice to the contrary, a person dealing with an admitted agent has a right to presume he is a general agent and that he is acting within the scope of his authority." See *Oakleaf Milling Co.* v. *Cooper,* 103 Ark. 79, p. 86, 146 S. W. 130, 133. See also on the general subject of agents' authority *American Southern Trust Co.* v. *McKee, ante,* p. 147.

The doctrine of these cases is not applicable to the facts of this record and cannot be invoked by the appellee to sustain his contention that it was within the apparent scope of the authority of the soliciting agent, Deyerle, to guarantee that his principal, the appellant, would pay to the appellee at least 26 cents per pound for his cotton. Deyerle was only the soliciting agent of the appellant, and, if it be conceded that the appellee, in dealing with Deyerle, had a right to presume that he was clothed with the powers of a general agent for the purpose of soliciting shipments of cotton to appellant for sale, still this would not justify the appellee in assuming that Deyerle had authority, as such soliciting agent, to guarantee the appellee 26 cents per pound for the cotton shipped by appellee to appellant, because such guaranty was not within the apparent scope of Deyerle's authority. If the appellant had been engaged in the buying of cotton and Deyerle had been employed by appellant to purchase cotton and had agreed with appellee, as the agent of the appellant, to buy appellee's cotton and to guarantee at least 26 cents per pound for such cotton if appellee shipped and sold same to appellant, then such guaranty on the part of Deyerle would have been within the apparent scope of his authority, even though appellant had given him express directions to the contrary. But such is not this case, and such a case has no analogy to the facts of this record. Here the appellant was not buy-

ing the cotton of the appellee, but was appellee's sales agent for the purpose of selling the same. Appellee knew that Deyerle was soliciting his cotton for shipment to the appellant as factor and to be sold by appellant for the appellee. Therefore the appellee, in dealing with Deyerle as the soliciting agent of the appellant, had no right to presume that Deyerle had express or implied authority to guarantee appellee 26 cents per pound if he would ship his cotton to appellant, nor did the appellee have the right to assume that such guarantee was within the apparent scope of his authority as soliciting agent for the appellant.

The facts bring the case within the general rule announced by the court in *United States Bedding Co.* v. *Andre,* 105 Ark. 111-115, 150 S. W. 413, 414, 41 L. R. A. (N. S.) 1019, Ann. Cas. 1914D 800, where we said:

"A person dealing with an agent is at once put upon notice of the limitations of his authority, and must ascertain what that authority is. Such person cannot presume that such authority exists; he cannot rely upon the representations of the agent as to what his authority is; he must make inquiry and use due diligence to learn the nature and extent of such authority. If he does not, he deals with the agent at his own risk; and if the authority of such agent is disputed, it devolves upon him to prove it."

In *First National Bank* v. *Farson,* 226 N. Y. 218-224, 123 N. E. 490, 492, the Court of Appeals, through Mr. Justice Collier, said:

"It is a general rule that the power of an agent to bind the principal in contracts of guaranty or suretyship can only be charged against the principal by necessary implication, where the duties to be performed cannot be discharged without the exercise of such power, or where the power is a manifestly necessary and customary incident of the authority bestowed upon the agent, and where the power is practically indispensable to accomplish the object in view." See also 2 Corp. Jur., p. 6.

Our conclusion is that there is no testimony in the record to warrant the court in submitting to the jury the issue of whether or not Deyerle was acting in the apparent scope of his authority in making the alleged guarantee upon which the appellee relied. It follows that the court erred in instructing the jury on its own motion, and in not granting the prayer of the appellant for a directed verdict in its favor for the amount claimed in its complaint. The judgment is therefore reversed, and, the cause having been fully developed, the clerk of this court is directed to enter judgment in favor of the appellant in the sum of $1,481.29, with interest thereon from March 1, 1923, at 6 per cent. per annum until paid. It is so ordered.

TRICE v. PEOPLE'S LOAN & INVESTMENT COMPANY.

Opinion delivered May 2, 1927.

1. APPEAL AND ERROR—ABSENCE OF BILL OF EXCEPTIONS.—Where there is no bill of exceptions, the Supreme Court can consider only whether or not there are any errors appearing on the face of the record.
2. BILLS AND NOTES—NEGOTIABILITY.—The negotiability of a note is not affected by a reference which is simply a recital of the condition upon which the paper was given, or a statement of the origin of the transaction, or that it is given in accordance with the terms of a contract of even date between the same parties.
3. BILLS AND NOTES—PARTIES.—The payee of a negotiable note is not a necessary party to an action thereon by an assignee against the maker.
4. SALES—JUDGMENT IN REPLEVIN.—Where plaintiff in a replevin action obtained possession of property sold under a conditional sale contract on which defendant had defaulted, judgment, under Crawford & Moses' Digest, § 8654, should be rendered against defendant and bondsmen for the total amount due, to be credited with the amount received on sale of the property.
5. APPEAL AND ERROR—MODIFICATION OF JUDGMENT.—Where the judgment in a replevin action rendered against defendant's bondsmen was merely for the value of the property as found by the jury, instead of the amount of the debt due, which was greater than the value of the property, the error will be cured and judgment

corrected to conform to the verdict by eliminating from the judgment the value of the property and allowing a money judgment to stand as rendered.

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

George Stockard, for appellant.

Pryor, Miles & Pryor, for appellee.

WOOD, J. This is an action brought by the plaintiff against the defendant to recover possession of a certain automobile and for a money judgment in the sum of $610. The instrument evidencing the contract of sale and purchase of the automobile, upon which the action is founded, is designated "Conditional Sale Agreement." It sets forth the terms of sale, describes the automobile, and recites the consideration and the amount of the cash payment, and then sets forth that the buyer agrees to pay to the seller, or order, a balance of $610, to be evidenced by a promissory note to be paid in twelve equal monthly installments of $50.83 after date. The seller retained title until all the purchase money was paid. The buyer agreed to operate and control the car in conformity with all the laws and ordinances and to indemnify and save harmless the seller from any or all loss or damage to person or property caused by said car or by the use and operation thereof to which the seller might be subjected. There was a provision in the contract to the effect that any extension or assignments of the contract of sale, or of the note, should not waive any condition therein contained. There were various other conditions set forth in the agreement, and there was a provision to the effect that, if the buyer failed to keep and perform any or all of the conditions imposed upon him, or failed to make the payments promptly, the seller could take possession of the property, and thereupon all of the deferred payments would become due, and the seller would have the right to institute action to enforce the payment of the note and to take possession of the car.

The contract is an exceedingly long one, and it is unnecessary to set forth any more of its provisions. It

was signed by the Sengel Motor Company, the seller, and by Joseph B. Trice, the buyer, March 1, 1925. After the signatures was the following recital: "Dealers must sign assignments on reverse side. Detach note before recording." Then follows a dotted line and after that the following:

"For value received, at the time or times stated in the schedule of payments herein, I, we, promise to pay to the order of Sengel Motor Company six hundred ten and no/100 dollars, with exchange, at the office of People's Loan & Investment Company, Fort Smith, Arkansas, with interest after maturity at the highest legal contract rate. This note, including all installments thereof of even date herewith, is identified with conditional sale agreement covering a certain motor vehicle and certain personal property and equipment thereon. Failure to pay this note or any of the installments thereof when due shall, at the option of the holder hereof, mature all of said installments then unpaid. In the event that an attorney be employed to collect or attempt to collect this note or any installment thereof, by suit or otherwise, or to preserve or protect the property described in the aforesaid conditional sale, the parties hereto agree to pay all costs incurred, including a reasonable attorney's fee, which shall not be less than 15 per cent. of the amount then due, consenting that a suit be brought herein in any county in the State wherein the holder hereof might elect to sue. The parties hereto, whether maker, surety, or indorser, hereby waive presentment, demand, protest and notice of nonpayment, and also waive all rights of exemption which they have or may have under the Constitution and laws of this or any other State, or of the United States, and the indorsers and sureties hereby agree to extensions of the time of payment hereof without notice to them of such extension." Signed Jos. B. Trice. Then follow assignments of the instrument, signed by the Sengel Motor Company, assigning the property and all the right, title and interest of the Sengel Motor Company to the plaintiff, People's Loan & Investment Company.

The complaint alleged that the defendant had failed to make the payments when due and that the plaintiff had exercised its option to declare all due, and prayed for a writ of replevin directing the sheriff to take possession of the car and a judgment against the defendant in the sum of $610, with interest as provided in the note, and for damages for the unlawful detention of the car. There was a demurrer, which set up that the plaintiff had failed to file the affidavit in replevin as required by law, and that the complaint did not state facts sufficient to constitute a cause of action, and that there was a defect of parties defendant in that the Sengel Motor Company of Fort Smith, Arkansas, was a necessary party defendant in the action to determine all the issues involved. The demurrer was overruled.

There was an answer, in which the defendant admitted the execution of the contract made an exhibit to the complaint, but denied that he purchased the car described in the complaint. He admitted that he executed his note for the balance of the purchase price for a 1925 model car. He denied the assignment of the instrument by the Sengel Motor Company to the plaintiff. He admitted the balance due on the purchase price as made by him of $508.34, provided car purchased was a 1925 model Durant Roadster. The defendant alleged that the Sengel Motor Company, by false pretenses and fraud, sold him the car as a 1925 model and a new car, which was not true; that the Sengel Motor Company, knowing that it had perpetrated a fraud upon the defendant, collusively assigned the note in controversy to the plaintiff, and that plaintiff knew, when it accepted the assignment, that the car purchased was not a 1925 model Durant Roadster, and knew that the seller had warranted it as such to the defendant at the time it accepted the assignment. He denied that the plaintiff was entitled to possession of the car and to the amount claimed in its complaint.

The judgment recites that the cause was tried by a jury and that the jury returned the following verdict:

"We, the jury, find for the plaintiff for the sum of $508.34 and the possession of the car, and value the car at $375." The court rendered the following judgment:

"On this 25th day of November, 1925, the above cause coming on to be heard, comes the plaintiff by its attorneys, Pryor & Miles, also comes the defendant by his attorney, George G. Stockard, and, both parties announcing ready for trial, whereupon a jury was impaneled to try the issues of fact in this cause, and the jury, after hearing the evidence, the instructions of the court and the argument of counsel, retired to deliberate on their verdict, and on the same day returned into court the following verdict, to-wit: 'We, the jury, find for the plaintiff for the sum of $508.34 and the possession of the car, and value the car at $375. B. W. Chitwood, foreman.'

"It is therefore considered, ordered and adjudged by the court that the plaintiff have and recover of and from the defendant and the sureties on his bond, to-wit: George Stockard, T. L. Wallace, O. H. Whittington, S. D. Kirkland, Mrs. W. W. Ocker, Mrs. Sadie Lewis, J. L. Jacobs, John L. Smith, Addis Bryan and F. O. McCullough, the sum of $375, which was the value of the car at the time this suit in replevin was brought, and a judgment for the possession of said car, and that, if said car is returned to the plaintiff by defendant, it is the order of the court that said car be sold and the proceeds of said sale be applied to the payment of said judgment of $375. The plaintiff to further have and recover of and from the defendant, J. B. Trice, the sum of $508.34, the said sum of $375, when paid, to be a credit on the judgment for $508.34 in favor of the plaintiff and against the defendant, J. B. Trice."

The defendant and the parties named in the judgment as the sureties on his bond filed the following instrument: "Come the defendant, J. B. Trice, and his bondsmen, George G. Stockard. T. L. Wallace, O. H. Whittington, S. D. Kirkland, Mrs. W. W. Ocker, Mrs. Sadie Lewis, J. L. Jacobs, John L. Smith, Addis Bryan and F. O.

McCullough, and each and severally and conjointly protest against the entry of the judgment herein, and for cause they say: 1. It is not responsive to the issues herein. 2. It is not a judgment in replevin. 3. It is not based on the findings of the jury herein. 4. It is contrary to the law, and is not a judgment on the undertaking of the sureties herein. Wherefore petitioners pray that said judgment be set aside and held for naught, and that a proper judgment be entered herein, directing and ordering that the property sued for, to-wit, one Durant Roadster, seized under replevin herein, be returned to the plaintiff, or its value, as found by the jury, paid to plaintiff if return cannot be had."

The plaintiff filed the following: "Comes the plaintiff, People's Loan & Investment Company, and reports to the court that it sold at public auction on March 1, 1926, the car in controversy in the above suit, and asks that the judgment be credited with thirty ($30) dollars, that being the highest bid and the price the car brought at said sale, the sale being made to Lee Gamage."

From the judgment of the court is this appeal.

1. There is no bill of exceptions, and we can only consider whether or not there are any errors appearing on the face of the record. The appellant first contends that the instrument on which the appellee bases its action is not a negotiable instrument. Appellant predicates its contention upon the following language contained in the note, to-wit: "This note, including all installments thereon of even date herewith, is identified with conditional sale agreement covering a certain motor vehicle and certain personal property and equipment thereon." It occurs to us that the above language was not intended to burden the note with the conditions in that part of the instrument designated "Conditional sales agreement." The language quoted was only intended to signify the origin of the note. It is only a reference to the transaction out of which the note arose.

The law on this subject is correctly declared in 3 R. C. L., page 918, as follows: "The reference in a bill or

note to some extrinsic agreement, in order to destroy its negotiability, must be such as indicates that the paper is to be burdened with the conditions of that agreement. Accordingly, the negotiability of a note is not affected by a reference which is simply a recital of the consideration for which the paper was given, or a statement of the origin of the transaction, or by a statement that it is given in accordance with the terms of a contract of even date between the same parties. * * * The negotiable instruments law declares that an order or promise to pay is unconditional, although coupled with a statement of the transaction which gives rise to the instrument."

Section 7770 of Crawford & Moses' Digest reads, in part, as follows

"An instrument payable upon a contingency is not negotiable, and the happening of the event does not cure the defect." And section 7771 reads:

"An instrument which contains an order or promise to do an act in addition to the payment of money is not negotiable. But the negotiable character of an instrument otherwise negotiable is not affected by a provision which (1) authorizes the sale of collateral securities in case the instrument be not paid at maturity, or * * * (4) gives the holder an election to require something to be done in lieu of payment of money."

A critical examination of the instrument discloses that it is an absolute and unconditional promise to pay a definite sum of money at all events and without any contingency, and at the fixed time therein designated for the installments to be made.

Counsel for appellant relies upon the case of *Murrell v. Exchange Bank,* 168 Ark. 645, 271 S. W. 21, 41 A. L. R. 1391, to sustain his contention. In that case the note under review, in addition to a provision for a retention of title, provides that the payee may declare the note due at any time that he deems himself insecure before maturity and sell same at public or private sale. Passing upon this instrument we said:

"This clause renders a note not only payable upon a contingency, but renders the time of payment uncertain."

No such provision is contained in the note now under consideration, and what we said in the above case is in accord with our holding in the instant case. That case, in fact, supports the present holding. We conclude therefore that the note upon which the appellee bottoms his action for a money judgment is a negotiable instrument.

2. It follows from what we have already said that the court did not err in overruling the appellant's demurrer. Since the note was a negotiable instrument, the payee in the note was not a necessary party to the action. The complaint contained the necessary allegations, if true, to constitute a cause of action against the appellant, and to entitle the appellee to recover a money judgment in the sum of $610. The complaint for the money judgment was not verified, but there was no motion made by the appellant to require the same to be verified. There was an affidavit in the record by Lee G. Simms which was sufficient, if true, to meet the requirements of the law to entitle the appellee to recover possession of the automobile.

3. The judgment was not in harmony with the verdict. The jury did not return any verdict for damages for the detention of the car. That was in issue by the pleadings. The appellee alleged that it had been damaged in the sum of $100 for the unlawful detention of the car, and the appellant in his answer denied the allegation. The appellee obtained possession of the car. The jury, in its verdict, merely placed a valuation upon the car; it did not find that the appellant owed the appellee as damages for the unlawful detention and use of the car the sum of $375. The court therefore erred in rendering a judgment against the appellant and his bondsmen in favor of the appellee in the sum of $375, the value of the car as found by the jury.

"In an action to recover possession of personal property, judgment for the plaintiff may be for the delivery of the property, or for the value thereof, in case

a delivery cannot be had, and damages for the detention." Section 8654, C. & M. Digest.

"In replevin the delivery of the property is the primary object of the action, the value is to be recovered in lieu of it as an alternative only in case a delivery cannot be had of the specific property." *Swants* v. *Pillow,* 50 Ark. 300, 7 S. W. 167, 7 Am. St. Rep. 98. See also *Spear* v. *Arkansas National Bank,* 111 Ark. 29, 163 S. W. 508, Ann. Cas. 1916A, 735.

Since the appellee was in possession of the property, judgment should have been rendered in favor of the appellee against the appellant and his bondsmen in the sum of $508.34, and directing that the appellee, as the owner, retain possession of the car, and that the same be sold to satisfy the judgment. There is a report of sale in the record showing that the car was sold under the directions of the court's judgment for the sum of $30. This amount should therefore be entered as a credit upon the judgment.

The judgment in favor of the appellee against the appellant and his bondsmen should have been in the sum of $508.34, but the judgment actually rendered against appellant's bondsmen was for only $375. The bondsmen are therefore not in an attitude to complain of the error of the court in the form of the judgment. Such error may be cured and the same corrected so as to conform to the verdict by eliminating the judgment in favor of the appellee against the appellant in the sum of $375 for the value of the car, and in allowing the money judgment for $508.34 against him to stand as rendered, the same being credited with the sum of $30, the proceeds of the sale of the car.

The judgment of the trial court therefore will be modified so as to allow the same to stand as a judgment in favor of the appellee against the appellant in the sum of $508.34, less a credit of $30 entered as of March 1, 1926, with interest thereon at the rate of six per cent. per annum from date of the rendition of the judgment, and a judgment in favor of the appellee against the appellant's

bondsmen in the sum of $375 as the extent of their liability on the judgment in favor of the appellee against the appellant and his bondsmen. As thus modified, the judgment will be affirmed.

HUDSON v. STATE.

Opinion delivered May 9, 1927.

CRIMINAL LAW—FORMER JEOPARDY.—Under Crawford & Moses' Digest, § 3311, providing that "conviction before a police or mayor's court or before a justice of the peace shall be a bar to further prosecution for the same offense, or for any misdemeanor embraced in the act committed, defendants, convicted of gaming on Sunday under § 2739, cannot be prosecuted for gaming growing out of the same transaction, under § 2639; the latter offense being included in the former.

Appeal from Clay Circuit Court, Western District; *G. E. Keck,* Judge; reversed.

Raley & Ashbaugh, for appellant.

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

HART, C. J. Appellants prosecute this appeal to reverse the judgment against them for the crime of gaming.

The record shows that, on Sunday the 19th day of October, 1924, officers came upon appellants while they were engaged in a poker game in Kilgore Township, in the Western District of Clay County, Arkansas. The appellants promised the officers to appear before a justice of the peace in the township on the next morning to answer to the charge of gaming. On that same night an affidavit for the arrest of the appellants, charging them with "gaming on the Sabbath day," was sworn out before a justice of the peace, and the appellants appeared before said justice of the peace on the same night and entered a plea of guilty to the crime of "gaming on the Sabbath day." They were fined $25 each, and, upon the payment of the fine and costs adjudged against them, they were all discharged.

Subsequently the appellants were arrested and brought before another justice of the peace, charged with the crime of gaming. They interposed a plea of former conviction. It being shown that the charge of gaming was the same transaction as the charge of "gaming on the Sabbath day" to which they pleaded guilty, the appellants were discharged. Later they were indicted for the crime of gaming, and interposed a plea of former conviction in the circuit court for that offense. It was shown that the offense of gaming for which the appellants were indicted in the circuit court was the same transaction as that for which they were convicted before the justice of the peace on the plea of guilty.

The punishment for gaming, under § 2639 of Crawford & Moses' Digest, is a fine in any sum not less than $10 nor more than $25. The fine of each of the appellants was fixed by the circuit court at $10. The punishment for gaming on Sunday is a fine in any sum not less than $25 nor more than $50. Crawford & Moses' Digest, § 2739.

The Attorney General seeks to uphold the judgment under the authority of *Sparks* v. *State,* 88 Ark. 520, 114 S. W. 1183. In that case it was held that a former conviction for the offense of gaming does not bar a prosecution for gaming with a minor, though the two offenses grow out of the same transaction, the two offenses being distinct. The lowest penalty provided by the statute for gaming is $10 and for gambling with a minor $50. On this account the court held that § 3311 did not apply. That section was construed in *Champion* v. *State,* 110 Ark. 44, 160 S. W. 878, where it was held that a town ordinance directed against selling liquor by the "blind tiger" device and the statute of the State against selling liquor without license are the same, and the conviction under one will, for the same offense, bar a prosecution under the other.

Section 3311 reads as follows: "Whenever any party shall have been convicted before any police or mayor's court or before any justice of the peace or circuit court, said conviction shall be a bar to further prose-

cution before any police or mayor's court, or justice of the peace or circuit court, for such offense or for any misdemeanor embraced in the act committed; provided, no such conviction before any police or mayor's court shall be a bar unless the penalty imposed is at least the minimum penalty prescribed by State laws for the same offense or act."

Under that section we are of the opinion that the plea of former conviction interposed by appellants should have been sustained. They entered a plea of guilty in the justice court to the crime of gaming on the Sabbath, and their punishment was fixed at a fine of $25. The question of collusion in that prosecution does not arise here, for no attempt has been made by the State to set it aside. Appellants are simply charged with gaming under another section of the statute which provides a lower punishment. The sole reliance of the State to uphold the judgment and sentence of conviction is that gaming, under § 2639, and gaming on Sunday, under § 2739, are distinct and separate offenses. As we have already seen, the punishment for gaming on Sunday is a fine not less than $25 nor more than $50, while betting on cards carries a fine in any sum not less than $10 nor more than $25. Hence we are of the opinion that the crime of gaming is embraced in the crime of gaming on Sunday, and that the conviction for the latter crime operates as a bar to the conviction of the former, which is a misdemeanor embraced in the act committed, and for which the appellants entered a plea of guilty.

It follows that the judgment will be reversed, and, inasmuch as the facts are undisputed, the cause will be dismissed here. It is so ordered.

WHITTAKER v. STATE.

Opinion delivered May 9, 1927.

1. CRIMINAL LAW—REOPENING CASE FOR RE-EXAMINATION OF A WITNESS.—Under Crawford & Moses' Digest, § 4190, reopening a case for re-examination of witnesses or taking of further testimony after testimony on both sides has been concluded and cause has been submitted to jury is matter within discretion of trial court.
2. CRIMINAL LAW—DISCRETION AS TO REOPENING CASE.—Under Crawford & Moses' Digest, § 4190, the Supreme Court will not reverse the ruling of the trial court for the re-examination of a witness or for taking further testimony after case had been submitted to the jury, unless there appears to be an abuse of discretion.
3. CRIMINAL LAW—REOPENING CASE—ABUSE OF DISCRETION.—The trial court did not abuse its discretion in accepting the statement communicated to him by a deputy sheriff that a witness denied admission that his testimony in the case was untrue and in refusing defendant's request to reopen the cause for re-examination of the witness after the cause had been submitted to the jury.
4. CRIMINAL LAW—NEW TRIAL FOR NEWLY DISCOVERED EVIDENCE.—Generally, the Supreme Court will not reverse the ruling of the trial court in refusing a new trial on the ground of newly discovered evidence, where such evidence tends merely to impeach the credibility of the witness.
5. CRIMINAL LAW—NEWLY DISCOVERED EVIDENCE—IMPEACHMENT OF WITNESS.—Refusal of a new trial on the ground of newly-discovered evidence tending merely to impeach the credibility of a witness, *held* proper where the witness did not make an affidavit retracting his testimony at the trial, since the court was warranted in finding that he had not altered and would not alter his testimony.
6. INTOXICATING LIQUOR—EVIDENCE OF SALE.—Testimony of a witness to the effect that he and another talked to accused regarding liquor and paid him for some and later went and got the liquor was sufficient to justify a verdict finding the accused guilty of selling intoxicating liquor.
7. CRIMINAL LAW—ADMONITION TO JURY.—Where the record on appeal did not set forth the language of court's admonition to jury, the Supreme Court will presume that the trial court admonished the jury as required by law.
8. CRIMINAL LAW—HARMLESS ERROR.—A criminal cause will not be reversed where a ruling made by the trial court in defendant's absence could not possibly have resulted to his prejudice.

9. CRIMINAL LAW—ADMONITION TO JURY IN ACCUSED'S ABSENCE.—The fact that the trial court admonished the jury after separation, while the accused was confined in jail, did not require a reversal of the judgment of conviction.

Appeal from Logan Circuit Court, Southern District; *J. O. Kincannon,* Judge; affirmed.

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

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

WOOD, J. Ray Whittaker was indicted and put on trial in the Logan Circuit Court for the crime of selling intoxicating liquor. Paul Bean, a witness for the State, among other questions, was asked the following:

"Q. State to the jury whether or not you and Claude Suttles bought some liquor from Ray Whittaker about the 25th of last September? A. I never. Claude came to me and asked me if I wanted some liquor, and I told him I didn't know. We started up the street, and he stopped and talked to some guys. When we got through, he said, 'Let's go up the street,' and when he had gone a little way he asked me for $1.25, and I gave it to him. Q. Where did you go? A. Out the highway. Q. How far was it from town? A. About a mile. Q. How much did you buy? A. A pint, I think. Q. Was it in a jar? A. Yes sir. Q. What kind of a jar A. A fruit jar. Q. What was it? A. Whiskey."

Claude Suttles, a witness for the State, testifies that he and Paul Bean, on September 25, 1926, in Logan County, Arkansas, bought some liquor, but witness could not say they got it from Ray Whittaker. Witness and Paul Bean met in front of Harp's Garage, and Paul stated that he would like to have a drink. Witness saw Ray Whittaker, and went over and had a talk with him. Whittaker said he had some, and witness asked him what it was worth, and he said $2.50 per quart. "We paid him for it then." Later on they went out and got it, but witness didn't see Ray Whittaker any more. Witness and Paul Bean contributed $1.25 each to the purchase of the liquor. Witness didn't remember whether he or Paul turned the

money over to Ray Whittaker. The money was given Ray before they got the liquor. Witness was asked who had the liquor, and stated, "Paul"; that he had about a quart in a fruit jar. Witness and Paul were together when they gave Ray the money. Witness did not know which one gave him the money. Witness gave him $1.25. Paul did not give witness $1.25 to give Ray, and witness did not know from whom Bean got the liquor. Witness did not get it from Ray Whittaker. Bean said something first about buying the liquor.

The cause was submitted to the jury, under instructions to which the appellant made no objection. The jury returned a verdict finding the appellant guilty and assessing his punishment at imprisonment in the State Penitentiary for a period of one year. Judgment of sentence was entered in accordance with the verdict, from which is this appeal.

1. The fifth ground of the motion for new trial is as follows: "After the jury retired to consider of their verdict in this case, the State's witness, Bean, told Elmer Bryant that the testimony of said witness given in this trial was not true; that said witness did not go with the defendant and receive from defendant a quantity of whiskey or other intoxicating liquor, as testified to by said witness on the trial; that this was a frame-up against the defendant, and that the defendant was not guilty of the charge made against him. Elmer Bryant stated this matter to counsel for defendant while the jury was still out considering of their verdict, and the counsel for defendant immediately reported this fact to the court, and asked the court to reopen the case and permit the defendant to examine said witness Bean with reference to said matter and to introduce in evidence the statement of said witness Bean made to Elmer Bryant. This request was refused by the court, and defendant saved his exceptions. The court erred in refusing this request."

Learned counsel for the appellant insist that the above assignment of error is well taken, and that the

trial court erred in not granting the appellant a new trial for the reasons set forth in the above assignment.

The reopening of a case for the reexamination of a witness, or the taking of further testimony after the testimony on both sides has been concluded and the cause has been submitted to the jury, is a matter, under our statutes and decisions, within the sound discretion of the trial court, and this court will not reverse the ruling of the trial court unless it appears that the court, in making such ruling, has abused its discretion. Section 4190, C. & M. Digest; *Teel* v. *State,* 129 Ark. 180, 195 S. W. 32; *Smith* v. *State,* 162 Ark. 458, 258 S. W. 349. The record recites that the court, in refusing the request of the appellant to reopen the cause for the reexamination of the witness Bean, stated: "That, while the court had not talked to the witness Bean, the deputy sheriff waiting upon the court had reported to the court that the witness Bean had stated to the deputy sheriff that he (Bean) had not made the statements to Bryant that had been reported to the court." While it would have been more appropriate for the trial judge to have interrogated the witness Bean to ascertain whether or not he denied that he had made the statement to Bryant as reported to the court, nevertheless the trial judge had the right to accept as true the statement of the deputy sheriff, who was the sworn officer of the court, to the effect that Bean had denied making the statement attributed to him by Bryant. The court did not abuse its discretion in accepting the statement communicated to him through the deputy sheriff as a denial of the statement of Bryant to the effect that Bean had stated that his testimony as a witness in the case was untrue. If the court had granted the appellant's request to reopen the case and to recall the witness Bean for reexamination, and Bean had adhered to his original statement, then nothing would have been gained, but, on the contrary, considerable time would have been lost in an endeavor to impeach witness Bean. If Bean had been recalled and had altered his testimony, he would have been guilty of perjury. There is nothing in the record

to show that, after the taking of the testimony was closed and the case was finally submitted to the jury, witness Bean was still in attendance on the court and that he was therefore readily accessible and could have been called without any considerable delay. As already stated, the deputy sheriff had informed the court that witness Bean denied that he had made the statement to Bryant which Bryant had reported to the court. All these were reasonable and cogent considerations which doubtless influenced the trial court in refusing the request of the appellant to reopen the case for the reexamination of Bean. In so ruling the court did not abuse its discretion. The assignment of error set up in appellant's fifth ground of the motion for a new trial is not well taken.

The appellant's sixth ground of the motion for a new trial was because of newly discovered evidence, as set forth in the fifth ground. The ground of the motion was supported by the affidavit of Bryant *et al.* as to the facts set forth in the fifth ground of the motion for a new trial. The only effect of the newly discovered evidence as set forth in the affidavit of Bryant would be the impeachment of the testimony of the witness Bean. It is the general rule of practice in this court not to reverse the ruling of the trial court in refusing a new trial on the ground of newly discovered evidence where such evidence tends merely to impeach the credibility of witnesses. *McMaster* v. *State,* 163 Ark. 194, 260 S. W. 45; *Lewis* v. *State,* 169 Ark. 340, 275 S. W. 663: *Hayes* v. *State,* 169 Ark 883, 277 S. W. 36; *Snetzer* v. *State,* 170 Ark. 175, 279 S. W. 9.

In the cases of *Bussey* v. *State,* 69 Ark. 545, 64 S. W. 268, and *Meyers* v. *State,* 111 Ark. 399, 163 S. W. 1177, L. R. A. 1915C, 302, Ann. Cas. 1916C, 933, we held that a new trial should be had upon the ground of newly discovered evidence. The prosecuting witness in those cases, without whose testimony there could not have been a conviction, made an affidavit retracting the testimony given at the trial. In the case at bar the witness Bean does not make an affidavit retracting his testimony at the trial, and the trial court was warranted in finding that he had

not altered and would not alter his testimony. Morever, we cannto concur with counsel for the appellant in the view that the witness Bean was the only witness in the case who testified to any facts that would warrant the conviction of the defendant. On the contrary, it occurs to us that the testimony of the witness Claude Suttles, which we have set out above, was amply sufficient of itself to justify the verdict. *Canaday* v. *State,* 169 Ark. 221, 275 S. W. 327. Therefore the cases of *Bussey* v. *State* and *Meyers* v. *State, supra,* cited by appellant, have no application. Likewise, for the same reason, the case of *Little* v. *State,* 161 Ark. 245, 255 S. W. 892, does not apply.

2. The jury, not having reached a verdict on their first sitting, after the case was finally submitted to them, were permitted to separate several times under the *usual admonition of the court.* The record recites the following: "When the court convened on Tuesday morning, the jury in the case was called, and all of them having answered to their names in open court, the court sent them out to further consider of their duties, and instructed them as to their duty in connection therewith. At this time the defendant was not present in court, but was confined in jail. Counsel for defendant called the attention of the court to the fact that the jury had been instructed as to their duties and permitted to retire to consider of them while the defendant was in jail and not present in court and the defendant's counsel saved an exception to the action of the court in instructing the jury as to their duties and sending them out to consider thereof in the absence of the defendant and while the defendant was in custody in jail."

The statute provides:

"The jury, whether permitted to separate or kept in charge of officers, must be admonished by the court that it is their duty not to permit any one to speak to or communicate with them on any subject connected with the trial, and that all attempts to do so should be immediately reported by them to the court, and that they should not converse among themselves on any subject con-

nected with the trial, or form or express any opinion thereon until the cause is finally submitted to them. This admonition must be given or referred to by the court at each adjournment."

The record does not set forth the language of the admonition the court gave the jury, and it must be presumed, in the absence of a showing to the contrary, that the court admonished the jury as required by law. The law requires that the defendant be present during the trial. Section 3136 of C. & M. Digest; also see art. 2, § 10, of the Constitution. In *Davidson* v. *State,* 108 Ark. 193-197, 158 S. W. 1103, we said: "The language of the Constitution, 'to be heard by himself and his counsel,' is a guarantee that an accused shall have the privilege of being present in person and by counsel whenever any substantive step is taken by the court in his case. *Bearden* v. *State,* 44 Ark. 331. Chief Justice COCKRILL, speaking for the court in the case just cited, said: "Under this rule it is not necessary that the accused shall show that he was actually prejudiced by the proceeding had in his absence. It is sufficient to annul the verdict against him if it appears that he may have lost an advantage or been prejudiced by reason of a step taken in his absence. The reason of the rule is to secure to the accused full facilities for defense. However, while he cannot be deprived of his right to be present at all stages of his trial, it does not follow that he must be. The statute provides that certain proceedings may be had in the absence of a defendant who absconds, or is on bail and absents himself. Where also no prejudice could by any possibility result from the action of the court, there is no reason for requiring the presence of the defendant."

It has been the uniform practice of this court to reverse convictions in felony cases where any ruling of the trial court was made during the progress of the trial when a substantive step was being taken, the accused not being present, calculated to prejudice his rights in his absence. In such cases, as stated in *Bearden* v. *State,*

above, "it is not necessary for the accused to show that he was actually prejudiced by the ruling in his absence." Some of the earlier cases are *Sneed* v. *State,* 5 Ark. 431, 41 Am. Dec. 102; *Cole* v. *State,* 10 Ark. 318 (5 English); *Brown* v. *State,* 24 Ark. 620. See also *Kinnemer* v. *State,* 66 Ark. 206, 49 S. W. 815; *Pearson* v. *State,* 119 Ark. 152, 178 S. W. 914. But we have also uniformly held that a cause will not be reversed where a ruling is made by the trial court in the absence of the defendant that could not by any possibility result to his prejudice. As is said in *Mabry* v. *State,* 50 Ark. 492, 8 S. W. 823:

"We do not depart from the rule that the probability of prejudice by an order made in the absence of a defendant prosecuted for a felony is all that need be shown to reverse a judgment of conviction, but adhere to its corollary, that we will not reverse for that cause when it is plain the defendant has lost no advantage by his absence." See also *Polk* v. *State,* 45 Ark. 165-168. Assuming, as we must do in the absence of any showing to the contrary, that the trial judge admonished the jury as the law requires, such admonition could not have resulted in any prejudice to the appellant, but was solely to protect the purity and integrity of the trial, and must have been for appellant's benefit. The appellant therefore lost no advantage by his absence, and the trial court did not err in so holding.

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

APPENDIX

OPINIONS NOT REPORTED.

By Order of the Court the Following Opinions are Omitted as of no Value as Precedents.

Alexandria Refining Company *v.* Harper; appeal from Union Circuit Court, Second Division; W. A. Speer, judge; affirmed March 21, 1927; per Hart, C. J.

Brooks *v.* Daniels; appeal from Pulaski Chancery Court; John E. Martineau, Chancellor; affirmed May 16, 1927; per Mehaffy, J.

C. C. & E. Coal Co. *v.* Bank of Clarksville; appeal from Johnson Chancery Court; W. E. Atkinson, Chancellor; affirmed May 9, 1927; per Humphreys, J.

Dail *v.* Etchison; appeal from Lawrence Circuit Court, Western District; Dene H. Coleman, Judge; reversed March 14, 1927; per Wood, J.

Deatherage v. Dennison; appeal from Washington Chancery Court; Lee Seamster, Chancellor; affirmed June 13, 1927; per McHaney, J.

Edwards *v.* State; appeal from Pope Circuit Court; J. T. Bullock, Judge; affirmed April 11, 1927; per McHaney, J.

Fairchild *v.* Darr; appeal from Conway and Yell Chancery Courts; Hugh Basham, Special Chancellor; affirmed March 21, 1927; per Smith, J.

Flanagan *v.* Hughes; appeal from Ouachita Chancery Court, Second Division; George M. LeCroy, Chancellor; affirmed February 28, 1927; per Smith, J.

Fleming *v.* Sledge & Norfleet Company; appeal from St. Francis Chancery Court; John E. Martineau, Special Chancellor; modified March 14, 1927; per Mehaffy, J.

Fulmer *v.* Hollan; appeal from Cross Chancery Court; A. L. Hutchins, Chancellor; reversed May 2, 1927; per Wood, J.

General Motors Acceptance Corporation *v.* Taylor; appeal from Greene Circuit Court, First Division; W. W. Bandy, Judge; reversed May 9, 1927; per Mehaffy, J.

George E. Shelton Produce Company *v.* Lena Lumber Company; appeal from Pulaski Circuit Court, Second Division; Richard M. Mann, Judge; affirmed February 28, 1927; per Humphreys, J.

Gillham *v.* Mutual Aid Union; appeal from Garland Chancery Court; W. R. Duffie, Chancellor; affirmed May 2, 1927; per Wood, J.

Great Southern Mutual Life Insurance Company *v.* Moore; appeal from Conway Circuit Court; J. T. Bullock, Judge; affirmed February 28, 1927; per Mehaffy, J.

Green *v.* Meadors; appeal from Sebastian Circuit Court, Fort Smith District; John E. Tatum, Judge; affirmed February 28, 1927; per Hart, C. J.

Harrell *v.* Harrell; appeal from Searcy Chancery Court; Sam Williams, Chancellor; affirmed April 4, 1927; per McHaney, J.

Helena *v.* Security Bank & Trust Company; appeal from Phillips Chancery Court; A. L. Hutchins, Chancellor; affirmed March 7, 1927; per Hart, C. J.

Hill *v.* State; appeal from Clark Circuit Court; James H. McCollum, Judge; affirmed June 6, 1927; per McHaney, J.

Johnson *v.* Arkansas Foundry Company; appeal from Pulaski Circuit Court, Third Division; Marvin Harris, Judge; affirmed March 28, 1927; per Mehaffy, J.

Kelley *v.* Pacific Fruit & Produce Company; appeal from Saline Circuit Court; Thomas E. Toler, Judge; affirmed May 30, 1927; per Hart, C. J.

Kindle *v.* Barrett; appeal from Jefferson Chancery Court; H. R. Lucas, Chancellor; affirmed March 14, 1927; per Smith, J.

Kochtitsky *v.* Allworden; appeal from Greene Circuit Court; G. E. Keck, Judge; affirmed March 21, 1927; per Humphreys, J.

Lane Motor Company *v.* Lowery; appeal from Greene Circuit Court, First Division; G. E. Keck, Judge; affirmed March 7, 1927; per Mehaffy, J.

Laster *v.* Raper; appeal from Saline Circuit Court; Thomas E. Toler, Judge; affirmed May 30, 1927; per McHaney, J.

Lincoln County Bank *v.* Leek; appeal from Lincoln Chancery Court; Harvey R. Lucas, Chancellor; affirmed March 28, 1927; per McHaney, J.

Live Stock State Bank *v.* Forrest City Grocer Company; appeal from St. Francis Circuit Court; E. D. Robertson, Judge; affirmed May 16, 1927; per Wood, J.

Love *v.* Young; appeal from Jefferson Chancery Court; H. R. Lucas, Chancellor; affirmed March 21, 1927; per Mehaffy, J.

McClintock *v.* Garrison; appeal from Drew Chancery Court; E. G. Hammock, Chancellor; reversed February 7, 1927; per Humphreys, J.

McNairn *v.* Billingsley; appeal from Izard Chancery Court; Lyman F. Reeder, Chancellor; affirmed February 28, 1927; per Humphreys, J.

Miller *v.* Rhea; appeal from Clay Chancery Court, Western District; J. M. Futrell, Chancellor; affirmed March 14, 1927; per Mehaffy, J.

Morris *v.* Clements; appeal from Pulaski Circuit Court, Second Division; Richard M. Mann, Judge; affirmed April 25, 1927; per Smith, J.

Parker *v.* State; appeal from Washington Circuit Court; W. A. Dickson, Judge; affirmed March 7, 1927; per Mehaffy, J.

Prairie County *v.* Harris; appeal from Prairie Circuit Court, Northern District; George W. Clark, Judge; affirmed June 13, 1927; per Hart, C. J.

Rogers *v.* St. Louis-San Francisco Railway Company; appeal from Crittenden Circuit Court; G. E. Keck, Judge; affirmed April 11, 1927; per Mehaffy, J.

Shreve *v.* Hall; appeal from Washington Chancery Court; Lee Seamster, Chancellor; affirmed May 2, 1927; per Mehaffy, J.

Smith *v.* Newman; appeal from Pulaski Chancery Court; John E. Martineau, Chancellor; affirmed April 25, 1927; per Humphreys, J.

Supreme Lodge Woodmen of Union *v.* Burnett; appeal from Jefferson Circuit Court; T. G. Parham, Judge; affirmed May 2, 1927; per Smith, J.

Supreme Royal Circle of Friends of the World *v.* King; appeal from Phillips Circuit Court; E. D. Robertson, Judge; affirmed May 23, 1927; per McHaney, J.

Tripp, Receiver, *v.* Browne; appeal from Bradley Chancery Court; E. G. Hammock, Chancellor; affirmed April 24, 1927; per Mehaffy, J.

White *v.* State; appeal from Lawrence Circuit Court, Western District; S. M. Bone, Judge; affirmed May 23, 1927; per Smith, J.

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