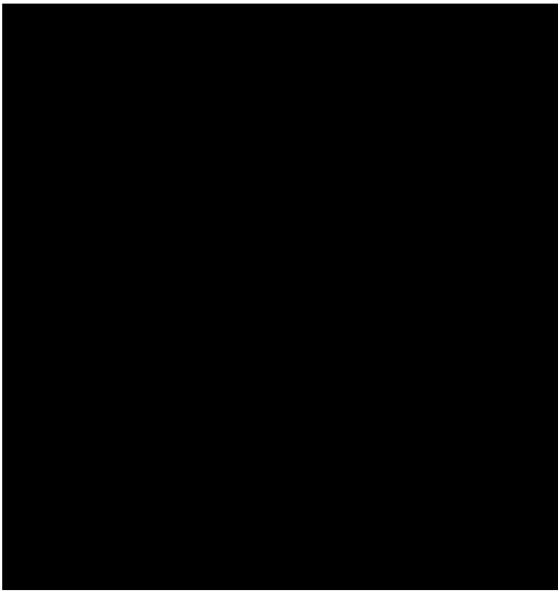

NATIONAL UNION FIRE INSURANCE COMPANY *v.* CASE & RISNER.

Opinion delivered October 15, 1928.

Williamson & Williamson, for appellant.

Owens & Ehrman, for appellee.

HART, C. J., (after stating the facts). The sole ground relied upon for a reversal of the judgment is that the falsity of the flue warranty clause in the policy, copied in our statement of facts, rendered the policy absolutely null and void from the date of its issuance. This is the general rule on the subject, but the facts and circumstances in the case at bar warranted a finding that the insurance company should be estopped from claiming a forfeiture of the policy on this account. In *Insurance Company* v. *Brodie,* 52 Ark. 11, 10 S. W. 1016, it was held (quoting first syllabus):

"The issue of a policy of insurance with full knowledge or notice of all the facts affecting its validity, is equivalent to an assertion that it is valid at the time of its delivery, and is a waiver of any ground for avoiding it, then known to the insurer. And as to such ground, the knowledge of an agent who receives the application on which the policy is issued is regarded as the knowledge of the company for which he acts, and notice to him is notice to his principal."

In the same case the court also held (quoting the second syllabus):

"Where an agent of a company authorized to fill up a blank application for insurance against fire, does so by writing therein answers as to the condition of the property to be insured, which he knows to be false, the company will be estopped from setting up the falsity of such answers to avoid a policy issued on the application,

although the latter contains a clause warranting the answers to be true."

In that case the applicant for insurance made his answers to questions in his application a warranty, and, in closing the discussion of the subject and holding that the insurance company was estopped from claiming a forfeiture on the ground of the falsity of the warranty, the court said:

"We therefore conclude that the appellant was estopped from taking advantage of the falsity of the answer appended to the question, 'Do all stovepipes go directly into brick chimneys?' if, at the time the policy sued on was issued, it, personally or through its agent, knew or had notice of the facts which the question was intended to elicit."

As recognizing the same principle, see *Providence Life Insurance Company* v. *Rutlinger,* 58 Ark. 528, 25 S. W. 835.

Counsel for appellant rely for a reversal of the judgment upon the principle of law decided in *Commonwealth Life Insurance Company* v. *Tanner,* 175 Ark. 482, 300 S. W. 927. We do not think that case has any application here. There the fact that the insured was in bad health was not found out by the agent of the company until after the policy had been issued, and on this account the court held that there was no estoppel. Here the agent had legal notice that the insured property had metal flues at the time of the issuance of the policy, and this brings the case within the principles of law decided in the Brodie case.

In Cooley's Briefs on Insurance, 2 ed., vol. 5, page 4222, it is recognized that there is a conflict in the authorities on this subject. The author said that in *Western Assurance Company* v. *Stoddard,* 88 Ala. 606, 7 So. 379, it was held that an insurance company is estopped to rely on a misrepresentation in assured's application, made a warranty by the policy, if the company's agent had knowledge of the fact when the policy was issued. Numerous other cases are cited in support of this prop-

osition, and among them is the *Insurance Company* v. *Brodie,* 52 Ark. 11, 11 S. W. 1016.

It is insisted, however, that this case should be differentiated from those cases because the agent in the case at bar did not have actual knowledge that the insured property contained metal flues. It will be remembered, however, that the agent was put upon inquiry in the matter, and agreed to ascertain the facts of which the insured was ignorant. He then issued the policy without making further inquiry as to the truth or falsity of the condition of the flues, and thereby waived a warranty in the policy in conflict with the actual facts.

In *Skinner* v. *Norman,* 165 N. Y. 565, 59 N. E. 309, 80 Am. St. Rep. 776, the court held that, where an agent of the insurance company soliciting insurance stated that he did not know whether the property was incumbered or not, and the insurer agreed to inquire regarding it of the owner, but issued the policy without making the inquiry, a failure to indorse or note an incumbrance on the policy did not invalidate it, though the property was in fact mortgaged. The reason for so holding is that the insurance agent's failure to comply with his agreement to ascertain the condition of the property led the plaintiff into what was practically a trap, and that the insurance company should not be allowed to plead its ignorance of a fact of which it had agreed to obtain knowledge. If the agent had delivered the policy and at the same time had told the insured that he had refused or had suggested inspecting the property as to the condition of the flues, doubtless the insured would have refused to take the insurance with the warranty clause in question in it. At least, he could have decided whether he would take the policy with that clause in it. The insurance agent had agreed to inspect the property with regard to the condition of the flues, and this induced the insured to take the policy of insurance in question. The insurance agent knew that the insured did not claim knowledge of the condition of the flues, and that the policy was to be issued and a change made after the house was inspected, if necessary,

When the policy was issued, the insured had the right to rely upon the fact that the agent of the insurer had already made an inspection of the premises, and had issued a policy in accordance with the facts ascertained.

Hence the record in the case at bar warranted a finding in behalf of the insured that the insurer should be estopped from claiming a forfeiture of the policy. Therefore the judgment will be affirmed.

JARRELL *v.* LEEPER.

Opinion delivered October 15, 1928.

Feazel & Steel, for appellant.

Steel & Edwards, for appellee.

HART, C. J., (after stating the facts). The principal ground relied upon for a reversal of the judgment is that the defendant was not a nonresident of the State of Arkansas at the time the attachment was sued out. The question of residence is a mixed one of law and fact. If, as contended by the defendant, the undisputed evidence shows that he was a resident of the State of Arkansas at the time the attachment was sued out, the finding of the court on the attachment branch of the case must be reversed.

What constitutes a nonresident within the meaning of our attachment law was considered and thoroughly discussed in the case of *Krone* v. *Cooper,* 43 Ark. 547. The court recognized that the words "resident" and "nonresident," as used in our statute relating to attachments, had never been defined by this court, and that no exact definition, which will fit all cases, is practical. The court recognized that domicile has a broader meaning than residence, and includes residence. In discussing the question the court said:

"No word, it is said, is more nearly synonymous with domicile than home, and it is generally agreed that a man can have but one home or domicile, but that he may have more than one place of residence. The domicile of a citizen may be in one State and his actual residence in

another. *Savage* v. *Scott,* 45 Iowa 130; *Board* v. *Davenport,* 40 Ill. 197.

"Drake, in his work on attachments, § 58, says: 'In determining whether a debtor is a resident of a particular State, the question of his domicile is not necessarily involved, for he may have a residence which is not in law his domicile'."

At the conclusion of the discussion, Chief Justice COCKRILL said:

"We may conclude from the cases that, in contemplation of the attachment laws generally, residence implies an established abode, fixed permanently for a time, for business or other purpose, although there may be an intent existing all the while to return at some time or other to the true domicile; but so difficult is it found to provide a definition to meet all the varying phases of circumstances that the determination of this question may present, that the courts say that, subject to the general rule, each case must be decided on its own state of facts."

The subject was also thoroughly discussed and the same conclusion reached by the Supreme Court of Minnesota in *Keller* v. *Carr,* 40 Minn. 428, 42 N. W. 292. Mr. Justice Mitchell, speaking for the court, said:

" 'Residence' and 'domicile' are not to be held synonymous. 'Residence' is an act. 'Domicile' is an act coupled with an intent. A man may have a residence in one State or country, and his domicile in another, and he may be a nonresident of the State of his domicile, in the sense that his place of actual residence is not there. Hence the great weight of authorities hold—rightly so, as we think—that a debtor, although his legal domicile is in the State, may reside or remain out of it for so long a time, and under such circumstances as to acquire, so to speak, an actual nonresidence within the meaning of the attachment statute."

Bearing in mind the principles of law above announced, we now come to a review of the evidence on the attachment branch of the case. To sustain the attach-

ment, the plaintiff testified that, at the time he entered into the contract for the sale of a hotel in which the defendant had an interest, at Haynesville, Louisiana, the defendant told him that his home and family were there. He said that he wanted to move his family from Haynesville to Austin, Texas, for the purpose of educating his children. R. W. Grady entered into a contract with the defendant for the exchange of property owned by him in Sevier County, Arkansas, for his interest in the hotel at Haynesville, Louisiana. During the course of their negotiation for the exchange, Grady was a guest of the defendant at the hotel, and sat at a family table with the defendant.

On the other hand, the defendant was a witness for himself on this branch of the case. According to his testimony, his residence was Nashville, Howard County, Arkansas, and he had lived there for more than a year at the time he began negotiations for the exchange of his interest in the hotel at Haynesville, Louisiana, with Grady, for certain lands which he owned in Sevier County, Arkansas. He was associated in the real estate business with Will Gaines at Nashville, Arkansas, and occupied an office with him. Witness admitted that he had been living in and out of Haynesville, where his family was located, for four years. He moved his family from there to Austin, Texas, in September, 1927. He had lived in Nashville at a hotel for more than a year before the transaction involved in this lawsuit had begun. He would make trips from Nashville to the Rio Grande Valley, in Texas, for the purpose of selling lands there. Sometimes he would be gone on these trips four or five days. At Christmas, 1927, he visited his family at Austin, Texas, for a few days. During the rest of the time he lived at the hotel in Nashville, Howard County, Arkansas, and had never voted either in the State of Arkansas or the State of Louisiana. He owned tracts of land in both Howard and Sevier counties. In the contract which is the subject-matter of this litigation he described himself as "M. A. Jarrell, from Haynesville, Louisiana."

Witness told all his customers that his residence was at Nashville, Howard County, Arkansas. He had some old stationery that gave Haynesville, Louisiana, as his place of business; but, after coming to Arkansas, when he used it he marked that out and gave Nashville as his place of business. His testimony in respect to his real estate operations was corroborated by his associate in business at Nashville, Arkansas.

Under the facts shown by the record, the court should have found that the defendant was a resident of the State of Arkansas. When he spoke to the plaintiff about his home being in Louisiana, he evidently referred to his place of domicile. He had lived at a hotel in Nashville, Howard County, Arkansas, for more than a year before the transaction involved in this lawsuit was had. He had accumulated various tracts of land in both Howard and Sevier counties. During all this time he lived at a hotel in Nashville. He was only absent when he would leave the State for the purpose of showing customers land in the Rio Grande Valley, in the State of Texas, and he would be gone only some four or five days at a time. He had a known place of abode, and service of summons could have been had upon him at his place of residence in Nashville, Howard County, Arkansas. His absence from the State for short spaces of time on business could not in any sense be said to affect his residence or to prevent service of summons from being had upon him. Even if it could be said that the court was justified in finding that his residence was at Haynesville, Louisiana, in the early part of September, 1927, the undisputed testimony shows that he had moved his family from there to Austin, Texas, some time in September, 1927, several months before the attachment in this case was sued out. Consequently he could in no sense be any longer a resident of Haynesville, Louisiana. The undisputed evidence also shows that he never attempted to acquire any residence at Austin, Texas. He did not buy any home there, and only moved his wife and children there for the purpose of educating the children. He remained at Nashville, Howard County,

Arkansas, where his headquarters for his real estate business were, and continued to reside at the same hotel. Under these circumstances we think the undisputed testimony shows that the defendant was a resident of the State of Arkansas on the 28th day of December, 1927, when the attachment was sued out by the plaintiff.

Therefore the court erred in sustaining the attachment on the ground that the defendant was a nonresident of the State of Arkansas. For this error the judgment must be reversed, and it is conceded that the court would have no jurisdiction to try the case on the merits unless the attachment could be sustained and thereby give the court jurisdiction in the matter. Hence it is not necessary to discuss or to determine the assignments of error in the trial of the case on its merits.

For the error in sustaining the attachment the judgment will be reversed, and the cause remanded for further proceedings according to law.

HARGRAVES *v.* SOLOMON.

Opinion delivered October 15, 1928.

E. M. Pipkin, Jr., and *Rose, Hemingway, Cantrell & Loughborough*, for appellant.

Polk & Orr, for appellee.

HART, C. J., (after stating the facts). The record shows that some of the bonds proposed to be issued will mature less than three years from the date of issue. Counsel for the defendant seek to reverse the decree on the ground that the provision in the Thirteenth Amendment to our Constitution, providing that such bonds shall be serial, maturing annually after three years from the date of issue, is directory, and that the court erred in holding the provision to be mandatory.

The correctness of the holding of the chancery court depends upon the construction to be placed upon that part of Amendment No. 13 which reads as follows:

"Cities of the first and second class may issue, by and with the consent of a majority of the qualified electors of said municipality voting on the question at an election held for the purpose, bonds in sums and for the purposes approved by such majority at such election, for hospitals. Said bonds shall be serial, maturing annually after three years from date of issue, and shall be paid off as they mature, and no bonds issued under the authority of this amendment shall be issued for a longer period than thirty-five years.

"Said election shall be held at such times as the city council may designate by ordinance, which ordinance shall specifically state the purpose for which the bonds

are to be issued, and, if for more than one purpose, provision shall be made in said ordinance for balloting on each separate purpose; which ordinance shall state the sum total of the issue, the dates of maturity thereof, and shall fix the date of election so that it shall not occur earlier than thirty days after the passage of said ordinance. Said election shall be held and conducted and the vote thereof canvassed and the result thereof declared under the law and in the manner now or hereafter provided for muncipal elections, so far as the same may be applicable, except as herein otherwise provided. Notice of said election shall be given by the mayor by advertisement weekly for at least four times, in some newspaper published in said municipality and having a *bona fide* circulation therein, the last publication to be not less than 10 days prior to the date of said election. Qualified voters of said municipality only shall have a right to vote at said election. The result of said election shall be proclaimed by the mayor, and the result as proclaimed shall be conclusive, unless attacked in the courts within thirty days after the date of such proclamation.

"This amendment shall be in force upon its adoption and shall not require legislative action to put it into force and effect."

The Constitution of a State and the amendments thereto are the organic law, and are usually construed to be mandatory. The general rule is well established that constitutional provisions are to be construed as mandatory unless by their express terms or by necessary implication a different intention is manifest. Cooley on Constitutional Limitations, 8 ed., vol. 1, pp. 159-164, inclusive; 6 R. C. L. 55; and 12 C. J. 140.

This general rule has been approved by our own court. *State* v. *Johnson*, 26 Ark. 281, and *Merwin* v. *Fussell*, 93 Ark. 336, 124 S. W. 1021.

The reason for the rule is especially appropriate in cases of this sort. Where a power is expressly given by the Constitution and the manner or means by which it is

to be exercised is prescribed, such means or manner is exclusive of all others.

In the application of the rule in *State* v. *Johnson,* 26 Ark. 281, it was said that, when a constitutional provision designates the time when a fundamental act shall be done and is silent as to any other time for performing it, it cannot be done at any other time. Under the same principle, where a power is given a municipality to issue bonds under certain conditions and the date of the maturity of the bonds is fixed in the same provision of the Constitution, this would be a restriction upon the power of the municipality to fix another or different date for their maturity.

We are not concerned with the wisdom or expediency of the provision of the Constitution under consideration. Our duty is to carry out the provisions of the Constitution as indicated by its plain language. We have quoted in full what the framers of the Constitution expressed as to the manner and means of allowing a municipality to issue bonds; and we find nothing in the language used which would indicate that it was intended that the provision for the maturity of the bond issue was to be declared directory. If such was the intention of the framers, the provision under consideration might just as well have been left out. It will be noted that the language of the provision is direct and positive, and there appears to be no reason for holding that it was to be considered directory merely. In direct and positive terms the clause of the constitutional amendment under consideration provides that the bonds shall mature annually after three years from the date of issue, and that no bonds shall be issued for a longer period than thirty-five years. They evidently decided upon having the first date of maturity three years after the date of issue in order to give the property owners time to accumulate a fund for paying the bond issue as it should annually mature. Whatever the reason might have been, however, it is our duty to construe the provision as mandatory, inasmuch as there

is nothing in the language used to indicate that it was intended to be directory merely.

Again, it is insisted that the plaintiff was barred of his right to attack the ordinance because the amendment provides that the result of the election, as proclaimed by the mayor, shall be conclusive, unless attacked in the courts within thirty days after the date of said proclamation. The attack in the case at bar was made more than thirty days after the date of said proclamation. We do not agree with counsel in this contention. We have copied the provision in question above, and it is apparent from the language used that the framers of the amendment to the Constitution only had in mind that the result of the election as proclaimed by the mayor should not be attacked after thirty days from the date of such proclamation.

It is next insisted that, even if we should hold that the bonds maturing before three years from the date of their issue were void, this would not invalidate the issue as to the remainder. We do not agree with counsel in this contention. The issue of bonds was an entirety; and, as we have already seen, there is no power to issue them unless the mandatory provisions of the amendment to the Constitution conferring the power have been complied with. Having violated the provisions of the Constitution in question in issuing the bonds, the invalidity of some of them necessarily affects the whole issue.

What we have said in this opinion should not be construed to prevent the common council of the city of Helena from passing an ordinance to hold another election for the purpose of issuing bonds for a city hospital, if said council should deem such course to be wise and expedient. The fact that the first issue has been declared illegal in no sense exhausts the power of the city council to commence a new proceeding in accordance with the provisions of the amendment to the Constitution in question.

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

DUNCAN *v.* TRAVELERS' BUILDING & LOAN ASSOCIATION.

Opinion delivered October 15, 1928.

J. A. Eades, for appellant.

J. H. Reynolds, for appellee.

SMITH, J. This appeal involves the question of priority of liens, it being insisted by appellant that his lien as a materialman is superior to that of appellee as a mortgagee.

On June 14, 1926, W. J. Vance, for the recited consideration of a thousand dollars, conveyed to J. W. Isaacs three lots in the city of Morrilton, and this deed was duly recorded June 20, 1926. On June 17, 1926, Isaacs executed a mortgage on this property to the Travelers' Building & Loan Association for $1,600, which instrument was filed for record June 26, 1926. This loan was obtained for the purpose of paying Vance the purchase price of the lots and to rebuild a house on said lots.

On September 18, 1926, appellant, Duncan, filed a claim for a materialman's lien, pursuant to § 6922, C. & M. Digest. It appears, from the account filed pursuant to this section, as well as from the testimony offered at the trial, that the materials for the value of which appellant claims the lien were furnished June 28, 1926, which was two days after the mortgage had been filed for record.

Under these facts the lien of the mortgage is superior to that of the materialman.

In the case of *Shaw* v. *Rackensack Apartment Corporation,* 174 Ark. 492, 295 S. W. 966, it was held that a

mortgage for the purpose of raising money to erect a building, which was filed prior to the commencement of work by a lien claimant, was superior to a lien for material and labor furnished, notwithstanding that some of the loan for which the mortgage was given was used for clearing the title.

The court below decreed that the lien of the mortgage was superior to that of the materialman, and this appeal is from that decree.

Appellant insists that Isaacs did not take title under his deed from Vance prior to July 20, for the reason that the possession of the deed was not delivered to him until that time. But filing the deed for record, which was done June 20, 1926, was a delivery to Isaacs.

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

GEORGIA STATE SAVINGS ASSOCIATION *v.* MARRS.

Opinion delivered October 15, 1928.

Collins & Collins, for appellant.

Lake, Lake & Carlton, for appellee.

SMITH, J. Suit was brought by W. T. Marrs to enforce a materialman's and laborer's lien upon several properties owned by Hettie A. Brown and her son, Robert A. Brown. The Georgia State Savings Association and the Arkansas Building & Loan Association were made parties, it being alleged that these associations had mortgages which were junior to plaintiff's lien. The Hayes-McKean Hardware Company, a partnership, intervened, and prayed that its materialman's lien be held superior to that of a mortgage to the building and loan association on the same property upon which interveners claimed a lien. There were other parties whose interests were adjudicated, but who have not appealed.

The savings association and the building and loan associations filed separate answers to the complaint of Marrs and a cross-complaint against Mrs. Brown and her son, in which it was prayed that their mortgages be foreclosed. There was a decree in favor of the lien claimants, from which is this appeal.

For the reversal of this decree it is first insisted that there was no proper affidavit, as required by § 6922, C. & M. Digest, in that the affidavit was signed "Mrs. R. B. Amos, for W. T. Marrs."

The testimony developed the fact that Mrs. Amos was Marrs' bookkeeper, and we think her affidavit was sufficient to meet the requirement of the law in this respect. The applicable statute (§ 6922, C. & M. Digest) requires the lien claimant to file "a just and true account of the demand due or owing to him," and that it be

"verified by affidavit." But it is not required that the affidavit be made by the claimant himself. It is a sufficient compliance with the law if the affidavit is made and filed.

In the case of *Terry* v. *Klein,* 133 Ark. 366, 201 S. W. 801, the court, in holding that § 6922, C. & M. Digest, did not require that an itemized account be filed, said: "* * * for, after all, the design of the lawmakers was to provide a method for giving public notice of an assertion of the lien and the extent thereof. That design is fully carried out by giving the statute such an effect as will require a notice which will apprise the public of the extent of the claim."

The claim of lien made by the interveners, Hayes-McKean Hardware Company, was sworn to before Bob Canton, who attached his seal as a notary public as a part of the jurat, but did not affix the words, "notary public," after his name, and did not give the venue of the affidavit by reciting where it was taken.

We think the case of *Railway Co.* v. *Deane,* 60 Ark. 524, 31 S. W. 42, is decisive of this question. It was there held (to quote the syllabus): "Where, to an affidavit for appeal from a justice's court otherwise sufficient, but expressing no venue, there is attached a proper jurat showing that the oath was administered to the affiant by a notary public, it will be presumed that the notary acted within his jurisdiction."

In the case of *Kull* v. *Dierks Lbr. & Coal Co.,* 173 Ark. 445, 292 S. W. 695, it was said: "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."

The seal of the notary public recites that he was a "notary public, Sevier County, Arkansas," and there was nothing in the testimony to overcome the presumption

that the notary acted within his jurisdiction. Section 7970A, C. & M. Digest.

Appellee Marrs claimed liens against a building referred to by the witnesses as the apartment building, and another referred to as the duplex building, and brought separate proceedings to enforce liens against each of them.

It is earnestly insisted that proceedings to enforce these liens were not brought within the ninety days as required by § 6922, C. & M. Digest.

The affidavits were filed against each property on February 16, 1927, and alleged that the work was completed in each instance on November 18, 1926, so that the claims for the lien were filed exactly ninety days after the work was alleged to have been completed.

Section 6922, C. & M. Digest, has been several times construed as requiring the verified account to be filed with the clerk of the circuit court within ninety days from the date of the last item furnished, and the testimony supports the finding of the court that Marrs' claims were filed within that time. *Ferguson Lbr. Co.* v. *Scriber,* 162 Ark. 349, 258 S. W. 383, and cases there cited.

The most important and difficult question in the case is that of the priority of the liens of the materialmen over the mortgage liens of the savings association, as decreed by the court.

The testimony shows that Brown made application to the savings association for a loan on the apartment on August 17, 1926, and that a mortgage securing the loan, which was executed on September 25, 1926, was filed for record September 29, 1926. The account filed by Marrs, under § 6922, C. & M. Digest, alleged that the first work was done on September 30, 1926, and that the amount due was $972. During the trial the court permitted Marrs, over the objection and exception of the savings association, to offer testimony to the effect that the work was begun on September 16.

In the case of *Shaw* v. *Rackensack Apartment Corporation,* 174 Ark. 492, 295 S. W. 966, it was held (to quote two syllabi):

"3. Under Crawford & Moses' Digest, § 6909, a mortgage for the purpose of raising money to erect an apartment building, which was given prior to commencement of work by a lien claimant, *held* superior to the lien for material and labor furnished, notwithstanding that some of the loan for which the mortgage was given was for clearing the title. 4. Under Crawford & Moses' Digest, § 6911, where work was commenced by a plumbing contractor prior to the time other liens and mortgages attached to the property, his lien was entitled to priority, regardless of how little he might have done before the other liens attached."

Upon the authority of this case we would be constrained to hold that the lien of the mortgage filed for record September 29, 1926, was superior to the account of a materialman or laborer which began on September 30, 1926, but the court below found, from testimony which we think sustains his finding, that Marrs began his work by putting in the sewer and pipe prior to the filing of the mortgage, and the ledger account kept by Marrs shows that the first material was furnished and the account opened September 16, which was prior to the filing of the mortgage for record.

It is earnestly insisted that Marrs should not be allowed thus to contradict the recital of his account filed under § 6922, C. & M. Digest, which recites that the account began September 30.

It does not appear that the savings association was misled by the statement in the affidavit that the account opened September 30, for the testimony shows that the savings association actually paid over the money secured by its mortgage on October 20, 1926. Marrs' account had not then been filed with the clerk, and was not filed until February 16 thereafter, so that the recital as to the date of the opening of the account did not affect the savings association's conduct. There is therefore no element of estoppel in the case, as the savings association had taken its mortgage and paid over the money secured by it before Marrs had completed his work and had ceased to

furnish material under his contract, and the statute gave him ninety days from that time in which to file his claim, under § 6922, C. & M. Digest.

Did the court err in permitting Marrs to show his account was opened September 16?

As we have already said, it was held in the case of *Terry* v. *Klein, supra,* that the statute did not require the lien claimant to itemize his account, and the only requirement of the statute in regard to time is that the account be filed with the circuit clerk within ninety days of the date the account closed. We conclude therefore that no error was committed in permitting Marrs to show that he did work and furnished material at a date prior to the filing of the savings association's mortgage for record.

It is finally insisted that the affidavit of the interveners, Hayes-McKean Hardware Company, is too indefinite as to the description of the property sought to be charged with the lien. The description was as follows: "Southwest corner lot 50 feet x 140 feet facing 50 feet on Haes Street, all in block 10, Braley's Addition to the town of DeQueen, Arkansas."

It appears, from the description employed, that the lot is the southwest corner of block 10 of Braley's Addition to the town of DeQueen; that it is 50 feet by 140 feet in area, and that its 50-foot side faces Haes Street. We think the property sought to be charged could be identified from this description.

In the case of *Barnett Bros.* v. *Wright,* 116 Ark. 44, 172 S. W. 253, we quoted with approval from Phillips on Mechanics' Liens (3 ed., § 379) the following statement of the law:

"Among those laid down, and probably the best rule to be adopted, is that, if there appear enough in the description to enable a party familiar with the locality to identify the premises intended to be described with reasonable certainty, to the exclusion of others, it will be sufficient. There is great reluctance to set aside a mechanic's claim merely for loose description, as the acts

generally contemplate that the claimants should prepare their own papers; and it is not necessary that the description should be either full or precise. It is enough that the description points out and indicates the premises, so that, by applying it to the land, it can be found and identified. A description that identifies is sufficient, though inaccurate. If the description identifies the property by reference to facts, that is, if it points clearly to a piece of property, and there is only one that will answer the description, it is sufficient."

See also *Arkmo Lbr. Co.* v. *Cantrell,* 159 Ark. 445, 252 S. W. 901; *Ferguson Lbr. Co.* v. *Scriber,* 162 Ark. 349, 258 S. W. 353.

The court below held that the liens of the materialmen were superior to the lien of the mortgage, and, as we concur in that view, the decree is therefore affirmed.

NATIONAL BENEVOLENT SOCIETY *v.* HARRIS.

Opinion delivered October 15, 1928.

[redacted]

S. R. Simpson, for appellant.

A. Welby Young, for appellee.

KIRBY, J., (after stating the facts). Appellant insists that the court erred in not giving its peremptory instruction directing the jury to find for the appellee in the minimum sum of $100, less the small credit to which appellant was entitled, and this contention must be sustained.

"Policies of insurance should be interpreted by the rules governing other written contracts where the meaning of the language used is clear and explicit; but, where there is doubt as to the meaning of the language used, they should be construed strictly against the insurer, and favorably to the insured." *Home Mut. Ben. Assn.* v. *Mayfield*, 142 Ark. 240, 218 S. W. 371. The language of the clause of the policy relating to the payment of assess-

ments limiting the maximum liability is clear and explicit, providing that, when a member shall have passed the age of 45 years and the certificate has been in force for four years, the said member shall be assessed double the amount of previous assessments for the purpose of keeping in force his death benefit, and may change his certificate for a secondary certificate of the same form, wording and terms, "except that the maximum death benefit shall be $100."

The undisputed testimony shows that the deceased member had kept his policy in force for four years, had passed the age of 45 years, and had not paid double the amount of the previous or $1 assessments, and had only paid the same amount of assessments, $1 per month, after reaching the age of 45 years, as he had been paying before arrival at that age. Under the terms of the policy, if the insured had reached the age of 45 years the payment of $1 per month assessment, the amount that the member had been paying before arrival at such age, could only entitle his beneficiary to the maximum death benefit prescribed in the policy as though a secondary certificate had been issued.

The beneficiary testified that she had attended to the correspondence of her husband, and that he had never received any notice from the company of the increased assessments, notwithstanding it was shown one had been duly mailed to his address, with directions for its return to the company upon failure of delivery; and it was shown also that she and her husband knew of the provision in the policy for the double assessment after the age of 45 years had been reached by the insured. She testified that she had asked the local agent about the increase of the assessments, and been informed by him that the company would notify them when the increase was made, but that they had received no such notice.

The provision in the policy or certificate relating to the double assessment after insured had passed the age of 45 years, required for keeping in force the death benefit or allowing the change to a secondary certificate, with

a maximum death benefit of $100, at the same rate or assessment, is self-executing, and the insured could not continue the policy in force for the full amount, after passing the age of 45 years, without payment of double the amount of the former assessment, which, the undisputed testimony shows, was not done; and, since he was entitled, under the terms of the policy, to a secondary certificate with a maximum death benefit of $100 upon continuing to pay the old rate or assessment, the society, having received the assessments, was liable to the payment of that amount to his beneficiary as though such secondary certificate had been regularly issued. *Sovereign Camp W. O. W.* v. *Arthur,* 144 Ark. 114, 222 S. W. 729; *K. & L. of Security* v. *Lewellen,* 150 Ark. 60, 233 S. W. 797.

The court should have instructed a verdict for appellee for the maximum amount of $100 only, with interest, less the credit of $15.94 shown to be due the society, reducing the amount of the recovery accordingly.

The judgment will be modified, and, as modified, affirmed. It is so ordered.

BANK OF MULBERRY *v.* FRAZIER.

Opinion delivered October 15, 1928.

Starbird & Starbird, for appellant.

D. L. Ford, for appellee.

MEHAFFY, J. Appellant, on the 7th day of January, 1927, brought suit in the Crawford Chancery Court, alleging that defendants, A. G. Frazier and Frances Frazier, were indebted to it in the sum of $9,000 upon their promissory note, and it is alleged that, to secure the payment of said note, the Fraziers executed a mortgage on 287 acres of land, and prayed for judgment and a foreclosure and sale of the property. It was alleged that the other defendants claimed some interest in the land.

A. G. Frazier and Frances Frazier, the makers of the note and mortgage, did not answer. The other defendants answered, alleging that they were the only heirs at law of T. M. White, deceased, who died in 1908, intestate, leaving them as his sole survivors; that at the time of the death of T. M. White he was the owner in fee of 158.33 acres of the land described in the mortgage, and was living upon the land at the time of his death; that at the time of the death of said White the defendants were minors, living with their father upon the property described, as their homestead.

The cross-complaint further charged that A. G. Frazier was the guardian of the minor heirs, and was the administrator of the estate of T. M. White, deceased; that A. G. Frazier, as administrator, did not have any part of the land set off as a homestead, but filed his petition in the probate court of Crawford County, asking for an order permitting him to sell all of the said lands. The petition set forth that there was a mortgage on the premises of $2,500, executed by T. M. White in his life-

time, and that there was an additional debt against the estate amounting to $500; that the interest amounted to about $300; that the fencing was run down, and would have to be rebuilt, and that the average rent of the farm was about $300, and stated in his petition that it was for the best interest of the heirs that the land be sold.

The petition did not show what debts had been probated, and it was the design of Frazier to defraud the heirs out of their legal rights. An order was made for the sale of the land, in compliance with Frazier's petition, and Frazier employed one J. A. Wigley to bid for him, with the understanding that Wigley would keep the lands for a period of one year, and deed the lands to Frazier. This was done. The sole purpose of the transaction was to keep up the fraudulent intent of Frazier. Wigley conveyed the land to Frazier, and the heirs of T. M. White, defendants in this suit, brought suit in the chancery court of Crawford County, and the court held that the sale was fraudulent and void, and that the trustee of the Bank of Mulberry knew it, and that with this knowledge Frazier executed to Alexander, trustee of said bank, the mortgage upon the lands described in plaintiff's complaint.

Frazier had no title to said lands. The appellant filed its reply to the cross-complaint, and alleged that the sale was made to pay a mortgage debt, and that it was made, in addition to paying the mortgage debt, to pay $500 of defaulted interest which the probate court had ordered him to pay. Appellant denied that it had any knowledge of the fraud of Frazier, and no notice of the matter other than that given by the administrator's deed, and, in faith of the recitation in the deed, loaned the money. The administrator's deed was duly acknowledged and recorded.

The plaintiff introduced in evidence the note and mortgage, and E. E. Cooper testified, in substance, that he took the mortgage attached to the amendment to the reply as Exhibit A; that this was on January 20, 1908,

and was filed for record February 7, 1908. The credits on the mortgage were made after the sale by order of the probate court in 1911, and the balance due was shown to be $2,500. The credits were for interest. A new mortgage was given on the same lands in 1913 by A. G. Frazier and wife. This was given for the balance due on the old mortgage, and it was satisfied February 19, 1915. The mortgage on the 158 acres is for $2,100, and that was released in 1915. That was the same day that the C. C. Nelson mortgage was recorded.

On cross-examination this witness said that his record did not show by whom the payments were made. It shows the payments up to February, 1911, and the balance due then was $2,500. The new mortgage was given February 20, 1923, by Frazier and wife; does not know by whom the mortgage was paid.

J. T. Nelson testified, in substance, that he was a member of the firm of C. C. Nelson & Company, and had a transaction with Frazier; loaned him money, as shown in mortgage, marked Exhibit C. This covered 158 acres of land claimed by the White heirs and other lands to secure debt of $5,500. This mortgage was made February 1, 1925. There was an incumbrance upon the place, and he took the mortgage, and he personally paid it off and satisfied it out of money loaned on the mortgage given to Nelson; does not recall what the incumbrance was. Does not remember the amount he paid.

M. C. Alexander testified that he was connected with the Bank of Mulberry in the capacity of cashier, and made the loan, for which this suit is brought, to Frazier, in the sum of $9,000; did not actually loan money, but took up an old mortgage, including Frazier's debt that he owed the Bank of Mulberry. Nelson & Company made an assignment of the mortgage. The assignment made by Nelson & Company was read in evidence. No other officers of the bank had anything to do with making the loan or taking the mortgage. He knew White in his lifetime, and at the time of his death he was living on the land where the Fraziers live. It is the place in contro-

versy; did not know at the time that White had any children living with him; never financed Frazier in his land deals.

The cross-complainants then introduced in evidence the letters of administration, showing the appointment of A. G. Frazier as administrator of the estate of T. M. White, deceased, and letters of guardianship appointing A. G. Frazier as guardian of the White heirs, minor children of T. M. White, defendants in this suit. They also introduced and read in evidence the petition of Frazier, administrator of the White estate, praying for an order to sell lands for the White estate.

The following is a petition of Frazier to sell lands:

EXHIBIT B.

"Petition to sell the farm of T. M. White, deceased.

"To the Honorable Ed Cochran, Judge of the Probate Court of Crawford County, Arkansas.

"Comes Arthur Frazier, administrator of the estate of T. M. White, deceased, and represents to the court:

"(1) That there is a debt against said estate of $2,500, bearing interest at the rate of ten per cent. per annum, held by a mortgage and loan company, which debt is secured by a mortgage on the lands belonging to said estate; said mortgage was executed by the deceased in his lifetime. (2) That there is an additional debt against said estate amounting to more than $500. (3) That the annual interest on the above named indebtedness amounts to more than $300. (4) That the fencing around said farm is now needing repairs, and at least a part of said fencing will have to be built anew, and the roof on the dwelling house and barn is very bad, and will soon have to be replaced. The needed repairs will not cost less than $100 annually. (5) The average rental value of said farm is about $300 per annum, which amount will not more than pay the interest on the debts, and leave nothing with which to pay taxes and repairs, leaving a deficit against the estate which will in a few years consume the whole of the value of said farm, leaving nothing for the heirs of the estate. (6) The farm can be sold

now for enough money to pay all debts and leave a good balance for the heirs. I verily believe it to be the best interest for the heirs that said farm be sold at an early date as possible.

"Therefore your petitioner prays an order authorizing the sale of said farm, subject to the mortgage mentioned above, on such terms as is considered by the court to be the best. A. G. Frazier, administrator."

The following is Exhibit E, introduced in evidence.

EXHIBIT No. E.

"In the probate court for Crawford County, February, 1911, term.

"Third annual settlement of A. G. Frazier, administrator of the estate of T. M. White, deceased.

"This accountant charges himself as follows, to-wit:

To this sum as rent on cotton, season 1911	$ 136.70
To this sum as rent on corn, season 1911	35.00
To this sum cash on sale of land	1,006.55
To this sum for cotton seed	27.00
To this sum paid Cooper mortgage	2,500.00
To this sum per J. A. Wright notes	3,018.00
	$6,723.70

"And asks credit as follows:

By this sum due administrator, as shown in last settlement	$ 11.88
By this sum paid interest to loan company	243.50
By this sum paid self in lieu of money paid loan company as per order of court	500.00
By this sum as interest on $500 for two years	100.00
By this sum paid mortgage	2,500.00
By this sum as taxes	56.14
By this sum clerk's fees	5.15
By this sum clerk's fees	4.55
By this sum as commission on thousand dollars at 5 per cent	50.00
By this sum paid to A. G. Frazier as his distributive share of the estate, he having bought two shares therein	731.61

By this sum paid for advertising sale of land	5.00
By this sum paid appraisers	3.00
By this sum to J. W. Storie, swearing appraisers	.75
By this sum as commission on $3,129.66 at 2%	78.24
Total credits	$2,469.82

Balance due estate $2,453.88.

"A. G. Frazier.

"Subscribed and sworn to before me this 17th day of February, 1913. C. M. Wofford, Clerk. By Wallace Oliver, D. C.

"Filed February 3, 1913. Confirmed June 3, 1913."

Cross-complainants then introduced a decree of the chancery court of Crawford County in the case of the White Heirs v. A. G. Frazier, a final decree rendered February 23, 1927. The court entered a decree canceling the administrator's deed of the lands to Wigley and decreeing that the White heirs, who are the cross-complainants here, have and recover the lands from A. G. Frazier, and that the titles to said lands be vested in them.

The court held that the proceedings of the probate court were void on their face; that the sale by Frazier, as an administrator, to Wigley, was a fraud; that Wigley was acting for Frazier under an agreement that he would later deed the land to Frazier; and that Wigley conveyed it to Frazier without any consideration.

In the same suit an accounting was had of the acts of A. G. Frazier as guardian of appellees, and decreed that the guardian was indebted to the cross-complainants in this suit in the sum of $11,620.14.

After hearing the evidence, the chancellor found that the title of A. G. Frazier and his wife, at the time of making said mortgage, was void, and that the land was the homestead of the cross-complainants, and was at the time of the sale to pay the mortgage indebtedness; that Frazier was at the time guardian of all the minors and administrator of the estate of White; that cross-complainants were the only heirs at law of T. M. White,

deceased; that Frazier, for the purpose of and with the intent of defrauding the minors, procured Wigley to bid on the land, and Wigley afterwards conveyed it to Frazier; that Wigley paid nothing, and bid it in for Frazier; and that the decree rendered in the case of White and others v. Frazier is *res judicata* herein.

There was something like 100 acres of land upon which the appellant had a mortgage that is not involved in this appeal. A decree of foreclosure was rendered as to said 100 acres, and no appeal taken. The only question involved in this case is whether the sale by order of the probate court was void.

We think it unnecessary to decide whether the decree in the case of the White heirs against Frazier was *res judicata* and binding on the appellant. A judgment or decree is binding not only on parties, but privies. But, as we have said, we think it unnecessary to decide this question. This court has recently decided that a sale by administrator of the homestead to pay debts is void. In that case it was said:

"The sale of the homestead of a minor by order of a probate court for the payment of the debts of a decedent is void, as the probate court has no such jurisdiction. Such a sale is void for lack of jurisdiction, under both the Constitutions of 1868 and 1874." *Hart* v. *Wimberly,* 173 Ark. 1083, 296 S. W. 39.

The authority of the probate court and the administrator is fully discussed in the above cited case, and we deem it unnecessary to review the authorities here.

Appellant, however, contends that the probate court had authority and jurisdiction to sell the lands as mortgaged lands, and cites C. & M. Digest, § 168. That section provides that the court may, on application of any person interested, order the executor or administrator, if the property cannot be redeemed, or if the redemption would be injurious, to sell all the right, title or interest in the estate at public auction.

If the appellant, before it had taken its mortgage, had examined the petition to sell, it would readily have

seen that the petition did not comply with the statute. That statute authorizes the sale of mortgaged property under certain conditions, but there is no statute that authorizes the sale of the minor's homestead to pay debts of the estate, and this petition was not for the purpose of paying this mortgage debt, but the petition expressly asks permission to sell to pay other debts and to sell subject to the mortgage. There is nothing either in the petition or the orders of the probate court showing jurisdiction. On the contrary, all of the evidence introduced before the chancellor, including the petition to sell, the settlement of the administrator, and all the proceedings had with reference to the sale of this property, conclusively show that the sale was void, and that the court had no jurisdiction to sell. And this court has said, in the case cited and many others, that the sale of a homestead by an administrator was void because the court has no jurisdiction to order it. It held that there is no provision anywhere in the law to sell a minor's homestead while a minor, for any purpose. The probate court, from the petition of some person interested, might order the sale under the section referred to by appellant, to pay the mortgage debt, or might redeem, but no such steps were taken in this case.

While the administrator's deed may be *prima facie* evidence of the recitals contained in it, it would be the duty of the purchaser to find out whether the sale was a homestead. But in this instance the appellant knew that it was the homestead of White and his minor children; knew without any investigation. But, if it had not known, it was its duty to investigate the records of the probate court and ascertain whether the court had jurisdiction to make the order of sale, and whether or not the sale was void.

It is next contended by the appellant that, even if the court should decide against it on the above proposition, then it is entitled to subrogation. The court, however, found in this case that the proof showed that all the facts which are shown by the probate record were

known to the plaintiff bank in this action by presumption of law at the time they took the mortgages. Among these facts that they were bound to know, if they examined the record, were that the petition did not comply with the law; that a sale ordered under the petition filed would be void; that the court had no jurisdiction; that it was not a sale to pay the mortgage debt, but a sale to pay other debts subject to the mortgage, and this the administrator had no right to do.

It would further have found by an examination of the settlement of Frazier, as administrator, and the record of the probate court, that the debt for which the land was sold was a debt claimed by the administrator himself, and a very little examination would have convinced it, if it had not already known it, that the sale was a fraud, and that the cross-complainants in this case were the owners of the land, and that it was their homestead.

And, without deciding whether the decree of the chancery court, introduced in evidence, was binding on the appellant or not, we are of the opinion that the decree of the chancellor is supported by the evidence, and is correct.

The judgment is therefore affirmed.

MISSOURI & NORTH ARKANSAS RAILWAY COMPANY *v.* BRIDWELL.

Opinion delivered October 15, 1928.

Shouse & Rowland and *Woody Murray*, for appellant.

George W. Reed, for appellee.

MEHAFFY, J. On December 14, 1925, appellant brought suit against the appellee, alleging that appellee was indebted to it in the sum of $157.47, growing out of a spur-track contract.

Appellee filed answer and counterclaim in the sum of $90. He admitted that appellant's claim was correct, but that he was entitled to a set-off of $90, which he alleged appellant owed him. Appellee's cause of action arose November 6, 1922, and appellant's complaint was filed December 14, 1925, more than three years after appellee's cause of action arose. Appellant filed a reply in which it claimed that, more than three years having elapsed, appellee's counterclaim was barred by the statute of limitations.

The parties entered into an agreement, waiving a jury, and agreeing to try the case before the court sitting as a jury, on the following agreed statement of facts:

"The facts set forth in plaintiff's complaint, in defendant's answer and cross-complaint, and in plain-

tiff's answer to defendant's cross-complaint, are true. The shipment of the goods complained of in cross-complaint of defendant was received by defendant and said loss discovered November 6, 1922; that plaintiff's cause herein was filed December 14, 1925, and that defendant's answer and cross-complaint was filed on the first day of March, 1926. That this question may be submitted on the pleadings aforesaid as evidence and this statement of facts alone, the only issue being the question of law as to whether the claim of defendant for $90 credit is barred by the statute of limitations, as pleaded by defendant."

The court below held that appellee's claim was not barred as a set-off, and gave judgment for the appellant for the amount sued for, less the $90 claimed by appellee. The judgment was for $67.47 and cost.

Appellant filed a motion for a new trial, which was overruled, exceptions saved, and appeal was prosecuted to this court. The only question in the case is whether the $90 claim of appellee was barred by the statute of limitations so that it could not be pleaded as a set-off and thereby reduce appellant's claim.

The authorities are not in harmony, some holding that, if action on the counterclaim is barred when it is filed, so that an independent action could not be maintained on it, it is not available as a set-off; others holding that, if it is not barred at the time suit was brought by the plaintiff, it may be used as a set-off, although barred at the time it was filed. This court, however, has held:

"So a counterclaim arising out of tort, even if barred by the statute of limitations, may be used by way of recoupment against a suit for the recovery of money. It was error therefore for the court to render judgment over against appellant for any sum, as the counterclaim was barred when the cross-bill was filed, and also error not to grant the demand made by appellant to reduce the amount of the counterclaim recovered against appellant to the amount recovered by appellee,

C. C. Smith, against him. The counterclaim was available for recoupment only. For that purpose it existed as long as appellant's cause of action existed." *Huggins* v. *Smith,* 141 Ark. 87, 216 S. W. 1.

"The defense of reduction or recoupment which arises out of the same transaction as the note or claim survives as long as the cause of action upon the note or claim exists, although an affirmative action upon the subject of it may be barred by the statute of limitations. But a counterclaim, even where by statute it may consist of any matter arising out of contract or tort, whether it arises out of the contract or transaction sued upon or not, if barred by the statute of limitations, is available only for recoupment, although for that purpose it may be used as long as plaintiff's cause of action exists." 37 C. J. 804-5.

The statute of limitations is intended to bar actions themselves, and not matters of defense to such actions. And where the counterclaim or set-off pleaded as a defense grows out of the transaction which is the basis of plaintiff's claim, it will not be barred as long as appellant's cause of action exists. Under our statute, a counterclaim may be any cause of action in favor of the defendants, or some of them, against the plaintiffs, or some of them, whether it grows out of the same transaction or not, and a set-off may be either a cause of action arising out of contract or tort. And where a counterclaim or set-off is pleaded, it is wholly immaterial whether it was founded on contract or whether it grew out of the same transaction.

In the case of *Huggins* v. *Smith, supra,* the question was not involved and not discussed as to whether there was any distinction as to claims growing out of or connected with the transaction which was the basis of plaintiff's complaint, or for an independent claim in no way connected with plaintiff's cause of action.

If a counterclaim or set-off is interposed as a defense merely, and no affirmative relief is asked, and when it grows out of the transaction which is the basis of plain-

tiff's cause of action, there is no reason why this defense might not be available as long as plaintiff's cause of action exists.

The statute of limitations provides that actions founded on any contract or liability, expressed or implied, not in writing, shall be commenced within three years after the cause of action accrued, and not thereafter. But that means the commencement of an action for an affirmative relief, and the commencement of an action requires the filing of a complaint and the issuing of a summons. But the defendant, in using a counterclaim merely as a defense, is not prosecuting any cause of action and not asking judgment on the claim, but he is simply asking permission to keep what he has, and that the plaintiff be not permitted to recover on his claim, except whatever amount there may be in excess of what he owes the defendant. Where, however, a counterclaim or set-off has no connection with plaintiff's cause of action, but is an independent claim against the plaintiff, it will be barred as a defense and not available to defendant if the right of action on such counterclaim was already barred before plaintiff's cause of action accrued. If action on the counterclaim is barred and plaintiff's cause of action accrues thereafter, the counterclaim cannot be used as a defense. But, if the counterclaim is not barred when plaintiff's cause of action accrues, then it is not barred as a defense to plaintiff's cause of action. The authorities are not in harmony, and it would serve no purpose to cite them here. We have reached the conclusion that the rule above announced is the best rule, and it has already been settled by the decision of this court.

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

BUSEY *v.* FELSENTHAL.

Opinion delivered October 15, 1928.

[redacted]

Marsh, McKay & Marlin, for appellant.

Patterson & Rector, for appellee.

McHANEY, J. The facts in this case are undisputed. In November, 1925, appellees, being brokers in El Dorado, Arkansas, solicited the appellant for the right to sell certain royalty interests owned by him individually and as trustee. The appellant listed the property with appellee at $20,000 net. It was agreed between them that he should add a 5 per cent. commission, or $1,000, to the net price, and attempt to get a purchaser for $21,000. Shortly thereafter he priced this property to Mr. P. R. Mattocks, representing the B. H. & M. Oil Company, at $20,000 for the owner and $1,000 commission. Mr. Mattocks was interested in the purchase, and appellees sent him to appellant to close the deal. Mattocks called on appellant on November 5, 1925, and agreed with him for the purchase of this royalty at the price of $20,000 plus the commission of $1,000 to appellee, conditioned that the title should be approved by Gaughan & Sifford, attorneys, of Camden, Arkansas. He thereupon drew a draft in favor of Gaughan & Sifford for $20,000, with instructions to them to turn it over to appellant on approval of the title. Appellees were notified of this contract of purchase and sale between appellant and the B. H. & M. Oil Company. Appellant thereafter refused to carry out the contract of sale, but breached his contract with the B. H. & M. Oil Company and sold the same royalty interest to another. At the conclu-

sion of the testimony the court directed the jury to return a verdict for appellees, which was done.

Appellant says, first, that there was no contract of employment between him and appellee, and second, if there was a contract of employment, it was expressly understood and agreed that he would not pay appellee for his services, and that no damages could have been sustained by him.

In a case quite similar to this in principle, *Lewis* v. *Briggs,* 81 Ark. 96, 98 S. W. 683, this court said:

"Under the terms of this contract Lewis does not make out a case for recovery against the plaintiff (defendant) by showing that he secured a contract with solvent parties to purchase the land. He must, under this contract, show either that defendants have received some part of the balance of the purchase money to which he was entitled, or that the parties who agreed to purchase were ready, willing and able to perform their part of the contract, and that they were prevented from doing so by the default or failure of the defendants to perform their part of the contract."

The above case was cited with approval in the more recent case of *Vaugham* v. *Odell & Kleiner,* 149 Ark. 118, 231 S. W. 562. In that case 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." Also, in stating the effect of the rule laid down in *Lewis* v. *Briggs,* the court used this language: "In concluding the opinion the court said that, under the contract, so long as the purchase price was unpaid, and so long as the defendants were not to blame for its nonpayment, they were not liable. This was a clear recognition of the rule as we have stated it. Upon the principle stated in these cases, the broker might have a claim for his services if the sale had failed through the fault of the defendant."

In the case at bar the proof is undisputed that an absolute sale was made, subject only to the approving

opinion of an attorney to whom the royalty interest was later sold. We are of the opinion that this case is ruled by the cases above cited, and that the court did not err in directing a verdict upon the undisputed testimony in the record.

Judgment affirmed.

COWAN *v.* THOMPSON.

Opinion delivered October 15, 1928.

McHaney, J. Counsel for appellees has correctly stated the case and the issues as follows: "The Luxora & Little River Road Improvement District No. 2 was created by orders of the county court under the Alexander Road Law, many years ago, and the limit of its right to issue bonds to the extent of 30 per cent. of the assessed value, as provided by the Alexander Road Law, was raised to 50 per cent. of the assessed value by special act No. 253, passed by the General Assembly in 1920. Bonds were issued amounting to approximately 50 per cent. of the assessed value of real property in the district, and the proceeds thereof applied toward the construction of about forty miles of highway within said district, some of which were only graded dirt roads, while others were covered with a layer of silica or gravel. The dirt roads, on account of the peculiar condition of the soil, have deteriorated to the point where they are impassable in wet weather. The silica roads, which are constantly traveled, have deteriorated to the point where they are rough and full of chuck-holes. The original district had no authority to issue additional bonds. To remedy this unfortunate condition of the property owners, R. E. Lee Wilson and many others in the district petitioned the county court to create a maintenance and repair district under C. & M. Digest, §§ 5463 to 5488. The petition of the property owners was granted, and

the district was created and organized. On account of the peculiar condition of the soil, the commissioners concluded that it would be a waste of money to attempt to repair the dirt roads by merely smoothing over the surface. Likewise they were of the opinion that it would be necessary, in order to put the silica roads in a good state of repair, to place thereon a thin coat of warrenite. Cowan, a property owner in the district, filed a bill attacking the plans of the commissioners, on the following grounds:

"(1) That the law passed in 1919 providing for the organization of maintenance and repair districts was repealed by the Martineau Act. (2) That a district organized under the maintenance and repair act has no right to issue bonds for any purpose. (3) That the maintenance and repair act applied to proceedings commenced in the year 1919 only. (4) That a maintenance and repair district was bound by the plans of the original district, and could use no material for repairing and maintaining roads other than the material specified and provided for in the plans of the original district."

The lower court sustained the latter contention. In other words, the lower court held that a dirt road could be repaired only with dirt, although the plaintiff concedes that the application of a thin layer of silica would be better and more economical in the long run, and that a silica road could be repaired only with silica, although the complaint concedes that the application of a thin layer of warrenite to the silica road would be better and more economical in the long run.

Both sides appealed.

1. Appellant first says that the act of February 11, 1919, §§ 5463-5488, C. & M. Digest, the first section of which is as follows: "Improvement districts may be formed for the purpose of keeping in repair roads and bridges now or hereafter improved by road improvement districts, created either by special act or under general laws," was repealed by act 11 of 1927.

The complaint alleges, with reference to the roads proposed to be repaired, that "none of said roads have been taken over for construction, repair or maintenance by the State Highway Department." The Martineau Act, act No. 11 of 1927, has to do only with State highways. *Taylor* v. *Rogers,* 176 Ark. 156, 2 S. W. (2nd) 56. In that case we said: "There is no prohibition in the several acts against the building of county roads, or roads not a part of the State highway system, under the Alexander Road Law, and we do not understand that the Alexander Road Law has been repealed by the provisions of the Acts of 1927." Not only was the act under consideration not repealed by the Martineau Act of 1927, but we think it will serve a useful purpose in the repair and maintenance of roads and bridges not forming a part of the State highway system, and which were originally constructed by road improvement districts. The chancellor correctly held there was no repeal.

2. Appellant next says that, because the form of notice prescribed by § 5469, C. & M. Digest, reads "on the ..... day of ..... 1919," the act was only in force during that year. Section 5463 above quoted clearly refutes that idea and conclusively shows that it was a mere clerical error or misprision of the scrivener in writing 1919 instead of 19..... Again the chancellor correctly so held.

3. Neither is there any merit in appellant's claim that, although the district may "issue negotiable evidences of indebtedness," as provided by § 5468, C. & M. Digest, it cannot issue bonds maturing over a period of years. This court has recently decided to the contrary, and the chancellor correctly so held. *Ark. State Highway Com.* v. *Kerby,* 175 Ark. 652, 300 S. W. 377.

4. The appellees contend that the court erred in holding, as it did, in effect, that the dirt roads could only be repaired with dirt and the silica roads only with silica, the language of the decree in this regard being: "They are perpetually enjoined from graveling the graded dirt roads and from putting a warrenite surface

on silica roads, and no bonds can be issued for that purpose." We think the court erred in this regard, and placed too narrow a construction on the act. A careful reading of §§ 5468 and 5469, C. & M. Digest, appears to us to be conclusive of this fact. We will not set them out, as they are too long, but the former defines the powers of the commissioners, and makes it their duty to keep in repair the roads constructed by the original district, and to do this they are given broad powers. "Before doing any work of improvement on any of said roads," they are required to get the "approval of the county court of the work they propose to do." By the latter section the commissioners are required "to determine what repairs will be necessary to the roads * * * to put them in a good state of repair, and shall make plans for the making of such repairs, subject to the approval of the county court," etc. If the commissioners could only make such repairs as were covered or contained in the plans and specifications of the original district; if they could only repair a dirt road with dirt, a gravel road with gravel, or a silica road with silica, why does the act require them "to determine what repairs will be necessary," and why require them "to make plans for the making of such repairs"? It would seem a useless procedure, if they can make repairs only out of material of which the road or bridge was originally built.

A case very much like this is *Higginbotham* v. *Road Imp. Dist. No. 3,* 154 Ark. 112, 241 S. W. 866. This court there construed § 2, act 133, special session 1920, relating to road improvement districts in Lonoke County, wherein the commissioners were "required to maintain and repair the roads constructed under their supervision, subject to the approval of the county court, and, in order that said roads may be properly maintained and repaired, it shall be the duty of the board of commissioners of said districts to cause a competent engineer to make an estimate of the cost thereof from time to time, which shall be reported to the county court.

If the county court finds the cost of said maintenance and repair to be reasonable and to the best interest of the district, it shall authorize the board of commissioners'' to do the work, levy a tax on the assessed benefits, etc. Suit was brought to enjoin the making of repairs under this statute, and the complaint charged that the commissioners had prepared plans and specifications for ''regrading, widening, shaping up the ditches, and putting in culverts, proper drainage, and resurfacing the road with seven inches of gravel, or about fifteen hundred tons per mile, which, in fact, is reconstruction work;'' that the total cost of the work was $85,250; and that, unless restrained, they would let a contract therefor. It was contended that the above statute, to ''maintain and repair'' the roads, was not authority for the work proposed to be done. A demurrer to the complaint was sustained by the lower court, and on appeal this court affirmed this action. It was there said: ''To repair means, according to the lexicographers, 'to mend, add to, or make over; to restore to a sound or good state.' Standard Dictionary. 'To restore to a sound or good state after decay, injury, dilapidation or partial destruction; to restore or reinstate as in former standing.' Webster.

''A fair interpretation of the meaning of the word, as used by the lawmakers in this statute, is that it means restoration to the original state of the road after the former improvement was completed. Not exact, but substantial, restoration was intened. It was not intended that entirely new improvement should be constructed in disregard of the original plans, but only restoration of the improvement according to the original plans, with mere incidental changes allowable.''

As will be noticed, the commissioners in that case were to repair the roads by resurfacing them with seven inches of gravel, in addition to regrading, widening, shaping up the ditches, putting in new culverts, and constructing proper drainage. The opinion does not show what the roads were originally surfaced with, but

the proposed work was alleged to cost $85,250, and apparently were to be rebuilt under the guise of repairing them, which the court sustained. Here, however, the commissioners propose to resurface the dirt roads with gravel and put a thin layer of warrenite on the silica roads. We do not think this can be said to be an entirely new improvement, in disregard of the original plans, "but only restoration of the original improvement," with slight changes in the surfacing of the roads, using to great advantage the work done under the original plans, such as the right-of-way, the dump, bridges, culverts, ditches, silica, and the only change contemplated from the original plans is in the surfacing. If resurfacing the roads with seven inches of gravel and doing the other work alleged in the Higginbotham case constitute repairs within the meaning of the statute there cited, we fail to see why the work proposed to be done in this case should not be permitted under the statute now under consideration.

In *Hout* v. *Harvey,* 135 Ark. 102, 204 S. W. 600, one of the cases cited in *Higginbotham* v. *Road Imp. Dist. No. 3, supra,* as illustrative of the principle there announced and herein quoted, it was held, to quote the syllabus: "Under act No. 338, Acts 1916, the commissioners of a road district may change the plans of the road by slightly changing the width of the road, and increasing the thickness of the gravel instead of using a layer of asphalt, as originally planned; when the length of the route of the road is not changed, and the increase in the cost is not large." See also to the same effect *Carson* v. *Road Imp. Dist. No. 2,* 150 Ark. 379, 234 S. W. 257.

Since all the roads comprising the State highway system have been taken over for construction, maintenance and repair by the State Highway Commission, under the Martineau Act, the roads constructed by improvement districts, not a part of the State highway system, would in time become impassable, and the investment therein be wholly lost, unless such districts be

permitted to repair and maintain them. Foreseeing such disastrous consequences, the Legislature enacted the statute now under consideration providing a remedy against such a result. And we think such a construction should be given the act as will accomplish the purpose of the Legislature. To repair the roads in question means to make them over, not necessarily exactly like they were before, nor in exact accord with the original plans, but, utilizing the work done in constructing the roads originally under the original plans, make them over with such material for resurfacing as experience and advance in the science of road building teach will be the best and the most economical in the long run, thereby giving the landowners value received for their investment.

The primary object in the construction of statutes is to determine what purpose or intent the Legislature had in mind in passing the statute, from the language used, and to give effect to that purpose or intent. *Howell* v. *Lamberson,* 149 Ark. 183, 231 S. W. 872.

It necessarily follows, from what we have said, that the court erred in enjoining the commissioners from making the proposed repairs and the issuing of bonds to provide funds for this purpose. The judgment will be affirmed on the direct appeal, and will be reversed, and remanded with directions to sustain the demurrer to complaint on the appeal of the district.

KIRBY and MEHAFFY, JJ., dissent.

SPENCE *v.* WHITTAKER.

Opinion delivered October 15, 1928.

Block & Kirsch and *Dudley & Dudley*, for appellant.

Ward & Ward and *Cooley, Adams & Fuhr,* for appellee.

MEHAFFY, J. The appellant and appellee were opposing candidates for the Democratic nomination for State Senator in the First Senatorial District, composed of Clay, Greene and Craighead Counties, at the primary election on August 14, 1928. There were no other candidates for the nomination. The appellant received a majority of the votes cast, and was declared to be and duly certified as the nominee for senator from said district.

After the primary election the appellee filed suit, alleging that appellant had failed to file the pledge required by § 4 of act 308, Acts of 1913 (C. & M. Digest, § 3898), requiring that candidates for State or district offices shall file with the Secretary of State, 30 days before said primary election, a pledge in writing, stating that he is familiar with the requirements of the act, and will in good faith comply with its terms.

Appellant filed answer and demurrer. A special term of circuit court was called for October 1, 1928, and the finding and judgment of the court was that appellant, having failed to file the pledge, was deprived of the nomination or the right to have his name on the ballot for the general election, and that there was no nominee for the party for State Senator, but that a vacancy existed.

Appellant filed his motion for a new trial, which was overruled, exceptions saved, and the case is here on appeal.

There were two suits brought; one filed on August 25, and thereafter, on September 12, a protest was filed before the Democratic State Central Committee, which was heard by the committee, and dismissed without prejudice; and the last suit was filed on September 19. The suits were consolidated, and were both prosecuted for the same purpose.

The case was tried upon a stipulation which recited "that the pledge required of candidates for this and other offices, under the provisions of § 3898 of the Digest, was at no time filed by the appellant in the office of the Secretary of State." That, as a matter of fact, appellant did, under date of June 7, 1928, mail to H. L. Lambert, then secretary of the Democratic State Central Committee, the pledge required to be filed by candidates in primary elections; that in the same letter to H. L. Lambert appellant did inclose the pledge executed and required under the provisions of § 3898 of the Digest; that H. L. Lambert did testify as follows with reference to the receipt of the letter and these pledges:

"I have looked up the correspondence between Hon. W. E. Spence, of Piggott, and myself regarding pledges. I find that a corrupt practice pledge was filed with me by Mr. Spence, and under date of June 7 he wrote me the following letter:

" 'Mr. H. L. Lambert, Secretary,
State Central Committee,
Little Rock, Ark.

" 'Dear sir: I am inclosing you herewith two pledges which I am filing with you as a candidate for State Senator from the First Senatorial District, and which I presume are to be filed with you. I do not know whether a fee is to be paid to your committee or to the county committee. Whichever it is, kindly let me know.

" 'Yours very truly, W. E. Spence.'

"In the rush of things just before the ticket closed, or possibly due to absence from the office, this did not come to my attention. My secretary filed the pledge

which is required under the rules of the Democratic Party to support the nominees, and the pledge under the Corrupt Practice Act, which should have been filed with the Secretary of State, was left attached to the letter. I did not know that this pledge had reached our office or I would have returned it to Mr. Spence and have requested him to file it with the Secretary of State. I regret very much that this did not come to my attention, since it is clear to me that Mr. Spence signed this pledge and filed it where he thought it should be filed."

It is further stipulated that, after the expiration of the time in which the pledge in question could be filed with the Secretary of State, appellee filed a protest with the Clay County Central Committee, at a meeting prior to said primary election, protesting and objecting to the placing of the name of appellant on the ticket for the primary election, because of appellant's failure to file the required pledge with the Secretary of State. That the minutes of the meeting of the Clay County Central Committee relating to the disposition of the protest filed by appellee is as follows:

"Mr. R. Whittaker, candidate for State Senator, filed a protest with the committee, seeking to prevent the name of W. E. Spence, also a candidate for State Senator for the First Senatorial District of Arkansas, being placed on the official ballot as a candidate for State Senator, alleging that he had failed to comply with § 3898 of Crawford & Moses' Digest, which requires any candidate for State or district offices to file with the Secretary of State a pledge in writing at least thirty days before the primary election. In answer to the protest, W. E. Spence stated that he had filed his pledge, as required by the primary law, with the Secretary of the State Democratic Central Committee, Mr. H. L. Lambert, and that he had a letter from Mr. Lambert stating that he had received the pledge, but that the letter did not state the disposition of same.

"Due to the fact that the chairman and secretary of the Democratic Central Committee have certified that

W. E. Spence, R. Whittaker and Carl L. Hunter have complied with the rules of the Democratic Party, we recommend that their names be placed on the ticket as candidates for State Senator.

"D. R. Stanley,
"W. S. Todd,
"E. R. Winton, Committee."

It is further stipulated that the name of W. E. Spence was placed on the ticket of Clay County as a candidate for State Senator, and that said central committee thereafter certified that at such primary election appellant received 1,430 votes and appellee received 1,136 votes; that the names of the candidates for office of State Senator appeared only on the ticket in Clay County, under a system of rotation between the three counties composing the district, whereby said counties rotated in regular order in furnishing the candidate for said office, and by which he appeared upon the ticket at the primary election only in the county from which he came in the regular order of rotation.

That a formal protest was filed by appellee with the State Central Committee, prior to its meeting on September 12, 1928, but after the filing of appellee's complaint in case No. 2050, on August 25, 1928; that in said protest appellee objected to the certification by the State Central Committee of appellant as the nominee for State Senator; that at said meeting of the State Central Committee appellant and appellee were each represented by counsel, and, upon a hearing, a motion was made by a member of said committee that the matter be dismissed by the State Central Committee without prejudice to either side, which motion was duly carried.

It was further stipulated that appellant did file the required pledge with the county clerk of Clay County; that H. L. Lambert, the secretary of the State Central Committee, would testify, if present, that at the hearing before the State Central Committee on September 12, 1928, he (Lambert) reviewed the correspondence between himself and appellant and between himself and appellee,

and made a statement to the State Committee, then in session, that, had his secretary, or assistant in office, called his attention to the fact the appellant had filed a corrupt practice pledge with him, he would have sent or taken it to the Secretary of State, or returned it to appellant; and that Mr. Lambert had in his hands, along with the other correspondence, at the hearing on the 12th day of September, 1928, the corrupt practice pledge made out by Mr. Spence, intended for the Secretary of State, but that it was not in fact filed with him.

As an exhibit to the stipulation of facts appears the following certificate:

"This is to certify that W. E. Spence has filed the pledge required under the rules of the Democratic Party as a candidate for State Senator from the First District of Arkansas, in the Democratic primary to be held August 14, 1928, and has paid NO dollars, the fee required of a candidate for said office.

"H. L. Lambert (in ink, signed)
"H. L. Lambert, Secretary
"Democratic State Central Committee."

The stipulation upon which the cause was heard was filed with the clerk at the hearing, and constituted all of the evidence offered by either of the parties.

The appellant discusses a number of questions in his brief, but we have concluded that it is unnecessary to pass upon any of the issues in the case except the construction of the statute with reference to the Corrupt Practice Act. The section of the law involved reads as follows:

"Candidates for State or district offices shall file with the Secretary of State, and candidates for county or township offices shall file with the county clerk of the county, and candidates for city or town offices shall file with the city clerk or town recorder, thirty days before said primary election, a pledge in writing, stating that he is familiar with the requirements of the act of April 2, 1913, and will in good faith comply with its terms" (§ 3898, C. & M. Digest).

The above section is a part of what is known as the Corrupt Practice Act. It was evidently the purpose of the Legislature, in passing this act, to prevent all kinds of corrupt practices in the election and to secure to the people honest and fair elections. It was its intention to protect the voters in the primary elections against fraud and corruption and wrongful conduct, and to insure the voter that his wishes expressed through his ballot should be given effect.

Statutes in some States require certain things to be done by the candidate, and provide that he shall be ineligible or that his name shall not be placed on the ticket unless he complies with the requirements. There is no such provision in our statute. The sections of the Corrupt Practice Act intended to prevent fraud and corruption and wrongful conduct in the election all begin with the statement "that it shall be unlawful." There is no such statement with reference to the duties prescribed in § 3898. That section simply provides that, 30 days before the primary election, the candidate shall file his pledge in writing with the Secretary of State, showing that he is familiar with the requirements of the act and will in good faith comply with its terms.

There is no charge against appellant in this case of any corrupt practice or any wrongful conduct in any way. It is simply contended that, because he failed to file the pledge with the Secretary of State in 30 days, his name should not go on the ticket. The central committee would have had the right to refuse to put his name on the ticket because of his failure to comply with this statute, but he explained to the committee the circumstances, and the committee put his name on the ticket to be voted for at the primary election. There is no dispute about the fact that he received a majority of the votes, but it is contended that he is not the legal nominee of the party and not entitled to have his name appear on the ballot at the election because he failed to file the pledge required.

The evidence shows that on June 7, more than 30 days before the primary, the appellant mailed to H. L. Lambert, secretary of the Democratic State Central Committee, the pledge to be filed by candidates in primary elections, and that in the same letter he inclosed the pledge to be filed with the secretary. He also inclosed the pledge executed and required under the provision of § 3898 of Crawford & Moses' Digest, when he should have sent this pledge to the Secretary of State. But in his letter inclosing the pledge he stated that he was inclosing two pledges which he was filing with the secretary of the committee as a candidate for State Senator, and stated that he presumed they were to be filed with the secretary of the central committee.

We think that this clearly shows that it was the intention of appellant to comply with the law. He thought he had complied with it, and, as testified to by the secretary of the central committee, it would probably have been filed by him, but in the rush of things just before the ticket closed, or due to the absence from the office of the secretary, the matter did not come to his attention.

If one should deliberately fail or refuse to file the pledge required by the law, it would be the duty of the committee to refuse to put his name on the ticket. But where, as in this case, the evidence shows that the candidate was guilty of no violation of the Corrupt Practice Act, that he intended in good faith to comply with the provisions of the law, and that no harm resulted, and he received a majority of the votes cast in the primary election, to hold that failure to file the pledge with the Secretary of State, under the circumstances, disentitled him to have his name on the ticket, would be, in effect, to disfranchise a majority of the voters in the district.

It was certainly not the intention of the Legislature to permit a majority of the voters to be disfranchised because some candidate, acting in perfect good faith, made a mistake, and filed his pledge in the wrong place.

And, whether the statute is directory or mandatory, in this case a very much greater wrong would be done to prevent appellant's name from going on the ticket than to permit it to go on. In other words, no harm can be done by putting his name on the ticket as the nominee when all the facts in the case show that he acted in good faith and violated no provision of the Corrupt Practice Act, and the majority of the electors voted for him as the nominee.

Appellant contends that the trial court was correct, and bases his contention on §§ 3775 and 3776 of Crawford & Moses' Digest. Section 3775 reads as follows:

"Should it be proved to the satisfaction of the trial judge, in a case instituted under §§ 3772, 3773, or a prosecution as contemplated by § 3774, that a successful candidate has been guilty of violating any provision of the Corrupt Practice Act, or any other violation of the laws regulating primary elections, the circuit court shall enter such finding as a part of the judgment, irrespective of the determination of the issues in the suit instituted under §§ 3772, 3773, or the verdict of the jury in a criminal prosecution; and the judgment to that effect shall operate to deprive the candidate of the nomination and right to have his name on the ballot, and the vacancy shall be filled by a special primary or otherwise, as may be determined by the party organization."

Section 3776 reads as follows:

"Should a proceeding under §§ 3767-3771, or a criminal prosecution under § 3774, be not determined finally until after the election, and the defendant in such proceeding is elected to the office as the nominee of the party, and it is determined that he was not entitled to the nomination, or the judgment contains a finding that he violated the laws, as provided in § 3774, then such judgment shall operate as an ouster from office, and the vacancy in it shall be filled as provided by law for filling vacancies in such office in case of death or resignation."

If § 3898 contained a provision to the effect that a failure to file the pledge would deprive the candidate of the right to become the nominee of the party or of the right for his name to go on the ticket, then there could be no dispute about it. But it does not so provide, and we think that the failure of the Legislature to provide that such failure would operate to deprive the candidate of the right to have his name on the ticket shows that it was not the intention of the Legislature that a person who acted in good faith and had violated no provisions of the Corrupt Practice Act, should be deprived of the nomination through a mistake such as has been made in this case.

"Until a comparatively recent date there was little, if any, legislative regulation of the methods by which political parties nominated their candidates for office; the candidates were named by caucuses, conventions, or unofficial primary elections, as the several parties determined. However, the right of political parties to make nominations is not absolute; it may be abolished or circumscribed, or its exercise regulated, by the Legislature. This right of regulation is of course subject to constitutional limitations; and accordingly, if the Legislature grants to any convention, committee, or other body the right to make nominations, it cannot limit the right of such body to nominate as its candidate any person who is qualified for the office. And the fact that statutory regulations were not complied with in the nomination of a candidate does not invalidate his election." 20 C. J. 104.

"The general tendency of these statutes is to put the rights of voters in party or primary elections under the protection of the law in the same manner that the rights of voters in elections of officers have been under its protection." 20 C. J. 112.

"The dominant idea pervading these statutes is the absolute assurance to the citizen that his wish as to the conduct of the affairs of his party may be expressed through his ballot and thus given effect,

whether it be in accord with the wishes of the leaders of his party or not; and that thus shall be put in effective operation in the primaries that fundamental principle of democracy which makes the will of an unfettered majority controlling. In other words, the scheme is to permit the voters to construct the organization from the bottom upward instead of permitting the leaders to construct it from the top downward." *People* v. *Kings County Democratic Gen. Committee,* 164 N. Y. 335, 58 N. E. 124, 51 L. R. A. 674.

When we hold in mind the purpose of the statute, that it was enacted to secure honesty and fairness in elections and to give effect to the wishes of the majority of the voters, it seems to us that any other construction of this statute, that is, to hold that, under the circumstances and facts in this case, the appellant would not be entitled to have his name go on the ticket, would defeat the very purpose of the act. It would deprive the candidate who received a majority of the votes of having his name on the ticket, when all the facts show that the election was fair and honest, free from fraud and corruption, and that the candidate himself acted in good faith.

The intention of the law is to assure fairness and honesty and the nomination of the man favored by a majority of the voters. If the Legislature had intended that a failure to file this pledge should deprive one of the right to have his name on the ticket when there was no question of any wrongful conduct or any attempt to violate or evade the law, it would have provided in plain language that this should operate as a disqualification. Since in the other sections of the statute the Legislature used the words "it shall be unlawful" and did not use those words or any similar words in this section or with reference to this section, we think it plain that they did not intend that the will of a majority should be defeated simply by the candidate making a mistake as to where his pledge should be filed.

The judgment of the circuit court is therefore reversed, and the cause dismissed.

HART, C. J., (dissenting opinion). Section 3898 of Crawford & Moses' Digest provides in effect that candidates for State or district offices shall file with the Secretary of State, thirty days before said primary election, a pledge in writing stating that he is familiar with the requirements of the act and will in good faith comply with its terms. This is § 4 of our Uniform Primary Act which was passed by the Legislature of 1913. The act contains fourteen sections, and all its provisions are in form mandatory. It is apparent from the subject-matter of the act and the purposes sought to be accomplished by the framers thereof that it was intended that all officers intrusted with its enforcement should be held strictly to the provisions of the act. Nothing was left to the good intentions of the candidate or of the officers intrusted with the enforcement of the act. In the very nature of things any construction which tends towards confusion or uncertainty in the provisions of the act is likely to be hurtful in its effect. Public inconvenience, confusion to the electors and political parties and great injustice to candidates may all result from any other view than a mandatory interpretation of the act in accordance with its express terms. Where the language of an act is clear and unequivocal, there is no room for interpretation, and its provisions should be enforced. Any other course would tend to defeat its purpose and might lead to fraud and injustice in many instances. It is no answer to say that the candidates affected in this case were both men above reproach, and that no injustice had resulted. The provisions of an act must be tested by the object and purposes of its enactment and what evils might result from an enforcement of its provisions contrary to the intention of the framers of the act.

I am authorized to state that Justices SMITH and HUMPHREYS concur in the view herein expressed.

HORD *v.* MANNERS.

Opinion delivered October 22, 1928.

George M. Chapline, for appellant.

J. E. Ray and *M. F. Elms,* for appellee.

HART, C. J., (after stating the facts). The judgment of the circuit court overruling the plea of *res judicata* of appellant was correct. Under our statute, an executor or administrator may establish his demand against his testator or intestate by presenting and proving the same to the satisfaction of the court. Crawford & Moses' Digest, § 96; *Free* v. *Maxwell,* 138 Ark. 489, 212 S. W. 325; and *Smith* v. *Mullen,* 169 Ark. 944, 277 S. W. 44. After the probate court allowed the claim of the executor, two of the legatees under the will were duly granted an appeal to the circuit court, under § 2258 of Crawford & Moses' Digest. The legatees filed a bond for costs, as prescribed in the section, but did not file a supersedeas bond, as provided in § 2259. Consequently the judgment of allowance in favor of the executor was not superseded. Section 2260 provides that an appeal may be taken without supersedeas. After the appeal had been granted by the probate court, the

legatees filed an application in the probate court to require the executor to distribute the funds on hand. The order of distribution was made, and the executor distributed the amount which he admitted to be due to the legatees under the order of distribution made by the probate court. Appellees were paid, and signed receipts for their part under the order of distribution. It is plain that they should not be barred of their right of appeal from the judgment of allowance in favor of the executor because they did this. We do not think they should be barred for two reasons.

In the first place, appellees prosecuted their appeal to the circuit court from a judgment of allowance in favor of the executor, but did not file a supersedeas bond. They had the right to appeal without a supersedeas; but, while the appeal was pending, they had no right to have the allowance in favor of the executor distributed to them. The order of distribution properly recited the amount in the hands of the executor, and also showed the amount claimed to be due him by the estate; and, inasmuch as appellees prosecuted the appeal from the order of allowance in favor of the executor without a supersedeas, the receipt by them of the amount admitted to be due could in no sense affect their right of appeal. If they had a right to appeal without a supersedeas, they would certainly have the right to receive that portion of the estate which the executor admitted to be due them, and this is all they received under the order of distribution. *Gate City Building & Loan Assn.* v. *Frisby*, 177 Ark. 252, 6 S. W. (2d) 537.

In the second place, when the executor answered the petition of appellees for the order of distribution, he reported to the probate court that there were several matters affecting the estate pending upon appeal in the courts, and for that reason he could not make a final order of distribution. It is true that he claimed in his account current that he had paid himself $1,500 allowed him by the probate court. This was in the application of the common-law rule that, if a creditor becomes exe-

cutor or administrator of his debtor's estate, he may retain so much of the assets in his hands as may pay his debt. 24 C. J. 436, par. 1193; and 11 R. C. L. 203, § 227. The order of distribution must be considered in connection with the report or account filed by the executor, and, when this is done, it is evident that the order of distribution was that the executor should distribute that part of the estate which he admitted was ready to be distributed. The approval of the account in the form in which it was presented could in no sense be an adjudication and settlement of his $1,500 claim, which was then pending in the circuit court upon appeal from the judgment of allowance made by the probate court in a proceeding instituted by the executor under the statute for that purpose.

It follows that the circuit court was right in overruling the plea of *res judicata* of appellant.

The case on the merits was tried by a jury on conflicting evidence. There was no error in the admission of testimony or in instructing the jury. There was a verdict and judgment for appellees, and no reversible error was committed by the trial court. Therefore the judgment will be affirmed.

TURNER *v.* ADAMS.

Opinion delivered October 22, 1928.

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[redacted]

J. D. Benson and *Daily & Woods*, for appellant.

Linus A. Williams, for appellee.

HART, C. J., (after stating the facts). At the outset it may be stated that the present suit was commenced within thirty days after the publication of the passage of the assessment ordinance, and therefore constitutes a direct attack upon the assessment of benefits filed with the council. *Missouri Pacific Rd. Co.* v. *Waterworks Improvement District,* 134 Ark. 315, 203 S. W. 696;

Ingram v. *Thames,* 150 Ark. 443, 234 S. W. 629; *Henry* v. *Board of Improvement,* 170 Ark. 673, 280 S. W. 987; and *Carney* v. *Walbe,* 175 Ark. 746, 300 S. W. 413.

The original assessment was filed with the common council, and remained on file there without being acted upon for a little over ten days. The board of assessors was then informed by the city council that the assessment of benefits was insufficient to meet the estimated cost of the improvement in each of said improvement districts. Therefore the board of assessors requested and was granted permission to withdraw its assessment of benefits for the purpose of reconsidering the assessment. After due consideration the board decided not to change its assessment of benefits, and the members of the board of assessors resigned without again filing the assessment of benefits with the council. Their resignations were accepted. Before the assessment of benefits was acted upon by the council, it was lawful for the assessment of benefits to be withdrawn and reconsidered by the board of assessors. *Thomas* v. *Street Improvement District No. 216,* 158 Ark. 187, 249 S. W. 590.

From that decision and other decisions of this court it is plain that, until the assessment of benefits had been acted on by the city council, the board of assessors might be granted permission to withdraw it for the purpose of equalizing the assessment of benefits, correcting errors in it, or for reconsideration of the assessment as a whole. This the board of assessors did, and concluded not to change its assessment. The resignation of the members of the board was accepted by the city council without requiring the board to again file the assessment of benefits. Hence there was no assessment of benefits for either district made by the original board of assessors.

A new board was appointed, and it proceeded to a discharge of its duties, and filed with the city council an assessment of benefits for each district which was practically double that of the first or original assessment. This it had the right to do, if it had proceeded

upon a proper basis and had complied with the statute in making its assessment of benefits. The statute requires the board to assess the value of the benefits to accrue to each piece of property, and in doing so the board must consider the value, area, location of the property, the improvements thereon, its relation to other property, and every other element which might go to make up the sum total of benefits. The purpose is to determine the effect of a proposed improvement upon the market value of the real property, including the buildings on it. *Kirst* v. *Street Improvement District No. 120,* 86 Ark. 1, 109 S. W. 526.

The burden was upon appellees, who attacked the validity of the assessment as a whole, to prove that it was made upon the wrong basis. The chancery court found that appellees had met the burden of proof in this respect imposed upon them, and a decree was entered of record enjoining appellants from proceeding further in the collection of the same. It is the settled rule of this court that the findings of fact made by a chancellor will not be disturbed upon appeal unless they are clearly against the preponderance of the evidence. In the case at bar one of the members of the new board of assessors testified that the city attorney, in the presence of the city council, told them that it would be necessary to practically double the assessment of benefits in each district in order to construct the improvement. In other words, they were told that the cost of the improvement exceeded the original assessment of benefits made by the old board, and that it would be necessary to practically double the original assessment in order that the assessment of benefits might exceed the estimated cost of the improvements. This was tantamount to arbitrarily doubling the assessment for the purpose of constructing the improvement. This could not be done. As above stated, the new board might double the assessment of benefits if, in its opinion, this should be done after taking into consideration all the elements that should be considered in making an assessment of benefits in accord-

ance with the rule above announced. An assessment of benefits made upon a wrong basis is illegal and void, and may be set aside by a direct attack made by the property owners upon it in the time provided by statute. *Kirst* v. *Street Improvement District No. 120,* 86 Ark. 1, 109 S. W. 526; *Lee Wilson Co.* v. *Road Improvement District,* 127 Ark. 210, 192 S. W. 371; *Sikes* v. *Douglas,* 147 Ark. 469, 227 S. W. 988; and *Desha Road Improvement District No. 2* v. *Stroud,* 153 Ark. 587, 241 S. W. 882.

This leaves each district without an assessment of benefits having been made, because the assessment as a whole has been set aside and held void as having not been made upon a proper basis A new assessment may be made by the board of assessors upon a proper basis; and, if the assessment of benefits so made shall be greater than the estimated cost of improvement, the construction of the improvement may be proceeded with. Otherwise, the plan of the proposed improvements must be abandoned.

It follows from what we have said that the decree of the chancellor was right, and must be affirmed.

ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY *v.* MCCLINTON.

Opinion delivered October 22, 1928.

E. T. Miller, E. L. Westbrooke, Jr., and *E. L. Westbrooke,* for appellant.

Sam Costen, Wils Davis and *Joe Simmons,* for appellee.

SMITH, J. This appeal is prosecuted to reverse a judgment recovered by appellee to compensate an injury sustained by him through the alleged negligence of the members of one of appellant's switching crews.

Appellee was employed, at the time of his injury, by a compress company at West Memphis, Arkansas. The compress company has two rows of sheds, in which bales of cotton are stored, the larger being about 1,800 feet in length. The shorter row of sheds is parallel to the larger one. These rows are divided by partitions into sections, and the one at which appellee was working had eleven sections, and appellee had been unloading cotton out of railroad cars into section No. 9.

The appellant railroad company has switching tracks along both sides of the longer row of sheds, up and down which tracks cars are placed for loading and unloading. There are four removable platforms connecting the two rows of sheds, which, when in position, cross the switch-track which runs between the two rows of sheds. By the use of these platforms cotton unloaded into the shorter row of sheds is carried to the compress, and while these platforms are down or in place no switching is done or could be done on the switch-track between the two rows of sheds.

Appellee worked in section 9 until the noon hour, when work was suspended for lunch, thirty minutes being allowed for that purpose. Going to his lunch, appellee crossed the switch-track running in front of and parallel with the row of sheds where he had been at work, and went to the home of Gus Woods, where he ate his lunch. The railroad tracks and the compress sheds run nearly north and south, and appellee was working on the south end of the larger shed, and on his return to his place of work he climbed between two cars. These cars, with several others, were attached to a switch

engine, which could not be seen by appellee because of a curve in the switch-track. Appellee went between the cars as a short way of returning to his work, and he testified that he had seen other employees of the compress company do the same thing. On behalf of the railroad company the testimony was to the effect that, when any one was seen crossing or attempting to cross between the cars, warning was given of the danger; but there was no testimony that appellee had been warned.

Appellee did not know there was an engine attached to the string of cars between two of which he attempted to cross, and, as he did so, the cars came together and caught his foot between the drawhead and deadwood of a car, and injured him severely.

The jury returned a verdict for substantial damages, and this appeal has been duly prosecuted.

Respective counsel discuss the question whether appellee, at the time of his injury, was a mere trespasser, a licensee, or an invitee, for the purpose of determining the degree of care due appellee by the railroad company; but we have found it unnecessary to determine this question, for the reason that, in our opinion, the negligence of appellee is greater than that of the defendant railroad company, and this fact prevents a recovery by him.

It is provided by § 8575, C. & M. Digest, that in all suits for personal injury caused by the running of trains in this State the contributory negligence of the person injured shall not prevent a recovery where the negligence of the person injured is of less degree than the negligence of the employees of the railroad company causing the injury, but the amount of recovery is to be diminished in proportion to such contributory negligence.

The case of *St. Louis-San Francisco Ry. Co.* v. *Horn*, 168 Ark. 191, 269 S. W. 576, involved the application of the statute quoted, and the court there refused to compare the negligence of the party injured with that of the railroad company, but it was there said:

"Each case must, of course, be considered upon its own peculiar facts, and the legal sufficiency of the evidence on the question of degree of negligence must be tested, the same as in other cases, by the state of the testimony presented in a given case. In other words, it is ordinarily a question of fact for the determination of the jury, but there may, as in other cases, be presented a question for the decision of the court as to the legal sufficiency of the evidence."

We must therefore assume that the jury accepted as true the testimony offered in appellee's behalf, with all the inferences reasonably deducible therefrom, and we would be required to affirm this judgment, as was done in the Horn case, *supra,* if, after so weighing the testimony, we were left in doubt as to whether appellee's negligence was of a less degree than that of the operatives of the train. We are of the opinion, however, that there is no reasonable view of the testimony which would support the finding that appellee's negligence contributing to his injury was of a less degree than that of the railroad company.

In so holding we have in mind the decisions of this court in which it was held that it is the duty of carriers to exercise ordinary care in moving its cars to prevent injury to owners of freight and their employees rightfully engaged in loading or unloading cars. It has been said that appellee, before his lunch, had been engaged in unloading a car, and that he was on his way, after eating his lunch, to continue that work, but it must be remembered that at the time of his injury appellee was not engaged in unloading a car. He was not at his place of employment, but was injured while climbing between two cars. No practical lookout which a train crew could maintain would suffice to prevent one from climbing between cars, and the undisputed testimony shows that no member of the train crew saw appellant as he went between the cars, nor is there any testimony or inference therefrom which would support the finding that the railroad company could have done anything

which would have averted appellee's injury, except not to switch its cars, a right which it, of course, had. The undisputed testimony is that a lookout was being kept by a switchman on the top of moving cars, but this employee testified that he did not see appellee at all until after his injury. Appellee, had he looked, must have known that all the platforms were up, which fact was a warning that switching might be done, and he must necessarily have known there was peril in climbing between cars which might be moved.

There is a presumption of negligence arising out of the fact that appellee was injured by the operation of a train; but the undisputed testimony is such that it must necessarily appear that appellee's negligence was greater than that of the operatives of the train, and, this being true, a recovery is not authorized by § 8575, C. & M. Digest.

It follows therefore that the judgment of the court below must be reversed, and, as the cause appears to have been fully developed, it will be dismissed.

ABBOTT *v.* STATE.

Opinion delivered October 22, 1928.

J. S. Townsend, for appellant.

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

SMITH, J. Appellant seeks by certiorari to quash the judgment of a justice of the peace imposing a fine on him, and also to obtain his release under a writ of habeas corpus from the custody of the officer who was seeking to enforce that judgment.

The judgment in question was rendered by M. Roundtree, a justice of the peace for Caddo Township, Clark County, and contains the recitals that on September 26, 1927, H. S. Nelson, a justice of the peace for Missouri Township, Clark County, filed with Roundtree a transcript of the proceeding previously pending before Nelson of the case of the State of Arkansas against Arthur Abbott, and that cause was set for trial October 1, 1927. On October 1, 1927, by agreement, the cause was reset for trial on October 8, 1927, but on October 4 the cause was, on motion of defendant, continued, and reset for October 20, 1927. The judgment of Roundtree, as justice of the peace, further recites that: "Now on this October 20, 1927, comes the defendant, Arthur Abbott, in person and by his attorney, J. S. Townsend, and files his motion for change of venue, which is by the court overruled, and defendant refuses to plead further, whereupon a jury of ten good and lawful men were impaneled and sworn to try the case," etc. The judgment further recites that the defendant was found guilty and fined $20, and that his attorney gave notice in open court of an appeal, and further, that on January 14, 1928, a commitment issued for the fine and costs, and was placed in the hands of the constable of Caddo Township for service.

There appears in the transcript a judgment of the Clark Circuit Court, rendered at an adjourned day of

the January, 1928, term of the court, which appears to have been rendered upon a hearing of defendant's petition for discharge upon his petition for habeas corpus, and the relief prayed was denied and the writ of certiorari was quashed. The judgment of the circuit court recites that appellant's appeal was dismissed, but the reason therefor does not appear from the judgment, and, as there is no bill of exceptions, we do not know the ground upon which the court dismissed the appeal, and we must therefore presume that the court's action in dismissing the appeal was proper, and warranted by the facts upon which that action was taken.

The insistence is that the judgment of the justice of the peace was void because of the refusal to grant a second change of venue, and that, as this fact appears from the face of the judgment itself, the justice of the peace was without jurisdiction to try the case, and appellant was entitled to have the judgment quashed on certiorari and to be released on habeas corpus.

Without deciding whether appellant was entitled to a second change of venue, we hold that the judgment of the circuit court must be affirmed.

In the case of *Green* v. *State,* 155 Ark. 45, 243 S. W. 950, the defendant was brought to trial in the municipal court of Pine Bluff, and in apt time he filed a proper petition for a change of venue. The act creating the municipal court provided that the defendant in a criminal case pending in the municipal court "shall have the right to change the venue in any case as is now provided by law in justice of the peace courts; and provided further, that the circuit court shall not have jurisdiction to try any defendant convicted of a misdemeanor in said court where a change of venue has been denied by the judge of the municipal court." The prayer for change of venue was denied the defendant Green, and he was fined by the municipal judge, from which judgment an appeal was prosecuted to the circuit court. The defendant filed in the circuit court a plea to the jurisdiction of the court, on the ground that jurisdiction

was lost upon the filing of the petition for a change of venue, the plea being based upon the provisions of the statute from which we have quoted. The circuit court overruled the plea, and proceeded with the trial of defendant on the merits of the charge, which trial resulted in defendant's conviction, and an appeal was duly prosecuted to this court.

It was contended by the State on the appeal to this court that defendant's remedy was by certiorari, and not by appeal, but it was there said that a judgment void on its face may be attacked by certiorari in the court exercising superintending control, but that remedy is not exclusive, but is cumulative to the right of appeal which is conferred by the Constitution.

It was there also held that: "Under the statute in question, the filing of the petition for a change of venue in proper form transferred the jurisdiction from the municipal court to a justice of the peace, to whom the court should have transferred the papers in the case, and the circuit court should have quashed the judgment of the municipal court and remanded the cause to that court, with directions to transfer it to a justice of the peace, in accordance with the prayer of the petition for change of venue."

But it will be observed that, while the filing of the petition for a change of venue from the municipal court deprived that court of jurisdiction to proceed further, it was so held because the statute creating the municipal court had so provided; otherwise, it would not have been so held.

If appellant here was entitled to a second change of venue (a point not decided), refusing his prayer therefor was an error which did not vacate the jurisdiction of the justice of the peace. *Kinkead* v. *State,* 45 Ark. 536. And if the court retained jurisdiction, the error of refusing a change of venue could not be corrected by certiorari nor entitle appellant, upon conviction, to his release on habeas corpus.

In the case of *Ex parte Byles,* 93 Ark. 612, 126 S. W. 94, 37 L. R. A. (N. S.) 774, it was held that the validity of a judgment of conviction for the violation of a valid statute can be tested only by direct appeal from the judgment, and it has been many times held that, if a petitioner for habeas corpus is in custody under process regular on its face, nothing will be inquired into save the jurisdiction of the court whence the process came. *State* v. *Martineau,* 149 Ark. 237, 232 S. W. 609, and cases there cited.

In the case of *Ex parte Williams,* 99 Ark. 475, 138 S. W. 985, the petitioner for habeas corpus prayed his release upon the ground that he had been denied the right of a jury trial by the judge of the municipal court of Fort Smith, and the chancellor ordered that the petitioner be discharged for that reason. Upon the appeal to this court it was held that the judgment of the chancellor discharging the prisoner from custody was erroneous, for the reason that, if it was error for the municipal court to refuse to allow a jury trial, such error could be corrected on appeal, and the question could not be raised on habeas corpus. See also *Marianna* v. *Vincent,* 68 Ark. 244, 58 S. W. 251; *Ex parte Brandon,* 49 Ark. 143, 4 S. W. 452; *Sharum* v. *Meriwether,* 156 Ark. 331, 246 S. W. 501.

It follows, from what we have said, that the judgment of the court below must be affirmed, and it is so ordered.

BUHLER *v.* PERRY COUNTY.

Opinion delivered October 22, 1928.

[redacted]

E. L. Carter, for appellant.

Boyd Cypert, for appellee.

SMITH, J. Appellants own in severalty large tracts of cutover land in Perry County, and they filed separate petitions in the county court of that county praying a reduction of the assessments of valuation against said lands for taxation for State and county purposes.

It was shown at the trial from which this appeal comes that all property throughout the State was supposed to be assessed upon the basis of fifty per cent. of its market value, and that a valuation of $2.50 per acre had been assessed against appellants' lands by the assessor and the board of equalization of Perry County, upon the assumption that the lands had a market value of $5 per acre.

The county court denied the relief prayed, and an appeal was duly prosecuted to the circuit court, where the petitions were consolidated and heard together, and, after hearing testimony both for and against the petitions, the court found "that the lands owned by the petitioners have a fair market value of $3.50 per acre, and that the present valuation of $2.50 per acre as fixed by the assessor and board of equalization is excessive." Upon the finding that the market value of the lands was $3.50 per acre, the court ordered that the lands

be assessed for taxation at $1.75 per acre, and from this judgment there is an appeal and a cross-appeal.

The testimony was substantially the same on behalf of each petitioner as to the value of the land. That on behalf of appellant Buhler was to the effect that, in 1922, he purchased from the Fourche River Lumber Company 18,000 acres of cutover land, paying therefor $2 per acre. No income was derived from the land, which lies on top of a mountain range, and the only value the land possessed was for grazing by cattle or for growing timber, and that about forty years would be required before a new crop of timber could be grown. That petitioner had endeavored to sell the land at $2 per acre, but had been unable to find a purchaser at that price, and that he would take that price for the entire tract. There was other testimony to the effect that the market value of the land did not exceed $2 per acre.

On the cross-appeal it is insisted on behalf of the county that the testimony does not show the value of any particular section or part of section of the land, but related to the value of the lands as a whole, and it is also insisted that the testimony does not show that the land was worth only $3.50 per acre as found by the court.

It is true, as insisted, that the statute (§ 9924, C. & M. Digest) provides that each tract of land shall be respectively assessed by section, or the largest subdivision of a section of which the same is capable; but it is also true that the testimony is to the effect that all of the land was of the same character and of substantially the same value per acre. Petitioners are not therefore to be denied relief to which they are otherwise entitled because the testimony did not show the separate value of each tract of land.

The testimony on the party of the county was to the effect that there was some—a small quantity—of timber on the land, and that the lands were worth about $5 per acre.

We do not review the conflicting testimony as to the value of the land. It suffices to say that there was testimony which would have supported a greater reduction in the assessed valuation than that made, and other testimony which would support a finding that no reduction should have been made.

The case of *Doniphan Lbr. Co.* v. *Cleburne County,* 138 Ark. 449, 212 S. W. 308, involved the question here under review, and it was there said: "Unless the undisputed facts in the case establish that the findings and judgment of the circuit court are erroneous, this court cannot reverse on appeal. The case falls within the general rule that the findings of the trial court will not be disturbed by this court on appeal where the findings are sustained by sufficient legal evidence" (Citing cases).

As the finding of the court below is sustained by sufficient legal evidence in the case of each petitioner, the judgment must be affirmed, and it is so ordered.

GREAT AMERICAN INSURANCE COMPANY *v.* STEVENS.

Opinion delivered October 22, 1928.

C. W. Norton and *R. L. Bartels,* for appellant.

Mann & Harrelson, for appellee.

SMITH, J. On February 15, 1927, the home of appellee was damaged by fire. He had insurance on the property in the appellant insurance company for $2,500, and he also had policies of insurance on the same property in three other companies. It was stipulated at the trial from which this appeal comes that the total loss payable by the four companies was $8,000.

The policy issued by the appellant insurance company contained a provision giving it the option to replace or restore the property damaged by fire in satisfaction of its liability in case of a fire, this option to be exercised within sixty days of the date of the damage by fire.

Suit to enforce appellant's liability under the policy issued by it was filed June 15, 1927, in St. Francis County, the home of Stevens. The insurance company filed an answer, in which it alleged that, after the fire and before the institution of the suit in St. Francis County, the insurance company, being at the time subject to legal process within the State of Tennessee, was duly served with a writ of attachment by garnishment in an action by the Shapleigh Hardware Company, as plaintiff, and A. L. Stevens *et al.* as defendants, the said suit in Tennessee being one to recover an alleged debt due by Stevens to the hardware company in the sum of approximately $3,000, and that the legal effect of the said attachment by garnishment is to render the defendant insurance company liable to the plaintiff hardware company for whatever sum defendant Stevens owes the hardware company, provided the hardware company establishes its debt against Stevens. That, immediately after the service of said garnishment, the defendant insurance com-

pany gave notice to Stevens and his attorney of the existence and nature of this suit, and requested them to make defense thereto, but this they declined to do.

By an amendment to the complaint and a reply to the answer, Stevens alleged that the dwelling damaged by fire was his homestead, and alleged that the insurance money representing the partial value of the homestead would not be liable for any debt which might be proved against Stevens by the hardware company, and further, that the debt to the hardware company was contracted prior to 1925, and that the plaintiff in 1926 filed his petition in bankruptcy, and scheduled the debt due the hardware company, and received a complete discharge from liability on said indebtedness. It was denied that Stevens was a party to the Tennessee suit, as he had not entered his appearance in said cause, and it was alleged that the suit in Tennessee was begun about thirty days after the fire, and that by the terms of the insurance policy the defendant insurance company had sixty days from the date of the fire to replace the building, and, if the defendant had exercised this option, no liability would have accrued against it under the suit in Tennessee.

With the issues thus joined the cause was reached for trial in St. Francis County on November 23, 1927, at which time the defendant insurance company presented a motion for a continuance. In support of this motion the pendency of the Tennessee suit was shown. It was further shown that the insurance company had resisted the suit by alleging every defense made known to it by Stevens and his attorney, including the pleas of homestead and bankruptcy in Stevens' behalf, but that, by reason of Stevens' default in the Tennessee court, a decree *pro confesso* had been entered against him there, and a motion had been filed by the hardware company and was then pending for a final judgment.

By way of response to the motion for a continuance, the plaintiff Stevens repeated the allegations of his reply to the answer. It was shown that the Tennessee suits

were filed March 19, 1927, and on the same day the service of a writ of garnishment was had on the insurance company, and that Stevens' nonresidence in Tennessee was legal ground there for attachment, a fact of which we take judicial notice. Section 4110, C. & M. Digest. It was further shown that the hardware company had alleged in its suit in Tennessee that its claim against Stevens is not discharged under the bankruptcy proceedings because the debt was created by fraud and misrepresentation upon Stevens' part by forging the names of certain guarantors.

In further opposition to the continuance, Stevens related the circumstances under which he had signed the names of the guarantors, the purport of his testimony being that he had committed no fraud.

The motion for a continuance was overruled, and the cause was submitted to the court without a jury, on the record herein summarized, with certain additional stipulations of counsel. Judgment was rendered against appellant for $2,000, its proportionate part of the loss, and this appeal has been duly prosecuted from that judgment.

It appears from what we have said that, at the time of the rendition of the judgment from which this appeal comes, a decree *pro confesso* had been taken in the Tennessee suit in accordance with the practice in that State. This decree was not final, but it would become final unless cause was shown by Stevens why it should not. Section 4270, M. & V. Code of Tennessee; *Lieberman* v. *Knight,* 153 Tenn. 268, 283 S. W. 450; *Taylor* v. *Sledge,* 110 Tenn. 263, 75 S. W. 1074.

The insurance company, as garnishee, had alleged, in its answer in Stevens' behalf in the Tennessee suit, the discharge in bankruptcy, but the creditor had replied that the discharge was void for the reason that the debt had been made through fraud. It is true that Stevens testified, in opposition to the motion for a continuance, that he had practiced no fraud in making the

debt, but such testimony in the St. Francis Circuit Court could have no effect on the Tennessee suit.

As had been said, the insurance company as garnishee answered in Tennessee, and alleged that the sum due by it to Stevens was for damage by fire to Stevens' homestead. But it was held by the Supreme Court of Tennessee, in the case of *Carson* v. *Railway Company,* 88 Tenn. 646, 13 S. W. 538, 8 L. R. A. 412, 17 Am. St. Rep. 921, that statutes exempting property from execution have no extraterritorial force.

This decision accords with that of the Supreme Court of the United States in the case of *Chicago, R. I. & P. Ry. Co.* v. *Sturm,* 174 U. S. 710, 19 S. Ct. 797, and also with the decision of this court in the case of *Person* v. *Williams-Echols Dry Goods Co.,* 113 Ark. 467, 169 S. W. 223.

In the case last cited it was held by this court that a nonresident cannot claim the benefit of the exemption laws of his own State in the courts of this State, and that the *situs* of a debt for purposes of garnishment is not only the domicile of the debtor, but is in any State in which the garnishee may be found, provided the law of that State permits the debtor to be garnished.

It was further held in the Person case, *supra* (to quote a syllabus), that: "A citizen and resident of this State may subject to the payment of his debt, by garnishment, the money due the debtor, a resident of another State, from an insurance company which also does business in this State, for a loss under a fire insurance policy issued in that State upon the debtor's homestead and household effects, all of which were exempt from seizure and sale for the payment of the debt in that State where the judgment, upon which this suit was brought, was obtained."

See also the case of *St. Louis S. W. Ry. Co.* v. *Vanderberg,* 91 Ark. 252, 120 S. W. 993, where it was held that a garnishee sued in Missouri could not claim exemptions on behalf of a debtor residing in this State,

the privilege being personal and available only by following the statutory provisions.

See also *Hartford Fire Ins. Co.* v. *Citizens' Bank,* 166 Ark. 51, 266 S. W. 675, 39 A. L. R. 1458.

In regard to the allegation, in the reply to the insurance company's answer, that the company might have defeated the garnishment in Tennessee by replacing the damaged property, as it had the option to do under the policy of insurance, it may be said that the agreed damage to the homestead property was several times the amount of the policy issued by the appellant insurance company. It would therefore be unreasonable to expect the insurance company to replace this loss in settlement of its liability. Moreover, the option to replace rested with the insurance company. The contract of insurance gave it the option to replace and restore, or to pay damages. It may be further said that the amount of damage had been agreed upon between the insured and the insurer, and the insurance company had so answered the garnishment in the Tennessee case. It is therefore no defense that the insurance company did not rebuild or restore the property.

We conclude therefore that the court should have continued the cause as prayed, pending the suit in Tennessee, and that no judgment should be rendered against the appellant on its admitted liability under its policy until the *pro confesso* judgment in Tennessee has been set aside.

The judgment of the court below will therefore be reversed, and the cause remanded.

SMITH, J., (on rehearing). Attention is called to the fact, in the petition for rehearing, that other insurance companies beside the appellant, Great American Insurance Company, were garnished in Tennessee, and that the garnishment proceedings have impounded a sum largely in excess of the amount of the Tennessee judgment. This being true, the opinion will be modified to permit the rendition of judgment on the remand of the cause for so much of the admitted liability of the insur-

ance companies as is in excess of the amount required to discharge appellee's liability under the Tennessee judgment, if appellee elects to take such a judgment.

BANK OF ALTUS *v.* BURROW.

Opinion delivered October 22, 1928.

J. D. Benson, for appellant.

G. C. Carter and *Starbird & Starbird*, for appellee.

HUMPHREYS, J. Appellant brought suit in the circuit court of Franklin County, Ozark District, against appellee, to recover $4,909.88 and interest thereon from the 4th day of January, 1927, at the rate of 8 per cent. per annum, which amount was a balance alleged to be

due on a $5,000 note executed by appellee to appellant on October 15, 1925.

Appellee filed an answer, in which he pleaded payment of the note, and an amendment thereto in which he pleaded the invalidity thereof, because executed to cover a shortage of his son, who had embezzled appellant's funds, under a promise on the part of the officials of the bank that they would withhold the evidence of the crime and abstain from prosecuting his son therefor.

Appellant filed a reply, denying payment of the note, or that it was executed in consideration of an agreement by the officers of the bank to withhold the evidence and not prosecute appellee's son for said crime.

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

The testimony was conflicting upon the issue of payment and whether the note was given to compound a felony, and the court submitted the issues of fact to the jury for determination on three declarations of law applicable to the case, according to his view. The instructions were severally objected to by appellant, but it did not preserve its objection in its motion for a new trial to instruction No. 3A. Appellant now argues that instruction No. 3A was erroneous, and that the judgment should be reversed on that account. As the ruling of the court in giving instruction No. 3A was not given as one of the grounds for a motion for a new trial, we cannot consider the alleged error contained therein. *Prairie Creek Coal Mining Co.* v. *Kittrell,* 106 Ark. 138, 153 S. W. 89; *Patterson* v. *Rishe,* 143 Ark. 376, 221 S. W. 468.

The giving of instruction No. 2A by the court on its own motion and the refusal to give instruction No. 1, requested by appellant, both over the objection of appellant, was properly preserved in the motion for a new trial.

Appellant first contends for a reversal of the judgment on the ground that the court erred in giving instruction No. 2A, which is as follows:

"You will find for the plaintiff the amount sued for, less any payments, if any, that you find have been made, which are not credited on the note, unless you find from the preponderance of the testimony that the note was signed by the defendant under an agreement with the bank officials that his son would not be prosecuted by the bank officials for a felony."

It is argued that this instruction was vague, indefinite, and misleading, because it did not confine the felonies referred to therein to felonies growing out of misappropriation of appellant's funds by appellee's son. There is nothing in the evidence tending to reflect that any other felonies than those connected with the misappropriation of the bank's funds were committed by appellee's son. We do not think the jury could have been misled by the instruction. Even, however, if the note had been given for the purpose of compounding any felony, whether connected with the bank's business or not, it would have been void, hence no prejudice could have resulted to appellant by giving the instruction. Appellant requested the court to give its instruction No. 1, which was a parallel instruction to instruction No. 2A given by the court, and that request was even more vague and uncertain that the one given by the court. Instead of using the word "felony" it used the word "crime," which could include both misdemeanors and felonies, either growing out of the business of appellee's son with the bank or out of some independent transaction disconnected with the bank's business.

Instruction No. 1 requested by appellant is as follows:

"You are instructed that the mere fact, if you find it to be a fact, that the note sued on in this case was made by the defendant, N. B. Burrow, on account of a shortage to the plaintiff of Fred Burrow, that alone would not be a defense in this case, but you must further find

from a preponderance of the evidence in this case that the defendant, N. B. Burrow, signed the note in consideration of the plaintiff abstaining from any prosecution of Fred Burrow for a crime."

Appellant's further contention is that the judgment should be reversed because the verdict is not supported by sufficient evidence of a substantial nature. Appellee and his son both testified positively that the only consideration for giving the note was to compound the felony the son had committed in his capacity as cashier of appellant's bank. The testimony introduced by appellant was, in substance, an absolute denial that any of its officers promised to withhold the evidence of the crimes committed and to refrain from prosecuting appellee's son as a consideration for the note. Testimony introduced by appellee responsive to this issue was of a substantial nature, and is sufficient to support the verdict.

No error appearing, the judgment is affirmed.

THOMAS *v.* OWEN.

Opinion delivered October 22, 1928.

Trimble & Trimble, for appellant.

M. K. Moran, for appellee.

HUMPHREYS, J. Appellee filed the following affidavit in the court of H. Monk, a justice of the peace in Caroline Township, in Lonoke County, omitting caption:

"I, Maggie Owen, do solemnly swear that I have reason to believe that I have a cotton planter on the farm of Joe Sims, either in barn or some outhouse on said farm. The planter is a Shawnee Avery Junior, and I hereby pray of H. Monk an order of delivery to be

served by day to have the barns and outbuilding searched that I may find said planter. Maggie Owen."

The justice of the peace thereupon issued the following order of delivery, omitting caption:

"To any constable of Lonoke County: You are commanded to take from the possession of John Thomas and Joe Sims, or any one who has possession, one Shawnee Avery Junior Combination Planter, of the value of $25, and deliver the same to Mrs. Maggie Owen. You will also summon John Thomas and any other person in whose possession the planter may be found, and you will summon John Thomas and all other persons, to appear in my office on the 26th day of March, 1927, at 10 o'clock A. M., and you will make due returns of this writ before me on the 26th day of March, 1927. Given under my hand this 18th day of March, 1927. H. Monk, J. P."

The cotton planter was found by the constable and delivered to appellee, pursuant to the order of delivery. The suit was transferred to the court of common pleas in said county, and John Thomas, one of the appellants, executed a forthcoming bond, and obtained the return of the cotton planter which had been delivered to appellee. The forthcoming bond is as follows, omitting caption and signatures:

"We undertake and are bound to the plaintiff, Maggie Owen, in the sum of fifty dollars, that the defendant, John Thomas, shall perform the judgment of the court in this action, or that the undersigned, John Thomas, will have the Avery Planter attached in this action, or its value, twenty-five dollars, forthcoming and subject to the order of the court for the satisfaction of such judgment."

On the trial in the court of common pleas, and also in the circuit court, to which the case was appealed, all the irregularities in the pleadings were waived by the parties, and the cause was tried by agreement upon the issues of who was the owner of the cotton planter, its value, and the damage for detention of same, if any.

No objections were made or saved in the course of the trial by either party to the evidence admitted or the instructions given by the court.

An appeal has been duly prosecuted to this court from the verdict and consequent judgment in favor of appellee for the possession and return of the cotton planter, or its value, in the sum of $20, and $5 damage for detention of same.

Appellant contends for a reversal of the judgment on the sole ground that the affidavit filed by appellee before the justice of the peace did not contain the prerequisites necessary to obtain an order of delivery of personal property and was insufficient to sustain a cause of action in replevin within the jurisdiction of the justice of the peace, and that therefore the circuit court acquired no jurisdiction by the appeal. It is true that the affidavit was in the nature of an affidavit for a search warrant, and did not contain the prerequisites of an affidavit in replevin, in accordance with § 8640 of Crawford & Moses' Digest, and did not sufficiently state a cause in replevin, yet did serve the purpose in both instances. The cotton planter was seized on the order of delivery, based on said affidavit, and delivered to appellee, and in the trial of the cause all irregularities in the pleadings were waived by the parties. The issue in replevin was tried by agreement of the parties, and testimony was adduced by both parties responsive to the issue, without objections or exceptions by either to the evidence introduced or instructions given by the court. After a trial and verdict on the merits it was too late to object to the insufficiency of the affidavit upon either ground. *Hawes* v. *Robinson,* 44 Ark. 308; *Waterman* v. *Irby,* 76 Ark. 551, 89 S. W. 844; *Climer* v. *Aylor,* 123 Ark. 510, 185 S. W. 1097.

No error appearing, the judgment is affirmed.

HODGES *v.* RACHELS.

Opinion delivered October 22, 1928.

Golden Blount, for appellant.

Wm. H. Roth and *John E. Miller*, for appellee.

HUMPHREYS, J. A judgment was obtained on December 10, 1927, by appellee against appellant, for an attorney's fee of $150, before W. H. Bell, a justice of the peace in Gray Township, in White County. At the time the judgment was rendered, appellant prayed and was granted an appeal to the circuit court of said county by the justice of the peace. Appellant filed or caused the justice of the peace to file an abstract in the office of the circuit clerk on January 7, 1928, which was nine days before the circuit court convened in regular session. The circuit court convened in regular session on January 16, 1928. After the transcript was filed in the circuit court the case was set down for trial on January 30, 1928, at which time the attorney for appellant appeared and objected to a trial at that term of the court because the transcript had not been filed ten days before court convened, contending that the court was without jurisdiction to try the cause unless the transcript had been filed as much as ten days before circuit court convened in regular session. The court overruled appellant's objection, and proceeded to try the cause. An exception was properly saved and preserved to the ruling of the court. The trial of the cause resulted in a judgment

against appellant, from which he has duly prosecuted an appeal to this court.

The first contention of appellant for a reversal of the judgment is that the court had no jurisdiction to try the cause because the transcript had not been filed and the appeal allowed by the circuit clerk ten days or more before the circuit court convened. The statute governing appeals from justices of the peace makes no such requirement where the appeal is allowed by the justice at the time of the rendition of the judgment and ten days or more before the circuit court convenes. Section 6525 of Crawford & Moses' Digest governs under the facts in this case, and reads as follows:

"All appeals allowed ten days before the first day of the term of the circuit court next after the appeal allowed shall be determined at such term, unless continued for cause."

The appeal was allowed by the justice of the peace on December 10, 1927, more than ten days before January 16, 1928, the day circuit court convened in regular session. Under this statute the intervening time is not computed from the time of filing the transcript with the circuit clerk, but from the day of its appeal by the justice of the peace, in order that it shall stand for trial at the next succeeding term of the circuit court. There is no merit in appellant's contention that the case did not stand for trial at the term of the circuit court beginning January 16, 1928.

Appellant makes the further contention that the judgment should be reversed for the alleged reasons that the verdict and judgment are not sustained by the evidence; that counsel for appellee was permitted to ask him leading questions; and that the court refused to allow appellant to testify to the exact conversation and happenings between him and appellee relative to the transaction in hand. Appellant has not seen fit to abstract the testimony in the case, so the court cannot consider this contention. These are questions that arise out of the evidence which should have been abstracted. In order

to consider them, the court would be compelled to explore the record, which cannot possibly be done with due regard to a dispatch of the business before us.

No error appearing, the judgment is affirmed.

HARNWELL *v.* HOLLENBERG MUSIC COMPANY.

Opinion delivered October 1, 1928.

C. P. Harnwell, for appellant.

Frank B. Pittard, Kenneth W. Coulter and *John H. Quidor*, for appellee.

KIRBY, J., (after stating the facts). This court on a motion for rehearing has concluded it should be sustained, and appellant's contention that the trial court erred in refusing to quash the summons and to dismiss the cause as against her for want of jurisdiction upheld. The motion to make her a party was made upon the disclosure by the answer of C. P. Harnwell and Mary Bryan that the property belonged to her, and she was duly served with a summons, and no error was committed in not granting the motion on that account; but the value of the property replevied was shown by the undisputed testimony to be in excess of $300, and therefore beyond the jurisdiction of the municipal court. The circuit court acquired no jurisdiction on appeal, and the motion to dismiss should have been sustained. Act 463, Acts of 1921, § 2; *Ware* v. *Shoemaker-Bale Auto Co.*, 177 Ark. 227, 6 S. W. (2d) 285.

Harnwell testified the value of the piano was something between $800 and $1,000 and Hollenberg "thought his company should sell it for $400, possibly $450." Said "he would be willing to sell it for $350 rather than to refuse an offer—that if it wasn't worth more than $200 he would be willing to take it as a cancellation of the debt." His statement that he would be willing to take it in satis-

faction of the debt to his company was without probative force as against his statement, and the other testimony about the value of the piano is not in conflict therewith or contradictory thereof, since he had no interest in it beyond the amount of his debt, a sum less than $300, secured by the mortgage thereon. There is no substantial evidence to support the court's finding that the value of the property replevied was under $300 and within the court's jurisdiction, and the court erred in so holding.

Having reached this conclusion, the other questions need not be discussed, and the motion for rehearing will be granted, the judgment reversed, and the cause remanded, with directions to dismiss for want of jurisdiction. It is so ordered.

HART, C. J., and MCHANEY, J., dissent.

PAYNE *v.* HART.

Opinion delivered October 22, 1928.

Griffin Smith, for appellant.

Daggett & Daggett, for appellee.

KIRBY, J. This appeal is prosecuted from a decree compelling specific performance of a contract of purchase of land. The case was tried upon an agreed state-

ment of facts, from which it appears that D. W. Dover was the owner and in possession of the 53.64 acres of land in Lee County, known as the Adams land, prior to the 24th day of July, 1908, described in the first item of his will. The said Dover died testate after said date, and a copy of the will was duly admitted to probate. John E. Hart, appellee, and the devisee mentioned in the first item of the will, with his family has occupied the land since the death of the testator. On the 4th day of November, 1927, appellee entered into a written contract of sale and purchase of the lands with appellant. On December 1, 1927, Hart and wife, appellees, executed a deed conveying the lands, in accordance with the contract of sale, to appellant, with a covenant of general warranty, and tendered same to appellant, who refused to accept it and perform the contract of purchase, claiming that an examination of the title disclosed that appellees were not the owners of the lands in fee simple, but only took a life estate under the will of the said D. W. Dover.

Norma Hart is the wife of J. E. Hart, and they have one living child 23 years of age.

It was agreed that the only question for determination by the court was whether or not the fee-simple title held by Dover was devised to appellee by the will, and whether the deed executed by appellees and tendered to appellant was sufficient to convey him a good and merchantable title to the lands. The first item of the will reads:

"I will and bequeath to my nephew, John E. Hart, his heirs forever, the 53-acre tract that he now lives on, being a part of what is now ( ) as the Adams land. Said land being entailed to the heirs of the said John E. Hart forever. Never to be mortgaged or sold."

The court construed the will to convey a fee-simple estate, and decreed a specific performance of the contract, from which this appeal is prosecuted.

The only question necessary for determination is the correctness of the holding that the clause in the will devised a fee-simple estate to appellee, John E. Hart.

The devise was made, "to my nephew, John E. Hart, his heirs forever," describing said tract of land upon which the devisee lived, and "said land being entailed to the heirs of the said John E. Hart forever. Never to be mortgaged or sold." The purpose of construction of a will is to ascertain the intention of the testator from the language used as it appears from consideration of the entire instrument, and, when such intention is ascertained, it must prevail, if not contrary to some rule of law. The first paragraph of item one of the will, by express language, "to my nephew John E. Hart, his heirs forever," clearly conveyed an absolute fee to the devisee, John E. Hart, and the interest thus given could not be cut down or diminished by the later conflicting and repugnant clause declaring the land "entailed to the heirs of the said John E. Hart forever. Never to be mortgaged or sold." *Bernstein* v. *Bramble,* 81 Ark. 480, 99 S. W. 682, 8 L. R. A. (N. S.) 1028, 11 Am. Cas. 343.

There is nothing in the language indicating an intention to give a life estate to the devisee and the heirs of his body, except the word "entailed," which cannot have effect to limit the fee expressly given to said devisee and his heirs to an estate tail, the devisee taking a life estate only under the statute. *Hardage* v. *Stroop,* 58 Ark. 303, 24 S. W. 490; *Willmans* v. *Robinson,* 67 Ark. 517, 291 S. W. 818.

The sentence providing "never to be mortgaged or sold," was an attempt to deprive the fee simple estate devised of its alienability, and is void for repugnancy. *Fies* v. *Feist,* 145 Ark. 351, 224 S. W. 633; *Letzkus* v. *Nothwang,* 170 Ark. 403, 279 S. W. 1006; *Davis* v. *Sparks,* 135 Ark. 413, 205 S. W. 803; *Combs* v. *Combs,* 172 Ark. 1173, 291 S. W. 818.

The chancellor correctly construed the will as creating a fee simple estate in the devisee, John E. Hart, who could convey a good and merchantable title to the lands by the deed tendered, and did not err in requiring specific performance of the contract of purchase by appellant.

The decree is affirmed.

SOUTHWESTERN GAS & ELECTRIC COMPANY *v.* GODFREY.

Opinion delivered October 22, 1928.

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J. I. Alley, W. H. Arnold, W. H. Arnold, Jr., and *David C. Arnold,* for appellant.

A. F. Smith, W. A. Bates, Sam T. Poe, Tom Poe and *McDonald Poe,* for appellee.

KIRBY, J. It is urged for reversal that the court erred in not sustaining the demurrer to the complaint of the parents of the deceased, the administrator only being authorized to sue for damages for his wrongful death, and that in no event could there be a recovery against the appellants jointly liable for the injury, if liable at all, separately and for different amounts. Under the statute the administrator alone was entitled to recover all damages resulting from the wrongful death of Victor Godfrey, both for the benefit of his estate and the next of kin. Section 1075, C. & M. Digest; *Ashcraft* v. *Jerome Hardwood Lumber Co.,* 173 Ark. 135, 292 S. W. 386.

The right of the heirs and next of kin of the decedent to sue for damages for his wrongful death is dependent upon there being no personal representative of such decedent, and, since the complaint of the heirs and next of kin did not allege there was no personal representative of the deceased, and did allege that J. R. Godfrey was the administrator of his estate, it did not state a cause of action as to them, and was subject to the demurrer, which should have been sustained. Section 1070, 1075, C. & M. Digest; *Jenkins, Adm'r.,* v. *Midland Valley R. R. Co.,* 134 Ark. 1, 203 S. W. 1; *Davis* v. *Ry.,* 53 Ark. 117, 13 S. W. 801, 7 L. R. A. 203 s. c., 55 Ark. 462, 18 S. W. 628; *K. C. S. Ry. Co.* v. *Henrie,* 87 Ark. 443, 112 S. W. 967. Since the suit was brought by the administrator or personal representative of the decedent, however, who had the right to recover all damages resulting from his wrongful death, no prejudice resulted from the court's failure to sustain the demurrer, and the error was harmless.

The other assignment, that there could be no greater recovery than $4,000, the amount of the sum of damages assessed against Harry Wann, the other joint tort-feasor and appellant, under the verdict rendered, must be sus-

tained. Only one act of negligence was alleged in the complaint, which consisted in the failure of appellants to guard properly, protect and insulate the electric wires carrying the current from the power plant of the appellant light company to the mill plant and the machinery of the other appellant, and in his failure to guard properly, protect and insulate the electric wire, machinery and equipment in the heading-mill plant. The jury returned two verdicts, finding for the plaintiff against the gas and electric company in the sum of $14,000, and for the plaintiff against Harry Wann in the sum of $4,000. Cyc. says: "Where, although concert is lacking, the separate and independent acts of negligence of several combine to produce directly a single injury, each is responsible for the entire result, even though his act or neglect alone might not have caused it." 38 Cyc. 488. The liability of the wrongdoers is not affected by the relative degree of negligence or of the care required, and if the negligence of both be a contributory cause, although one may owe to the person injured a higher degree of care, and even though there be different degrees of negligence by each, either or both alike are responsible. Damages must be assessed in a single sum, and cannot be apportioned by the jury among the defendants, since the sole inquiry is to the damages resulting from the injury, and not who ought to pay them. 38 Cyc. 490, 492; *St. Louis S. W. R. Co.* v. *Kendall,* 114 Ark. 224, 169 S. W. 822, L. R. A. 1915F, 9; *Coleman* v. *Gulf Ref. Co. of La.,* 172 Ark. 428, 289 S. W. 2.

In *Spears and Purifoy* v. *McKennon,* 168 Ark. 357, 270 S. W. 524, a suit for damages for negligence in performing a surgical operation, the jury returned a verdict in the sum of $3,500, separately, against the physicians, and judgment was rendered for $7,000 against them, to be paid one-half by each. This court held that a judgment for the sum of both the separate verdicts could not be rendered, saying: "This suit was against defendants jointly, to recover damages against them as tort-feasors;

there was only one operation and one damage, both appellants participated in it, and, according to the verdict, both were liable. Under the testimony they were liable as joint tort-feasors, if at all, and the verdict should be construed as a finding of joint and not separate liability. The only way this can be done is to construe the verdict as a joint finding against appellants for $3,500."

In *Wear-U-Well Shoe Co.* v. *Armstrong,* 176 Ark. 592, 3 S. W. (2d) 698, the jury returned two verdicts, one against John Rule, the agent or salesman of the shoe company, for the sum of $750, and the other against the company for $1,750, and this court held that each of the tort-feasors, only one tort being committed and one damage resulting, was liable for the whole damage, and that there could be no greater recovery against both the joint tort-feasors than the lower sum assessed by the jury against one of them. So here, under our decisions, since the injury resulted from the joint or concurring negligence of the two appellants, the negligence of both contributing to it, their liability was not affected by the relative degree of negligence and of the care required, each being liable for the whole damage resulting, and there could be no greater recovery against either or both the joint tort-feasors than the smaller amount assessed by the jury against one of them, the sum of $4,000.

We have carefully considered the authorities in the able brief of appellee supporting a different rule, but find no sufficient reason for not following the rule already adopted by our decisions. The court erred in rendering judgment for the entire damage resulting from the negligence of appellants for more than the smaller amount of the verdict against the appellant Harry Wann in the sum of $4,000.

The testimony is in decided conflict as to whether there was any conscious pain and suffering of the deceased after he came in contact with the defectively insulated wire, the preponderance of it probably being

against such a finding, but there was some substantial testimony from which the jury might have found that such was the fact, and we cannot say the evidence is not sufficient to support the judgment. The testimony also was slight as tending to show a disposition on the part of the deceased to contribute any great amount of his earnings to the support of his parents, but we cannot hold it insufficient, the jury having found otherwise.

We do not regard it necessary, nor do we attempt, to separate the damages resulting to the estate on account of the pain and suffering endured by the deceased and the pecuniary losses to his heirs and next of kin, since there were no debts or claims against the deceased or his estate for which his father and the next of kin were not liable to the payment, and since his heirs and next of kin will be entitled to the whole amount recovered by the administrator for the estate and the next of kin.

There are other errors complained of, and it is insistently urged that the verdicts were excessive, but, under this court's holding that only the smaller amount of damages assessed against the one defendant can be recovered from both of them, we do not find it necessary to go further into the question of the excessiveness of the verdict, nor to consider the other assignments, which are not urged in view of the conclusion reached.

The judgment against the appellant electric company will be modified in accordance with the opinion herein and reduced to the amount of the damages assessed against appellant Wann, $4,000, for which amount only both appellants are liable, and judgment will be entered here accordingly, and the case affirmed. It is so ordered.

SOUTHWESTERN BELL TELEPHONE COMPANY *v.* MCADOO.

Opinion delivered October 22, 1928.

Elmer Schoggen and *Edward B. Downie,* for appellant.

W. R. Donham, for appellee.

MEHAFFY, J. The appellee brought suit in the Saline Circuit Court against the Southwestern Bell Telephone Company, to recover damages for an injury alleged to have been caused by the negligence of the telephone company.

Appellee had a telephone in his front room, and had got up to get the baby a drink of water; had the baby in his arms, and was standing under an electric light drop, and was about 15 or 16 feet from the telephone instrument. Appellee alleges that a flash of lightning came, and he was knocked down. It is claimed that the lightning came in through the telephone instrument and struck McAdoo, and that it was because the telephone company had negligently and carelessly failed to use ordinary care in installing the telephone, in that it adopted no precautions to prevent charges of atmospheric electricity entering appellee's residence, and that it failed to use known and approved appliances and devices to prevent such occurrence. Appellee also alleged that the telephone company negligently and carelessly failed to ground its telephone wires, or, if grounded at all, they were grounded in a careless and indifferent manner, in that no iron rod was driven into the ground and the wires attached thereto.

Appellant denies all the material allegations of the complaint, and alleges that, if appellee was injured as claimed, it was due to an act of God and causes which appellant could not foresee or control.

The appellee testified, in substance, that he was 43 years of age. He lives in Benton, and works for the railroad company; is a bridge carpenter, and has been with them about two years; makes 67 cents an hour, and works eight hours and a half. He had lived at his present residence since the latter part of the year 1926, but does not own the property. The telephone company

installed a telephone in his residence after he moved there, but he did not see them put it in. There was a very severe storm the night he was injured; it hailed and lightened all night. Between ten and eleven o'clock he got up and put on his clothes, then lay down on the bed. The folks were scared of the storm, so he got up and walked in the kitchen to get the baby some water. He heard something pop, and the lights went out during the flash, and he was knocked out. That was the last he remembers. The lightning seemed to come through the house. There was the popping and then the flash. He was 15 or 16 feet from the telephone, and facing the 'phone the way he walked into the room. There is a door right straight through to the telephone. The lightning came from that direction, from towards the telephone. The telephone fuses were burned out. The batteries were burned out and thrown away. They were taken out next day. They put in new batteries. The injury seemed to paralyze him. When he recovered consciousness he could not talk and could not raise his arm; he was helpless. People were bathing him. He could not control his limbs nor hold his head up. It hurt on the side of his head. That was the worst place. He could not swallow water or anything. It was 40 or 50 minutes before he realized anything. When he regained consciousness he was sitting in the front room in a chair, and the doctor was there; several people were there. He bit his tongue, and it was bleeding. It was next morning before he could swallow, and several days before he could talk. The hurt commenced on the side of his head and went down the back of his neck, and his eyes pained him. He can't see to read; was not troubled like that before the injury. Cannot read an ordinary newspaper. This condition has existed ever since his injury, and he does not seem to get better. Often in trying to talk he tries to say things, and cannot say them right. After the injury he was confined to his home 14 days, and in bed about half that time. He is not now able to do work that requires the use of his eyes like he could before.

His job was lining up the forms, and he can't see to line them up as he could before. Was earning about $5.36 a day; was off 14 days.

He had had a telephone about two years prior to the time he moved into his present home. The 'phone was put in where he now lives about two weeks after he moved there. The house he lives in is about square. The telephone is a wall type. The lights were on when he got the water. His house is lighted by electricity; there is a drop cord with a globe and a snap-off at the end of that. He is five feet nine inches tall; the cord would come down within eight or nine feet of the floor—has about a three-foot cord. The living room is about twelve by twelve; the kitchen is about the same size. There is an electric light drop in the living room and one in the kitchen. The telephone had been working all right when he attempted to use it from time to time before the injury. There was a storm the night he was injured, and a house was struck by lightning across the street. A transformer or some lighting device burned out in his neighborhood, but he did not know where it was located, but several blocks west of the house, not on his street. At the time appellee was injured the lights were out. The lights went out, and that is all he knows about it. It hit him, and he was in bed all next day. The telephone was on the wall in the living room, and he was standing about the center of the kitchen.

Witness came in through the door—came into the kitchen. When he made his turn he would be facing the telephone, because the 'phone is right in front of the door. The light fuses were not burned out. The transformer was fixed next day, and the lights came on. There was nothing done to the lights in the house. The telephone fuses were blown out and the batteries burned out. The telephone line came down the west side of the street across from the house; they were strung on the light company's poles. Appellee was the only person on that street that had a telephone.

Dr. Blakely, physician, testified that he attended Mr. McAdoo, and that he was in a nervous condition, and would have a twisting or jerking of the muscles of the face. His speech was bad. Knew that he had received some kind of shock. Such a shock as appellee received would be produced by a stroke of lightning. At the time he thought that appellee's condition was such as to endanger his life; that he would probably die. He gave him some narcotics to relieve him. Does not think a man that received shock like that would likely stand any severe cold, or hear—doesn't believe his nerves would stand it. Such a shock might affect the eyes.

Nelson McAdoo, son of the appellee, eleven years old, testified, in substance, that he was there when they put in the telephone. He watched the man put it in. When the man was putting in the telephone he just hung the ground wire down the side of the wall; he didn't stick it in the ground; it just hung down there; he did not have an iron rod or anything that he drove in the ground that he attached it to; witness was there when he fixed the telephone after his father got hurt, and watched the man fix it. The man left the house three different times. The last time he came he used an iron rod, and attached the wire to it. He got the iron rod when he went back to the office, and when he got back he drove it into the ground and fixed the wire around it. When the man was repairing the telephone he scratched around to see if there was any ground wire there; he didn't find any; there was none there for him to find. The last time the man was there he said there ought to have been a rod there. He saw him when he went to town and saw him bring an iron rod back. The 'phone was put in over a year ago. The man who put it in and the man who repaired it after his father was injured were not the same. Obie Jones put it in, and then, after his father was hurt, Mr. Hankins came. The man did not tell witness why he put the wire down there. The 'phone was working all right before appellee was injured. The telephone is on the wall in the west end of the living room, and

appellee was standing in the kitchen, near the kitchen cabinet, where the bucket of water was kept. There was an electric light globe on a wire hanging down for the electric lights. The lights went out that night all over the neighborhood. Lightning struck a house across the street. Mr. Seville, whose house was struck, did not have lights in his house. Witness noticed one thing about the wiring on the front porch—that they put that little rubber rod that had two wires, one joined on one and one on the other, and now there is just one.

Appellee, being recalled, found there were two wires attached to the plate out on the porch at the time. It was a two-way circuit, and they afterwards changed it and had it one-way. That change was made the 28th of October. He did not see the man making the change. Mr. Boyd ordered the wires taken off of the light company's poles, and next day they were taken off. Mr. Boyd works for the telephone company at Benton. The house that was struck by lightning was about 150 feet away. When the flash came the room was all lighted up. There was a glass window in the kitchen, and it was not broken. There were no boards or anything taken off of the house, and no visible sign of its having been struck by lightning.

Carl W. Alley testified, in substance, that he was an electrician; had been about 24 years; had worked for the Southwestern Bell Telephone Company, and originally installed a good many telephones in Benton. There are two methods of installing a 'phone—the ground circuit and the metallic—one wire and the ground circuit. The purpose of grounding it is that, in a one-way circuit, the earth takes the place of the other wire where you just have one wire. You cannot talk over a telephone with a one-wire circuit unless the wire is grounded. You can talk over a telephone or two-wire circuit when the wire is not grounded. The purpose of grounding the two-wire circuit is for protection from lightning; you are supposed to have a fuse box there, and the lightning comes in and blows the fuse and protects the telephone.

The lightning is supposed to be diverted and go through the wire to the earth, over the ground wire. That is the usual method of installing telephones. Whether you have a one-wire circuit or a two-wire circuit, the rule is to ground them to protect the occupants from lightning. Witness observed the wire on the McAdoo house. He observed the plate on the porch; it is a two-wire circuit —two wires and two fuses; the way it is being used now is one. To change it from a two to a one you put the wire over on that post and then ground the other side of your telephone. The plate originally was a two-wire circuit. There were two wires, but they are twisted together and made one now. That was intended or fixed for a two-wire circuit clear into the house. Other 'phones in Benton have two wires. Does not know of any one-wire circuit in Benton except this one. If lightning should enter the residence over the telephone wires, in some instances it would blow the fuse, in others it would not—lightning plays freaks sometimes. You can't always control it. If the fuses were blown out, it would indicate that lightning had been in there. Never knew of a telephone fuse blowing unless it was lightning that caused it. A fuse is of soft metal. If lightning strikes it, it melts and cuts the current out of the telephone. If the fuses are blown out they break the current in the circuit between the outside wire and the wire leading into the telephone instrument itself. But, at the same time, there might be enough current arc through the fuse and tear up the telephone and still blow the fuse at the same time. If you found the fuse blown, that would show that it functioned, and that a current of electricity had come in there, and that it broke down and had cut the current off from the telephone instrument. All rural telephones are furnished with a ground, and this telephone is working grounded now. If the telephone was working, one wire was bound to have been grounded, but if you had a two-wire circuit there wasn't any necessity of grounding it to make it work. The

wires are now attached to one post. This is all new wire running into there now. The wiring on there is new.

Witness could not say where lightning would come out of a telephone and cross a room 15 or 16 feet. Does not know anything about the conditions at the time Mr. McAdoo was hurt. There is a better chance of lightning not getting in over the wire if it is grounded. If lightning came in through the wall it is likely to leave some sign of it, unless it was conducted in over a wire. Protective devices are not an absolute protection; they are just protective; there is a better chance of saving the telephone instrument if you have it protected. All telephones that are burned out by lightning are not knocked off the wall by it. Sometimes it will knock them off.

Grady Smith testified, in substance, that he is superintendent of the water and light plant at Benton; remembers the storm that occurred at the time Mr. McAdoo was struck by lightning. They have a transformer for their light plant about three or four blocks from where McAdoo lives. During that storm the transformer burned out on the primary side, burned the fuse on the primary side. That was all the damage it did. For electric current from that lightning to be transmitted into the home of Mr. McAdoo, it would have to go through the meter. The meter was not injured. When lightning is transmitted through a meter, it usually burns the potential coil out. If lightning had been transmitted into the house over the light wires, you would expect a blowing of the light fuses. It usually happens if a big bolt comes in, but it doesn't every time. The fuses blew on the transformer; it cut that entire end of town off that was fed from that primary circuit. The lights went off because the primary fuse on the transformer blew. Their primary lines are protected with lightning arresters. The transformer has to transform the high tension current to the low tension.

Florence McAdoo, 14-year-old daughter of appellee, testified, in substance, that she had seen the telephone wires on the outside of the house a few days before

her father was struck; saw the wire that came down outside the house toward the ground. Saw it on Saturday, and it was Monday or Tuesday when her father was struck. When she saw the wire on Saturday it was just dangling down from the side of the house about two or three inches from the ground. She noticed it, and called her mother and asked about it. When her father was struck he could not talk. He bit his tongue, and it was bleeding. The accident occurred between 10 and 11 o'clock. It was days before he talked so you could understand him. He complained of his eyes and his neck hurting. He has not been able to read since the injury. Witness knows about the plate and the wires, and that there was one wire going to each one of those. That was the condition of them at the time of the injury. They are not in that condition now. The difference is that both of those little wires go to one of those rubber things. It is attached to one post instead of two. The 'phone is still in the house. After they fixed it next morning it worked all right. There had been no trouble with it before the injury. There was a good deal of lightning and thunder that night. The kitchen is near the living room. There is an electric light in the kitchen, on a cord. The lights were on at the time, but when that clap of thunder came they were all out. They went out just at the time he fell. The noise was just like thunder. It lighted up the house. The telephone is in the front room. Witness' father had the baby in his arms, and it was not hurt. Witness was there when the man came to repair the telephone, and helped him, rang the 'phone for him. Saw him when he was making the repairs. He drove a rod down in there and connected it with that wire that was dangling down. It was dangling down at the side of the wall when he came to repair it. It was not attached to anything before he came. He made three trips down that day, and the last time he came he brought the rod. He drove it into the ground and attached the wire to it. He felt around down there, and was looking around, and saw there was not any rod.

Pete White testified, in substance, that he lived across the street from McAdoo, and heard Mrs. McAdoo screaming, and went over there. Stayed there about a minute, and went for the doctor. His wife attempted to use the 'phone, but could not get central. All the time he was there McAdoo was unconscious; unable to use his limbs, arms, feet or legs.

Robert Land testified, in substance, that he saw McAdoo in his home the night he was struck by lightning. He took some kerosene lamps, and when he got over there McAdoo seemed very nervous. There is a difference in McAdoo's speech now and before the injury.

The defendant introduced O. F. Jones, who testified, in substance, as follows: Had worked for the telephone company about 17 years; worked in Benton; repaired trouble, and installed telephones. Installed the telephone in the residence of McAdoo in August, 1926. It was a regular standard telephone. Put in the standard wire—twisted two-wire drop. That goes from the cable up to the house. The cable is not on the electric light pole. Witness put a protective device on there—what is commonly called a No. 12 type protector. It is located right at the point of entrance—on the porch. The wires go through the wall into the room and fasten to the telephone. It had a standard ground rod, one-half inch in diameter by five feet long, and that had attached to it No. 14 wire from the protector leading from the protector to the ground rod. The rod was driven down in the ground. The purpose of the ground rod is for protection. The 'phone was working on one wire; had to use the ground for return to complete the circuit. They did that because of the shortage of facilities out there at that time. The difference between a metallic circuit and a ground circuit is that a metallic circuit has two wires. The telephone would not work if there had not been a ground wire on it. Does not know if it is still working grounded. Knows that is the way it was installed. Most of the telephones in Benton are metallic—that is, have two wires. Has not seen this 'phone since

the time McAdoo was hurt. He ran two wires into the house, but only used one. All telephones in Benton were not two-wire circuits at that time; ran two wires in because it comes a twisted pair of wires. Witness did not wire the house next to Mr. McAdoo. There was no telephone close to this. When he put in McAdoo's telephone, there was no 'phone right near him that he knew about. The proper thing to do in grounding a wire is to put down the ground rod. It is a half-inch rod about five feet long. You drive it all the way up in the ground and then attach the wire to it. Witness did not repair the 'phone after it was blown out; was working at Malvern. Knows he installed the telephone. It is a matter of record. At the time that telephone was put in there they had a cable pair. They ground them all. It is necessary to ground them as a matter of protection. Has not been in McAdoo's yard since he installed the telephone. Did not go back to drive in the rod. He put it in when he put the telephone in. When he put the 'phone in, he did not have an available pair. One side is open. They would use only one side of the pair. All the rest of the pairs were in use to serve other subscribers, so there wasn't a pair available for McAdoo. He therefore put him on a ground circuit. The record shows installation completed on August 11. A little flash of lightning may blow a fuse. The purpose of the fuse is to protect the premises and the telephone. The current, instead of going through the telephone, will go to the ground. Lightning or any current of electricity will seek the shortest path to ground. If lightning goes past the protector, it is liable to tear the telephone up and burn the wires out of the 'phone. The best device for protection against lightning is a protector properly grounded. Where they have that device, they do not expect damage to occupants inside a room from strokes of lightning.

D. M. Hankins testified, in substance, that he was out at McAdoo's house next morning after he was injured. Found one of the fuses blown—the protector on

the telephone. He replaced it with a new one. The 'phone was not working when he went out there. It did not work when he replaced the fuse. The best he can remember there was something the matter with the cable pair, and he had to change that. The way he found it, the telephone was working what they call grounded. There were two drop wires that ran in there. That is what they call parallel wires. This 'phone had a ground wire on it.

This witness was asked if he did not state in the presence of others, naming them, that that was the cause of the trouble; that it had never been properly installed, and that the rod was not there. He said he did not.

Mr. Seville testified about the storm, and the lightning striking his house.

Mr. Best testified that he is an electrical engineer, and is employed by the Arkansas Light & Power Company. Examined the McAdoo premises, and found they had a standard lightning arrester protector of twelve gauge, with two fuses, and with a ground wire and a ground rod—standard ground rod and ground wire. It was necessary to have a ground wire and a ground rod to operate the 'phone—otherwise it would not work. If the fuse was blown out, that would indicate to him that the protector was performing properly. If it went into the house with sufficient force to knock McAdoo down when he was 15 or 16 feet away from the instrument, it would have left some effect on the instrument. It would show some smoked place on it. Basing his answer on his experience and technical knowledge in connection with the matter, it would not be possible for lightning to come in on a 'phone without leaving some effect. Does not consider it probable that lightning jumped that far from the telephone. Assuming that the lightning came in over a wire at all, he thinks it came in over the electric wire. If the telephone was installed without a ground piece to which you attach a ground wire, it was not properly installed, and it wouldn't work, assuming it was a one-wire circuit. A two-wire circuit will work

without a ground wire. If a bolt of lightning passed through a meter, it would not necessarily burn that out. It would burn out the current coil. It would not necessarily burn out the light fuse. Thinks that, if the lightning came in the house on any wire at all, it probably came in on the electric wire.

Mr. Drees testified that it was his opinion that the lightning came in over the light wire, and, assuming that there was no ground wire, lightning would have gone into the 'phone and shown some evidence of it by the condition of the 'phone. He did not examine the 'phone. He is president of the Arkansas Electric Company, a firm selling electrical wiring and electrical supplies.

Witness was then asked, assuming that he examined the telephone the morning after McAdoo was injured and found that the light meter was not molested—that it was in good condition, not damaged in any way, and the light fuse not molested; that it was in good condition, and not damaged in any way—then, after he found that the telephone apparatus had no ground wire and the telephone fuse had been blown, if lightning was conveyed into the building over either sets of wires. Witness said that he would assume that some slight charge did perhaps come in over the 'phone wires. As you relate, there is no evidence shown of its coming in over the electric light wires, though it might easily have done so.

Mr. Ettinger testified, in substance, the same as the other witnesses about the installation of the telephone and about the lightning coming in over the light wire instead of the telephone wire.

We have copied enough of the testimony to show that it is conflicting on the question of how the telephone was installed—whether properly done or not—and we deem it unnecessary to set out more of the testimony.

The appellant submits four reasons why the case should be reversed. The first is that the alleged negligence on the part of the appellant in failing to install a

protective device and grounded rod wire was not proved. Both Nelson McAdoo and Florence McAdoo testified to facts showing that it was not grounded; that there was no rod there; that the man who repaired the 'phone after the injury brought a rod with him and drove it in the ground; that he looked around there and found none, because there was none there.

While this testimony is contradicted by the witnesses for the appellant, it is sufficient evidence to submit to the jury the question of whether the instrument was or was not negligently installed. This court has many times held that, where there is any substantial evidence to sustain the verdict of the jury, the verdict will not be disturbed, although this court might think that the weight of the testimony was the other way. This court does not pass on the credibility of the witnesses nor the weight of their testimony.

The next contention of appellant is that the verdict of the jury is not based on any testimony as to how the lightning entered the house, if at all. We do not agree with the appellant in this contention. Appellant argues that there is doubt about the lightning entering the house at all. There is no contradiction about this at all, and several witnesses testified that it did enter the house. But how did it enter the house? It would be physically impossible for it to come through the wall of the house, or to come into the house without making some sign on the walls or window, if it came in through a closed window, unless it came over the electric wire or the telephone wire. It therefore must have come over one or the other.

The evidence conclusively shows that, while the electric lights went out at the time the lightning came in the house, it was because a transformer some blocks away was injured; and when this transformer was repaired the lights immediately went on in the house, and there was therefore no injury either to the wires entering the house or to the globes, and no part of the apparatus was affected in any way.

On the other hand, it is undisputed that the telephone was injured and had to be repaired before it could be used, although it was in perfect order before the lightning came into the house. We are of opinion that this was sufficient evidence to submit to the jury the question of whether it came in over the electric light wires or the telephone wires; that is, it is sufficient to submit to them the question whether it entered the house because of the negligence of the defendant in failing to properly install the telephone.

The appellant quotes from authorities that the proof of an alleged act or omission, as causing injury, is not sufficient to establish it as the cause so long as other causes existed and were present which might as well have caused it. This is unquestionably a correct statement of the rule. The jury will not be permitted to surmise or conjecture, because surmises and conjectures cannot supersede or take the place of proof. But we think the proof in this case shows that there were no other causes present which might have caused it. We think it is conclusively shown that it did not come in over the electric wires. To be sure, the jury is not allowed to indulge in presumptions. There must be proof. And, if it were merely matter of conjecture, it would not be sufficient to sustain the verdict.

We also agree with appellant that it is not with defendant to account for the accident. But when evidence has been introduced, as it has in this case, showing that the defendant was negligent in installing the instrument, and also proof that the electric wires were in perfect condition after the storm, the conclusion is inevitable that the lightning came into the house over the telephone wire.

It is next contended by appellant that there is no evidence that the appellee was "struck by lightning," and appellant argues that lightning always leaves its mark on any object, animate or inanimate. The lightning came into the house, and, as it came in, appellee was knocked down. Nobody pretends that there was

any other force to knock him down, and, whether there was any mark where it struck him or not, we think that the proof shows the lightning struck him. There is no conjecture, speculation or guess about it, but the proof clearly shows that the appellee was struck by lightning. If appellant had proved that one could not be struck by lightning without there being some marks on the person, there might be some basis for making this argument. But when all the proof shows that appellee, when the lightning came, was knocked down, and his condition thereafter such as it would be, as the doctor testified, by receiving a shock from lightning, we think this contention of appellant is without merit.

Appellant's next contention is that the court erred in permitting appellee to prove that witness Hankins admitted that the telephone was not properly grounded, and that this was the cause of the injury. This is not evidence of a collateral matter. Hankins was there for the purpose of repairing the telephone after the injury.

In appellant's motion for a new trial it states that the court erred in permitting the witness Mrs. Florence Griffin to testify that D. M. Hankins, an employee of defendant, after the accident occurred, made an admission that the defendant's telephone was not properly grounded, and that, by reason of this, the accident of plaintiff occurred, over the objections and exceptions of the defendant, and that the court erred in refusing to exclude this testimony.

There is no effort to bind the company because of Hankins being a general agent, but he was a witness in the case, and, like any other witness who testifies in a case, it was competent to ask him if he did not make certain statements which, if made, would impeach his testimony at the trial, or would tend to discredit him. The testimony was only admissible as to his credibility, but there was no request made by appellant to limit this testimony to the credibility of the witness. We think it was admissible for this purpose.

Our statute provides that "a witness may be impeached by the party against whom he is produced by contradictory evidence by showing that he has made statements different from his present testimony." Section 4187, C. & M. Digest. See *Eureka Oil Co.* v. *Mooney,* 173 Ark. 335, 292 S. W. 681, and cases cited.

Since evidence of statements of the witness made at a different time was proper by way of impeachment, a general objection to his testimony was not sufficient. The appellant might, by proper request, have had this testimony confined in its application to the credibility of the witness. If such request had been made, the court would doubtless have instructed the jury that this testimony was admissible for no purpose except as it might affect the credibility of the witness.

We think the evidence in this case was sufficient to submit the question of appellant's negligence to the jury, and also the question of whether appellant's negligence, if the jury found it negligent, was the proximate cause of the injury, and, if there is any substantial evidence upon which to base a verdict, it will not be disturbed by this court.

"The liability of a telegraph or telephone company for personal injuries is governed by the principles applicable in the case of electric companies generally. Such a company is clearly liable in damages for injuries proximately resulting from the failure to exercise the proper degree of care, to those to whom it owes the duty of such care, but it is not an insurer, and will be liable to respond in damages only where the company or its employees have been negligent, and the injury complained of was the natural and probable consequence of such negligence. Negligence of such a company may be the proximate cause of an injury even though there may be an intervening cause, such as negligence of another, which, though not anticipated, would not have occasioned the injury except for the earlier negligence." 26 R. C. L. 529.

"But whether or not the defendant company has been negligent in the erection and the maintenance of its poles, wires and plate, is one for the proper determination of the jury upon the facts of the instant case, unless the negligence is so clear upon the evidence that intelligent minds cannot form different conclusions upon it. Thus, for instance, the extent to which wires conveying deadly electric currents should be insulated or otherwise guarded must be decided by the jury under the facts of each case, as must the question whether a company has furnished proper safety devices, and properly connected the same, upon installing its instruments, and whether it has performed its duty as to inspection and repair of its appliances." 9 R. C. L. 1227.

That the appellant's wires conveyed deadly electric currents is not disputed; that is, that it would do so. And, under the authorities, it was a question for the jury whether its instruments were properly guarded and insulated; whether it used proper safety devices, and properly connected same.

The proof in this case is conflicting on the question of whether there was a rod in the ground and a ground wire. There is, however, no dispute about the question, if it was installed in the manner that the plaintiff's witnesses testified that it was, a ground wire was required for protection, but that it was not required in order to be able to use the telephone. It is conceded by appellant, however, or rather appellant's witnesses testified, that this grounding of the wire is for protection so that the lightning coming in over the wire, if any should come in, is carried to the ground, and that this is the proper way to install it for the purpose of protection. It is true there is a conflict about whether the company was negligent in this regard, but that conflict was for the jury to settle.

It has been said:

"It is error to grant a nonsuit because the facts testified to are incredible and impossible, when it is not shown by science and common knowledge that the tes-

timony—the case involving electrical phenomena—is false, and, according to some authorities, a verdict cannot be directed for the defendant in such an action, although its evidence is uncontradicted and sufficient, if true, to overcome the *prima facie* case made by the plaintiff. * * * The question whether or not the negligence of the defendant was the proximate cause of the injury is also one for the jury, where the evidence is not clear, or the proper inference from undisputed evidence may be in doubt." 9 R. C. L. 1227-8.

This court quoted with approval from the court of Texas Civil Appeals as follows:

"The duty resting upon telephone companies to adopt precautions for preventing charges of atmospheric electricity from entering buildings over their telephone wires is thus 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. If, while in the exercise of such care, it had reasonable grounds to apprehend that lightning would be conducted over its wires to and into the house, and there do injury to persons or property, and there were known devices for arresting or dividing such lightning, so as to prevent injury therefrom to the house or persons therein, then it was the defendant's duty to exercise due care in selecting, placing and maintaining, in connection with its wires, such known and approved appliances as were reasonably necessary to guard against accidents that might fairly be expected when conducted to and into a house over its telephone wires'." *Southwestern Tel. & Tel. Co.* v. *Abeles,* 94 Ark. 254, 126 S. W. 724, 140 Am. St. Rep. 115, 21 Ann. Cas. 1006.

The court then cites the following authorities to the same effect: *Griffith* v. *New England Tel. & Tel. Co.*, 72 Vt. 441, 48 A. 643, 52 L. R. A. 909; *Southwestern Bell Tel. & Tel. Co.* v. *McTyer,* 137 Ala. 601, 34 So. 1020, 97 Am. St. Rep. 62; 1 Joyce on Electrical Law, § 445F;

Rural Home Tel. Co. v. *Arnold,* 119 S. W. 811; *Southwestern Tel. & Tel. Co.* v. *Bruce,* 89 Ark. 581, 117 S. W. 564.

While the appellant objected to some of the instructions given by the court, these objections are not urged here, and are therefore abandoned. The court however fully and, we think, fairly instructed the jury, and, while the evidence may be slight, we think it was sufficient to submit the questions to the jury, and the jury's finding on questions of fact is binding here.

The judgment is therefore affirmed.

Mr. Justice McHaney dissents.

BRYANT *v.* HILL.

Opinion delivered October 22, 1928.

Strait & Strait and *J. A. Eades*, for appellant.

Dean, Moore & Brazil, for appellee.

MEHAFFY, J. This is a suit begun by R. E. Hill, in the chancery court of Conway County, against T. F. Bryant, and he alleged that, as administrator, he procured an order of the probate court to sell lands belonging to the estate of F. O. Stobaugh, describing the lands, and that, as directed in said order, he offered for sale the lands described in the petition, and that the appellant offered and bid $3,550 for said lands. It is alleged that the administrator executed and delivered to Bryant a deed, after the expiration of three months, copy of said deed being filed with the complaint, marked Exhibit E.

Bryant answered, denying all the material allegations in the complaint. The facts are substantially as follows:

A petition was presented to the probate court to sell certain lands described in the petition. The administrator was ordered to sell said lands, and did offer them for sale, and T. F. Bryant became the purchaser, and afterwards discovered that the lands were not properly described, and that, for that reason, he was unable to borrow money by giving a mortgage on the land. Thereafter there was a second sale ordered and second petition, and Bryant again became the purchaser for the

same price. He then applied for a loan of $2,200, and the party to whom he applied was unwilling to lend more than $1,700.

Bryant contends that his bid was conditional; that at the first sale he agreed to take it at the price bid, provided he could borrow the money he desired to borrow. He contends that at the last sale he did not bid, but argues that the agreement to purchase was conditional, and that it was not to be binding on him unless he could borrow the amount of money he wished, $2,200, and he refused to pay, and this suit is brought to collect the price which the administrator alleges Bryant bid.

Appellant says there are two questions to be determined. Appellant contends, first, that there was a tentative understanding between appellant and Hill that the deal was conditional if he could procure a loan of $2,200, then he could finance the remainder of the purchase money, and take the place; otherwise the deal was off.

There was a conflict in the evidence as to whether this deal was conditional, the administrator testifying not only that it was not, but that he offered to arrange the terms satisfactory to Mr. Bryant. The proof also shows that, although Mr. Bryant says he did not bid, immediately after the sale he went to Mr. Vance's office for the purpose of securing a loan.

The chancellor found against appellant. The evidence is conflicting, and we cannot say that the finding of the chancellor on this proposition was against the preponderance of the evidence.

It is appellant's next contention that the administrator failed to show that the sale was reported and approved by the probate court, and calls attention, first, to the case of *Bell* v. *Green,* 38 Ark. 78. In that case the court said: "But we are not to presume that the sale in this case had been confirmed. If it had been, the complaint should have so alleged. Until confirmed, it was not completed or binding, and conferred no right to the property to the purchaser, or at least to the interest that

Andrews' estate had in it; and he might call in question its validity. And it could not be known, though he brought the money into court, that he would ever be able to get a title."

The court then cites the case of *Wells* v. *Rice,* 34 Ark. 346, and appellant also relies on this case. Among other things, the court said in that case: "No evidence whatever was offered that the sale had been confirmed, or that it had ever been reported to the court; consequently no title could be established in the defendants through the deed. Although therefore it may not have been necessary for the plaintiffs to have shown that the debt was paid, evidence of such fact was not improper, and could not have prejudiced the defendants."

These cases sustain the contention of appellant that the sale must have been reported to the court and confirmed by the court. It is not contended that the complaint does not allege these facts, but it is contended that there is no proof tending to show that the sale was confirmed by the probate court.

While it is necessary, in case of sales made by an administrator under order of the probate court, that the probate court should confirm the sale, and necessary that proof of this fact be made, it is not necessary that the proof be direct and positive, but it may be shown by circumstances. It may be shown by any evidence which tends to show that the sale was confirmed by the probate court. The judge of the probate court was a witness, and testified in the case.

The administrator testified that Bryant bid the $3,550; was trying to get a Federal loan to help pay for the land, and that he arranged the terms of payment satisfactory to Mr. Bryant. That Bryant never made any excuse to him for not accepting the Federal loan other than that his wife would not sign the papers; that he had been ready and willing at all times to perform his part of the contract in regard to the sale of the lands; that the deed and abstract had been brought down to

date, and everything fixed ready to close the deal up, and everything signed by the court and ready to close up.

We think that the fact that the judge was present and testified; that the administrator testified that everything was signed up by the court; the fact that Bryant was making an effort to get a loan, and the fact that he took and retained possession of the property, are sufficient to show that the provisions of the law were complied with, and that the sale was made as contended by the appellee, and was approved by the court.

The probate judge testified that, at the first sale, Bryant purchased the land for $3,550, and that it was resold on account of an error in the description. He also introduced a statement signed by Bryant himself, which was as follows: "I hereby agree that, if the administrator will resell said property purchased by me, perfect the title so that the loan company will accept the deed and title, I will repurchase the property for the sum of $3,550."

We think this clearly shows that he not only purchased it at the first sale, but he agreed to repurchase it; the circumstances show that he would repurchase it, and the defect in the title was merely a misdescription, and the proof conclusively shows that the title was perfect.

This court has several times held, however, that an administrator's sale to raise money to pay debts is a judicial sale, and that the rule of *caveat emptor* applies. That is, the purchaser acts at his peril. He gets just such title as the administrator was able to give. However, this question is not now involved, but it is merely a circumstance tending to show the conduct and agreement of the parties, and, we think, has some tendency to corroborate the evidence that the sale was confirmed by the probate court.

While the administrator must show that the order of sale was made by the probate court and that the sale was confirmed by the probate court, yet the admissibility and sufficiency of evidence on this question are governed by the general rule of evidence.

It has been said: "The rule has long been sanctioned, in regard to public sales, that, where the vendee becomes bound for the purchase, as by having the article struck off to him as the highest bidder, and refuses to complete the purchase, the vendor may resell and hold the purchaser responsible, in case of deficiency of the purchase money upon the resale, for the difference between the two sales." 24 C. J. 647; and *Mount* v. *Brown,* 33 Miss. 566.

It is true that the purchaser is under no obligation to pay the price unless the sale has been confirmed; but, as we have said, the complaint alleged that it had been confirmed; the circumstances and evidence are sufficient, we think, to show that it had been confirmed, and especially the fact that appellant made no contention and asked no questions, and offered no proof in the lower court with reference to the failure to have the sale confirmed.

It has been said that the order confirming the sale need not be formal or need not be made in any precise form of words. Anything which expresses the approbation of the court is sufficient. 24 C. J. 556.

Again, appellant's conduct in undertaking to borrow money, in stating that his failure to do so was because of the refusal of his wife to sign, the taking and retaining possession of the property, are all inconsistent with appellant's claim that there was no confirmation of the sale.

"One who might otherwise successfully attack a sale may be estopped from so doing, the principles governing such estoppel being practically the same as those applying to estoppel generally. Thus, one will not be heard to object to the regularity of proceedings had on his own application, instigation, or consent, or which he has aided in carrying into effect. Neither will one be heard to complain of defects for the existence of which he is himself responsible." 24 C. J. 661.

"The purchaser cannot, while he retains possession of the property, resist payment of the purchase money,

or otherwise repudiate the burdens arising from the purchase because of defects in the sale or proceedings leading up thereto.'' 24 C. J. 663.

The evidence in this case shows that the appellant has possession of the property, and, as we have already said, is sufficient to justify the court in finding that the sale was confirmed by the probate court.

We therefore conclude that the decree of the chancery court is correct, and it is affirmed.

PASSWATER CHEVROLET COMPANY *v.* WHITTEN.

Opinion delivered October 22, 1928.

A. F. Auer, for appellant.

McHANEY, J. Appellee instituted this action in replevin to recover the possession of one Chevrolet Sedan

automobile from appellants under the following circumstances: On February 12, 1927, appellee purchased from appellant, Passwater-Chevrolet Company, hereinafter called the company, the car in question, at a price of $888, $350 of which was paid in cash, and the remainder, $538, was payable in 12 equal monthly installments of $44.84, beginning March 12, 1927. This sale was evidenced by a written conditional sale contract, on a form provided by the General Motors Acceptance Corporation, hereinafter called the corporation, to whom the contract was sold and assigned by the company by unrestricted indorsement. This contract provided that "title to said property shall not pass to the purchaser until said amount is fully paid in cash," and that "the assignee shall be entitled to all the rights of the seller." It also provides that, upon default in the payment of any installment when due, at the option of the seller, the full amount shall immediately become due and payable; that time is of the essence of the contract; that the seller may repossess the property without demand and sell the same at public or private sale, with or without notice to the purchaser, and many other provisions too numerous to set out herein. Appellee made four payments—March, April, May and June. He defaulted in the payments due July 12 and August 12, and, early in September, Mr. Passwater had a conversation with him in which he advised appellee that the corporation had instructed him to repossess the car. That afternoon, Thursday, September 8, appellee brought the car to the company's store room and voluntarily surrendered it. On Saturday following the agent of the corporation came. He required the company to make good its indorsement of the conditional sales contract by paying the corporation the balance due thereon. Shortly thereafter the company sold the car to appellant Stuart, and at the time of the sale, or shortly thereafter, appellee gave the key to the car to said Stuart. A few days later he went to the company with his attorney, tendered the balance due, demanded the car, and was told that the car had already been sold

to Stuart, a fact which appellee knew, for he testified that he gave Stuart the key to the car after it was sold to him.

Appellants requested a directed verdict in their favor, which the court refused. The court, on its own motion, instructed the jury, over the objection of appellants, "to find a verdict for defendants for the car in controversy, and to find the amount which may be due by the plaintiff to the defendants for the purchase money upon the contract under which the car was purchased."

The jury returned this verdict: "We, the jury, find for the defendants for the car in controversy, and find that the plaintiff is due the defendants purchase money herein in the sum of $358.72. A. L. Keith, foreman."

Based on this verdict, the court entered a judgment that appellants were entitled to the car in question, and that appellee have ten days from that day to pay into the registry of the court the $358.72, plus interest from date of judgment and accrued costs.

From that part only of the judgment allowing appellee to deposit the balance due and redeem the car, this appeal is prosecuted. It is conceded by appellants that the court correctly instructed the jury to find in their favor for the car in controversy. Evidently the court held appellants were rightfully in possession of the car, but thought appellee had the right to redeem from them by virtue of § 8654a, C. & M. Digest. That section reads as follows:

"In any action in a justice court or circuit court of this State, where it is attempted to foreclose any mortgage, deed of trust, or to replevy, under such mortgage, deed of trust or other instrument, any personal property, the defendant or defendants in said action shall have the right to prove or show any payment or payments or set-off under such said mortgage, deed of trust or other instrument, and judgment shall be rendered for the property or the balance due thereon, and the defendant may pay the judgment for the balance due and costs within ten days and satisfy the judgment and retain the property. Act May 23, 1901, p. 303."

Clearly this section has no application to this controversy. The plaintiff in the court below was not attempting "to foreclose any mortgage, deed of trust, or to replevy, under such mortgage, deed of trust or other instrument, any personal property." He brought replevin, it is true, but not under "any mortgage, deed of trust or other instrument." He brought it on a complaint and affidavit alleging that he was the owner of the car and entitled to the immediate possession thereof under a conditional sales contract, which he admits he had breached, and had voluntarily surrendered the possession of the car to the rightful owner. Had he kept possession of the car and refused to surrender it to appellant company, and it had brought replevin, then this section would be applicable. *Shaffstall* v. *Downey,* 87 Ark. 4, 112 S. W. 176; *Hollenberg Music Co.* v. *Barron,* 100 Ark. 403, 140 S. W. 582, 36 L. R. A. (N. S.) 594, Ann. Cas. 1913C, 659; *Wilson* v. *McCown,* 103 Ark. 422, 147 S. W. 451; *Strode* v. *Holland,* 150 Ark. 122, 233 S. W. 1073; *Fore* v. *Chenault,* 168 Ark. 747, 271 S. W. 704.

Under the facts in this case appellee cannot maintain replevin. It is undisputed that he voluntarily surrendered the car to the company and permitted same to be sold to appellant Stuart, and thereafter turned over the key to the car to said Stuart. Therefore, whatever interest or right he had in the car was voluntarily surrendered. The legal title to the car was retained in the conditional sales contract, and passed to the corporation, and when the company made good its indorsement and paid the corporation the balance due on the car, the legal title passed back to the company. "Property in defendant is a good defense in an action of replevin, and this is ordinarily true whether it be an absolute or a special or qualified property in the goods which are the subject-matter of the litigation." 34 C. J. 1414.

In order to maintain an action to recover the possession of personal property, or to recover damages for the conversion of such property, plaintiff must show title in the property so wrongfully taken or converted. *Secur-*

ity Bank & Trust Co. v. *Bond,* 132 Ark. 592, 201 S. W. 820.

In *Brown & Hackney* v. *Loveless,* 152 Ark. 541, 239 S. W. 23, it was said: "Replevin cannot be maintained without showing a general ownership of the property in the plaintiff, together with the right of immediate possession."

Since appellee has surrendered the car and permitted same to be sold to an innocent purchaser, he lost whatever general or special ownership he had in the property, together with the right to the immediate possession thereof, and therefore is precluded from maintaining this action. The judgment of the circuit court is therefore reversed, and the cause dismissed.

[redacted]

BOYLE *v.* REYNOLDS.

Opinion delivered October 22, 1928.

[redacted]

Edward Gordon, for appellant.

Strait & Strait, for appellee.

McHANEY, J. Appellant, Elmer and Lee Boyle are children and heirs at law of J. M. Boyle, deceased, by his second wife, and the appellees are his children and heirs at law by his first wife. At the time of his death, J. M. Boyle was the owner of some land and a small

amount of personal property in Conway County, Arkansas, and left surviving him both sets of children and his widow. The widow took as her homestead and dower interest all the land he owned, as also all the personal property, which was not in excess of $450 after payment of his debts and funeral expenses. The widow died in March, 1925, and at the time of her death she had rented the land for that year to appellant and Elmer, who continued to occupy the land for the years 1926 and 1927.

This suit was instituted to have the land partitioned, and for an accounting against appellant and Elmer Boyle for the rents and profits for the years 1926 and 1927. In the course of the trial it was admitted that "the occupancy of this property by Elmer Boyle and Luther Boyle, since the death of the widow in March, 1925, has been without any contract for the payment of rent, and it is agreed that they are liable for reasonable rent for the two years, 1926 and 1927, and that they are still not holding or in possession as administrators, and that the usual rent of one-third of the corn and one-fourth of the cotton and cottonseed is reasonable."

It appears that of the 1925 crop Elmer Boyle stored eight bales thereof for about a year in a warehouse, and incurred an expense of $58.50 for storage and insurance. It further appears that Elmer Boyle was due the estate $152.33 for rent for the years 1925 and 1926. It also appears that appellant had acquired Elmer Boyle's interest in said land prior to the rendition of the decree herein.

The court found that Elmer Boyle was indebted to the estate in the sum of $152.33, which should be charged against his interest in the hands of appellant because of his purchase thereof. The court further found that the land was not susceptible of division in kind, and ordered same sold and distributed to the heirs according to their respective interests, after deducting from the Elmer Boyle interest the amount of the rent due as aforesaid.

It is not contended on this appeal that the court did not correctly find the amount of the rent due by Elmer Boyle to the estate. It is said that he had no right to charge the interest in the land in the hands of Luther with this amount, and it is further said that the amount Elmer was due the estate should be credited with the $58.50 storage and insurance on that part of the 1925 crop stored by him. We do not agree with appellant in either contention. It is undisputed that Elmer Boyle owed the estate this amount of rent, and it is undisputed that appellant knew this fact when he purchased his brother's interest in such real estate. We therefore agree with the trial court that it was proper to charge the interest of Elmer Boyle in the hands of Luther with the amount of such rent. Under these circumstances he could not be said to be an innocent purchaser of his brother's interest.

Neither was it error not to deduct the $58.50 from the amount of such indebtedness. Appellant and his brother stored this cotton in the hope of getting a better price for it. It was their cotton, and they had the right to do with it as they pleased, subject to the payment of the rent. It was their individual liability incurred, through a desire to get an advance over the then prices of cotton, which they believed might be realized by holding it for such advance. Unfortunately the price of cotton went down instead of up.

We think the decree of the chancellor was correct, and it is in all things affirmed.

DUMAS *v.* CROWDER.

Opinion delivered October 22, 1928.

Pat McNalley and *Jordan Sellers*, for appellant.

Eugene H. Murphy and *Francis T. Murphy*, for appellee.

MCHANEY, J. This is a suit to reform a written instrument conveying to appellee by appellants an interest in the royalty in the mineral rights reserved and to be reserved in the southwest quarter of the northeast quarter of 11-17-14, Union County, Arkansas. It is alleged that appellant, G. C. Dumas, was the owner of the above described land, on which he had given a commercial oil and gas lease to one J. A. Rowland, by which he reserved a 1/8 royalty interest in the oil and gas produced therefrom; that appellant, Dumas, offered to sell, and appellee purchased, in March, 1922, for a consideration of $200, an undivided ½ interest in and to said royalty, with respect to the southeast quarter of the said 40 acres, subject to the Rowland lease, which would be a 1/16 interest in all the oil and gas and other min-

erals in and upon said 10 acres of land, subject, however, to the Rowland lease; that the scrivener who drew the deed of conveyance was unfamiliar with oil field conveyancing and with the technical terms used in connection therewith, and that in drawing said instrument so prepared it as to convey to appellee an undivided 1/16 of the royalty reserved under the Rowland lease and subject thereto, which constituted only a 1/128 of the total production from said land, instead of a 1/16 of the total production as agreed upon; that the Rowland lease expired by limitation on November 4, 1924, and that on January 8, 1927, all the persons then interested in the land joined in a lease to one Jasper N. Smith for a consideration of $800, the lessors reserving as rental therefor an undivided 1/8 of all the oil, gas or other minerals to be produced therefrom, which lease was by the said Smith assigned to the Magnolia Petroleum Company, and that appellee was entitled to $100 of the purchase price of $800, but was only paid $12.50 therefor; that, at the suggestion of the Magnolia Petroleum Company, appellee conveyed to appellant, Dumas, the royalty interest described in said deed, because his interest covered a small tract of ten acres, and accepted from Dumas a deed covering the entire forty-acre tract, but only ¼ as great an interest therein; that appellant, G. C. Dumas, joined by M. L. Dumas and Olive E. Dumas, conveyed to plaintiff an undivided 1/64 interest in the minerals in and upon said 40-acre tract, but subject to the Smith lease, but that he should have conveyed, and, under the agreement, was bound to convey an undivided 1/8 interest in and to all the mineral royalty reserved and to be reserved under the Smith lease, which would have been equivalent to an undivided 1/64 of the total production of minerals from said land during the lifetime of said lease; or what is commonly known as a 1/64 royalty, and that he was led to believe that he was getting a 1/64 royalty, but, by virtue of a mutual mistake and a lack of knowledge on their part as to how said deed should have been drafted so as to convey said

interest, it was actually drawn so as to convey to appellee a 1/64 of the 1/8 royalty reserved, which would be equivalent to a 1/512 of the total production from said land, or only 1/8 as great an interest as they had in fact agreed to convey to him. In other words, it is charged that in the first agreement under the Rowland lease he was to get a ½ undivided interest in a 1/8 royalty in ten acres, or a 1/16 of the oil in ten acres, which would be the equivalent of a 1/64 interest in the minerals of forty acres.

He further alleged that he was a railroad trainman, and wholly unfamiliar with conveyancing; that he accepted the deeds, thinking he was getting the exact interest to which he was entitled, and which he and appellant, Dumas, had agreed upon. The deed to his royalty interest under the Rowland lease passed out of the case by limitation, and it is the deed to the royalty interest under the Smith lease that is sought to be reformed. The chancellor found, after an extended hearing, that the latter deed was a proper subject of reformation, and entered a decree reforming it in accordance with the agreement of the parties. A final decree was rendered on December 8, 1927, in which appellant was allowed 120 days to prepare and file his bill of exceptions. He failed to prepare and file his bill of exceptions within the time allowed by the court, and, on motion of appellee in this court, all the oral testimony has been stricken from the record. Appellants now say that there remains only one question for this court to consider, and that is, whether the complaint states a cause of action against any or all of the defendants. Appellants cite *Rowe* v. *Allison*, 87 Ark. 206, 112 S. W. 395, and quote therefrom the following:

"There is no oral testimony before the court, and there are no recitals of evidence in the judgment, and therefore a conclusive presumption must prevail that the evidence sustains the decree of the court, so far as it is possible for a decree based on the complaint to be sustained by evidence. If the decree is without the

issues, or the complaint does not state a cause of action, this presumption cannot aid the appellee. *Jones* v. *Mitchell,* 83 Ark. 77, 102 S. W. 110. Where the decree is not responsive to the issues, it is void. *Rankin* v. *Schofield,* 81 Ark. 440, 98 S. W. 674; *Cowling* v. *Nelson,* 76 Ark. 146, 88 S. W. 913."

Appellants say that the complaint herein does not state a cause of action against any of the appellants. We cannot agree with counsel in this contention, except as to M. L. Dumas and Olive E. Dumas, who should be eliminated from the second deed of appellant, G. C. Dumas, to appellee, as reformed by the chancery court. Both parties agree that they should be eliminated from this deed, and we concur with this agreement. The deed referred to is Exhibit B to the complaint.

In this case appellants did not demur to the complaint. They filed an answer, thereby treating the allegations of the complaint as sufficient to put them to answer. They are therefore asserting for the first time, in this court, that the complaint does not state a cause of action. As said by this court in *Cohn* v. *Hager,* 30 Ark. 25: "If the defendant had doubted the sufficiency of the pleadings, he should have demurred, and brought the question of its legal sufficiency before the court; but, instead of this, he has treated them as sufficient in law to put him to answer, and, having answered, and gone to trial upon the issue formed, even if the pleadings were technically insufficient, the question cannot for the first time be raised in this court."

In *Morning Star Mining Co.* v. *Bennett,* 164 Ark. 244-253, 261 S. W. 639, it is said:

"Various questions are raised about the sufficiency of the allegations of both the complaint and the cross-complaint to raise the issues here reviewed; but, without setting out these pleadings, it suffices to say that the testimony developed the issues we have discussed, and this testimony was taken without objection on either side, and, if the pleadings are not otherwise sufficient to raise

these issues, they must be treated as amended to conform to the testimony taken without objection."

In *St. Louis Southwestern Ry. Co.* v. *Tucker,* 161 Ark. 140, 255 S. W. 553, this court held that, where plaintiff's testimony made out a case for damages, judgment therefor will not be reversed because he defectively stated his cause of action and the measure of his damages, in the absence of a demurrer or motion to make his complaint more specific.

We therefore find it unnecessary to discuss the several questions raised in appellant's brief regarding the sufficiency of the complaint. There is no oral testimony before the court, although the decree recites it was heard on oral testimony, the bill of exceptions having been stricken from the record. The decree of the court is not without the issues raised by the complaint and the answer. Clearly the complaint states a cause of action for reformation, and, even if it be admitted that it is defectively stated, still there is a conclusive presumption that the evidence sustains the decree, and this court will treat the complaint as being amended to conform to proof.

The decree of the chancery court will therefore be modified in accordance with the agreement of counsel by the elimination of M. L. Dumas and Olive E. Dumas from the deed as reformed, same being Exhibit B to the complaint, and, as modified, will be affirmed. It is so ordered.

MISSOURI PACIFIC RAILROAD COMPANY *v.* YANCEY.

Opinion delivered October 29, 1928.

[redacted]

[redacted]

E. B. Kinsworthy, for appellant.

E. P. Toney, N. B. Scott and *Golden & Golden,* for appellee.

HART, C. J., (after stating the facts). The first assignment of error is that the testimony is not legally sufficient to warrant the verdict. In this contention we cannot agree with counsel. The question whether White, as alleged by the plaintiff, was acting within the general scope of his authority as a special agent for the defendant company, was one of fact. To warrant a submission of the question to the jury, the evidence for the plaintiff, when viewed in its most favorable light, must be sufficient to make it appear that the false arrest was caused by an agent acting in the scope of his authority. *Dickinson* v. *Muse,* 135 Ark. 76, 204 S. W. 609. White testified that he had authority to arrest persons in the

yards of the railroad company who were interfering with railroad property. Yancey testified that, after he had arrested him, White told him that he was arresting him because some one had broken into a box-car of the defendant a few nights previously, and that he was suspected of being that party. Notwithstanding White's denial of this and his testimony to the effect that he had arrested Yancey at the request of the marshal of McGehee as one suspected of burglarizing some houses in McGehee a few nights previously, the jury was warranted in returning a verdict in favor of the plaintiff. The testimony of the plaintiff was of a substantial character, and, if believed by the jury, showed that the plaintiff was arrested by White because he was suspected of having broken into a box-car of the defendant a few nights before, and it turned out that the plaintiff had nothing to do with that crime. He was kept in confinement in the city jail from about 11:30 one night until about 6 o'clock the next afternoon, when he was turned out by the city marshal because it had been ascertained that the plaintiff had nothing to do with breaking into the box-car of the defendant.

The next assignment of error is that the court erred in submitting to the jury the question of punitive damages, and in this contention we think counsel is correct. Actual damages are given to compensate a person for an injury done when none was intended, or, in other words, where the injury was the result of the negligence of the defendant in the action. In such a case the injured party is entitled to recover for the pain and suffering experienced by his false imprisonment, any illness caused by it, the sense of shame and disgrace endured by him, and any other element which was the natural consequence of the injury the plaintiff received by the treatment of the defendant. On the other hand, exemplary damages will not be awarded in this State on account of negligence alone, however gross. *Ward* v. *Blackwood,* 41 Ark. 291, 48 Am. Rep. 41; *St. Louis S. W. Ry. Co.* v. *Owings,* 135 Ark. 56, 204 S. W. 1146; *Hodges* v. *Smith,* 175 Ark. 101, 298 S. W. 1023.

According to these cases, to justify an award for punitive damages there must be malice, express or implied, or some element of willfulness or wantonness.

The general rule is that exemplary or punitive damages will never be allowed where the false imprisonment was brought about in good faith, without malice in fact or in law, and there is no element of wantonness or recklessness on the part of the party making the arrest. 25 C. J. 565; and 11 R. C. L., § 36, page 821. Tested by this rule, we do not think there is any testimony in the record which would warrant the submission of punitive damages to the jury. There is nothing whatever from which the jury might legally infer that White was actuated by malice, express or implied, in arresting the plaintiff. The plaintiff was accompanied by another person who had been charged with stealing cigarettes from a box-car of the railroad company, and the occasion was quite out of the ordinary. The arrest was made in the yards of the company, at 11 o'clock at night, which was an hour when no person was likely to have any business there. White was charged with the duty of protecting the property of the railroad company, and was in the discharge of his duties at the time he made the arrest. As soon as he arrested the plaintiff, he carried him to the depot, some two hundred yards away, and at once delivered him to the night marshal. He had nothing further to do with the matter. The arrest was not accompanied by any abuse or any act of cruelty or oppression. All the accompanying circumstances show that White acted in good faith, and we can find no element of punitive damages in the whole transaction. Therefore the court erred in submitting the question of punitive damages to the jury. For that error the judgment must be reversed, and the cause remanded for a new trial.

STATE *v.* DAVIS.

Opinion delivered October 29, 1928.

H. W. Applegate, Attorney General, and *J. S. Abercrombie,* special counsel, for appellant.

J. P. Clayton and *Evans & Evans,* for appellee.

HART, C. J., (after stating the facts). The Legislature of 1923 passed an act, at a special session, for the collection of certain license fees from automobile owners by the sheriff of each county in the State, and, under § 42 of the act, it made it the duty of the sheriff to pay into the State Treasury, to the credit of the State Highway Commission, all moneys received by him under the provisions of the act. Acts of Arkansas, 1923, Special Session, act 5, p. 11. Under § 44 of the act, the official bondsmen of such sheriff are liable for the faithful performance of his duties under the act. Section 5166s and § 5166t, Castle's Supplement to Crawford & Moses' Digest, pp. 316 and 317.

The record shows that the sheriff deposited the automobile license taxes collected by him for the month of January, 1926, in the People's Bank of Ozark, without any express authority to do so, and that the funds so deposited were lost on account of the insolvency of the bank. The sheriff had no knowledge of its insolvency at the time the deposit of the automobile license taxes was made in the bank by him. The sheriff and his bondsmen were relieved from the payment of this money by act 42, passed by the Legislature of 1927. Acts of 1927, page 121. The constitutionality of this act is challenged by the State, and it is also claimed that the transaction under consideration did not fall within the terms of the act. Section one of the act reads as follows:

"The Governor shall have power to relieve any public officer in this State, and the bondsmen of such public officer, from the payment of any public funds which said officer may have on deposit in any bank in this State that has been officially designated as a State or county depository, that is now or may hereafter become insolvent. The action of the Governor in relieving any public officer or bondsmen from personal loss in this respect shall in no way relieve the bank from accounting for said funds."

There is a conflict in the authorities as to whether a public officer who loses money by failure of a bank in which are public funds intrusted to his care may be

relieved of liability therefor by the Legislature. Cooley on Taxation, 4th ed., § 196. In this State it has been held that, where a public officer has lost public funds without any fault on his part, he may be reimbursed or relieved from liability therefor. *Pearson* v. *State,* 56 Ark. 138, 19 S. W. 499, 35 Am. St. Rep. 91; *Newton County* v. *Green,* 104 Ark. 270, 149 S. W. 73, Ann. Cas. 1914C, 491; and *Bauer* v. *North Arkansas Highway Improvement District No. 1,* 168 Ark. 224, 270 S. W. 533, 38 A. L. A., 1507. It has become the well-settled rule in this State that the Legislature has the power to pass an act relieving a public officer from liability, where public money has been lost without any fault on his part.

In *Miller* v. *Henry,* 62 Ore. 4, 124 Pac. 197, 41 L. R. A. (N. S.) p. 97, the Supreme Court of the State of Oregon said that the weight of authority as well as the better reason is to the effect that the Legislature possesses the power to cancel liability of officers for money lost by them, when such loss was not occasioned by their unfaithfulness or willful misconduct.

It is next suggested that the act in question is open to objection because it is a delegation of legislative power. While it is a doctrine of universal application that the functions of the Legislature must be exercised by it alone, and cannot be delegated, it is equally well settled that the Legislature may delegate to executive officers the power to determine certain facts, or the happening of a certain contingency, on which the operation of the statute is by its terms made to depend. 12 C. J. 846, and 6 R. C. L., paragraph 165, p. 164. This principle has been frequently recognized by this court. *Harrington* v. *White,* 131 Ark. 291, 199 S. W. 92; *Howard* v. *State,* 154 Ark. 430, 242 S. W. 818; and *Summers* v. *Road Improvement District No. 16,* 160 Ark. 371, 254 S. W. 696.

If the law is mandatory in all it requires and all it determines, it is a legislative act, although it is put into operation by officers or administrative boards selected by the Legislature.

In *Locke's Appeal,* 72 Penn. St. 491, 13 Am. Rep. 716, Mr. Justice Agnew, speaking for the court, said:

"Then, the true distinction, I conceive, is this: The Legislature cannot delegate its power to make a law, but it can make a law to delegate a power to determine some fact or state of things upon which the law makes, or intends to make, its own action depend. To deny this would be to stop the wheels of government. There are many things upon which wise and useful legislation must depend which cannot be known to the law-making power, and must therefore be a subject of inquiry and determination outside of the halls of legislation."

In the case at bar the Legislature passed a law for the relief of public officers named therein, and provided that the Governor might examine and look into the facts as a part of the enforcement of the law, and the granting of the authority to him was not a delegation of legislative power. The power was given to him as an incident to his duties as Governor; but the Legislature might have given to any other board or officer of the executive department of the State the power to ascertain the facts in the case as a basis for putting the law into operation. Hence we are of the opinion that the act is not open to the objection that it is a delegation of legislative power to another department of the government and on that account in violation of our Constitution.

Again, it is insisted that the Legislature only intended for the act to operate where a public officer had deposited State funds under the statute in a State depository with a bond for the protection of said funds, or had deposited county funds in a county depository under like circumstances. When the object and purposes of the act are considered, we think this is too restricted a construction to give to the language used by the framers of the act. The act provides that the Governor shall have power to relieve a public officer from the payment of public funds which the officer may have on deposit in any bank in this State which has been officially desig-

nated as a State or county depository. The Legislature evidently had in mind to give the Governor the power to relieve any public officer from liability when he had deposited the funds in a bank which had been officially designated as a State or county depository, regardless of the fact whether such officer had been expressly given the power to deposit such funds in the bank. In other words, the Legislature meant to say that a bank which had been designated officially as a State or county depository was such a bank as an officer was entitled to place confidence in, and the officer could not in any sense be said to be negligent in depositing the public moneys in it.

Under our former decisions on the subject, where money has been lost without the fault or carelessness of the public officer on account of having been deposited in a bank which became insolvent, the Legislature has power to relieve such officer from liability. The Legislature, in the act in question, evidently intended to give the Governor the power to find out whether there had been negligence on the part of the public officer where he had deposited the money in a bank which had been officially designated as a State or county depository. The fact that the bank had been officially designated as a State or county depository for other funds would give it the stamp of official approval, and by depositing the money there the public officer might relieve himself from any negligence in the selection of the bank; therefore we are of the opinion that the proclamation of the Governor, under the terms of the act in carrying out the provisions of the Legislature, had the effect of relieving the sheriff and his bondsmen from liability for the payment of the funds in question. The judgment is therefore affirmed.

SMITH, J., dissents.

ALFORD *v.* PRINCE.

Opinion delivered October 29, 1928.

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Nelson & Crawford, for appellant.

Frank C. Douglas, for appellee.

HART, C. J., (after stating the facts). This is the second appeal in the case. *Prince* v. *Alford*, 173 Ark. 633, 293 S. W. 36. Upon the former appeal the court said that, while the lease did not require Alford or Reeves to construct a new building, it did convey to Prince the lot upon which the new building was erected for the term of two years, and that he had a right of possession of the whole lot for that period of time, and was entitled to the possession of any new building or buildings erected on the lot upon the payment of a rental of $50 per month. The effect of the decisions upon the former appeal was that Prince was entitled to the whole lot and the building or buildings erected on it by Reeves, regardless of their size. Alford and Reeves could not require him to accept a new building of the same size as the one which had been torn down and relinquish his right of possession of the remainder of the lot.

The testimony upon the present appeal is substantially the same as that upon the former appeal, and what was said upon the former appeal becomes the law of the case. It was there said that, if Reeves took title to the lot with notice of the lease, he was jointly liable with Alford for any damages resulting from the breach of the contract.

Upon the present appeal the court submitted to the jury the question whether or not Reeves took title to the lot without notice of the lease, and the jury found against Reeves on this point. The individual liability of Alford is shown by the undisputed testimony. In other words, according to the interpretation of the terms of the lease upon the former appeal, Prince was entitled to the possession of any new building or buildings upon the lot in question for two years, at a rental of $50 per month. In the present appeal there is no testimony tending to excuse Alford's breach of the lease contract. Hence, under the undisputed evidence, Prince was entitled to recover from him the sum of $100 per month for two years, less the $50 per month which he had agreed to pay as rent. This would amount for two years to the sum of $1,200, as found by the jury.

The jury having found, upon conflicting testimony, that Reeves had actual knowledge of the provisions of the lease at the time he purchased the lot in question, he was jointly liable for the difference between the agreed rental of the lease and the amount that Reeves actually received for the rent of the new building or buildings. This, as we have already seen under the undisputed evidence, amounted to $1,200. Therefore the judgment will be affirmed.

BRENARD MANUFACTURING COMPANY *v.* PATE.

Opinion delivered October 29, 1928.

O. A. Featherston, for appellant.

Pinnix & Pinnix, for appellee.

SMITH, J. Appellant brought suit in the Pike Circuit Court against appellees, on a contract for the sale of a radio outfit and certain accessories amounting to $305.

Appellees answered, and alleged that, under the contract sued on, they had executed to appellant's order five notes for the sum of $55 each and a sixth note for $30. That on November 30, 1925, the Security Finance Company brought suit on four of the $55 notes, as the owner thereof, in the court of a justice of the peace of Pike County, alleging that it was the owner of said notes, and that the same were unpaid. Appellees answered in the justice court, and alleged that the execution of the notes sued on had been procured by fraud, and that there was no consideration for them. The issue joined was heard by the justice of the peace, who, on November 30, rendered judgment in favor of the defendants. From this judgment of the justice of the peace an appeal was duly prosecuted to the circuit court

of Pike County. It was further alleged and shown that on January 20, 1926, the Security Finance Company brought suit on the fifth note for $55 and the $30 note, before another justice of the peace of the county, and that the same defense was interposed by the defendants, and on the trial before the justice of the peace a judgment was rendered in favor of the defendants. From this judgment of the justice of the peace an appeal was duly prosecuted to the circuit court of Pike County.

At the ensuing term of the circuit court the plaintiff, Security Finance Company, took a nonsuit in each of these appeal cases, and they were dismissed at plaintiff's cost.

The authority of the Security Finance Company to sue on the notes in the courts of the justices of the peace is not questioned, and, the identity of the present case with that of the two suits before the justices being shown, the judge directed the jury to return a verdict for appellees, on the theory that the justices' judgments were a bar to the present suit, and the correctness of this ruling is the question presented by this appeal.

For the reversal of the judgment of the court below it is insisted that, after the appeal to the circuit court, the suits of the Security Finance Company had the same status as if originally begun in that court, and inasmuch as the statute (§ 1261, C. & M. Digest) gives the plaintiff the right to dismiss his action without prejudice to a future action "before the final submission of the case to the jury or to the court," the right existed, before the submission of the justice appeals to the court or jury, to dismiss those cases without prejudice to a future action.

We do not concur in this view, for the reason it does not give proper effect to the judgments of the justices of the peace. The justice courts had jurisdiction of the causes brought in them, and judgments were rendered which adjudicated the rights of the parties, and these judgments were effective and valid until they were set aside in some manner provided by law.

It is true that, on appeal from the judgment of a justice of the peace to the circuit court, the cause is tried *de novo;* but it is true also that the nonsuits taken in the circuit court amounted to dismissals of the appeals, and, when that was done, the judgments of the justices of the peace were left in force as if no appeals had been taken.

The case of *Burgess* v. *Poole,* 45 Ark. 373, rules this. There Burgess and Poole had separate mortgages upon a crop of cotton produced by Williams, who brought replevin before a justice of the peace against Burgess for four bales of the cotton. Poole, on his own application, was admitted as a party to the suit, and, judgment having been given for Burgess, Poole appealed to the circuit court. Subsequently, and before any disposition had been made of this appeal, Poole instituted suit in replevin against Burgess before another justice of the peace for the identical cotton. This last-mentioned action also found its way into the circuit court by appeal, and was there determined in favor of Poole. The opinion recites that it was not shown what had become of the first appeal, but that it had probably been dismissed, either upon Poole's own motion or for want of prosecution, before the trial in the second appeal. It was said:

"If this be so, the obvious effect was to leave the judgment of the justice of the peace in full force, the same as if no appeal had been taken." It was there further said: "But, whether dismissed or not, the judgment of the justice of the peace stands until it is set aside by a superior court. The grant of an appeal did not impair it. Nor did it revive Poole's original cause of action, which had been destroyed by merger, so as to enable him to maintain an independent suit upon it. Burgess, if sued again for the same matter, during the pendency of the appeal, might plead the former judgment in bar. (Citing cases). It was an issue in the present action that the matter in controversy was *res judicata.* Burgess filed in the circuit court a plea of former suit pending between the same parties and in-

volving the same subject-matter, and on the trial he read in evidence the docket entries of the justice in the first action, showing the facts above recited.

"If Poole had kept aloof from the litigation between Williams and Burgess, he would not have been concluded by any judgment therein. Being a stranger to the proceeding, he might have sued out his writ of replevin for the same property without waiting for the determination of that suit. *Hagan* v. *Deuell,* 24 Ark. 216. But, having voluntarily come in, he is bound by the result, as much as if he had been an original party."

It is true the instant case was not brought until after the nonsuit had been taken in the circuit court, but, as was said in *Burgess* v. *Poole, supra,* "the obvious effect (of a nonsuit) was to leave the judgment of the justice of the peace in full force, the same as if no appeal had been taken." There was therefore, at the time the instant case was begun, two outstanding judgments of the justices of the peace adjudicating that the notes which formed the consideration for the contract sued on were without consideration.

In the case of *Denver & R. G. R. Co.* v. *Paonia Ditch Co.,* 49 Colo. 281, 112 Pac. 692, the facts were that a judgment was rendered in favor of the defendant railway company in a suit against it by the plaintiff ditch company. On the appeal to the circuit court, the ditch company was granted leave to dismiss its action without prejudice. It was contended that this right existed under the section of the Code of Civil Procedure of the State of Colorado, where the action originated, similar to § 1261, C. & M. Digest, which gives to the plaintiff the right to dismiss his action at any time before trial, upon payment of costs, if a counterclaim had not been made. No counterclaim had been made in that case, but there had been, as was pointed out by the Supreme Court of Colorado, a trial of the action in the county court, and it was held by the court that the statutes of that State giving the plaintiff the right to take a nonsuit did not give the plaintiff against whom a judgment had been rendered

in the lower court, as the result of a trial there, the right to dismiss his action without prejudice, after he had appealed to the district or superior court. It was there said:

"The spirit of the Code provision, as applicable to the facts of this case, is that the plaintiff may, as matter of right, before trial in the county court, dismiss his action upon payment of costs, if no counterclaim has been made; but an unsuccessful plaintiff is not thereby authorized, after failing in the county court, to appeal to the district court, and, before trial there, dismiss his action without prejudice, over the objection of the successful defendant. The perfecting of an appeal to the district court from a judgment rendered by the county court does not vacate that judgment. It merely suspends its execution till the district court otherwise orders. The action of the district court here is equivalent to an investiture in a litigant of the power in the appellate court to vacate a judgment rendered against him in the court of original jurisdiction, without a trial on the merits, which, in a case like this, resides only in the district court itself."

In so holding it was pointed out that it was to the interest of the State that there be an end to litigation, and that, if the ruling of the district court was sanctioned, it would tend unjustly to prolong litigation and put unrestricted power in the hands of one litigant to harass and annoy another.

We conclude therefore that the court below was correct in holding that the judgments of the justice courts were *res judicata* of the causes of action sued on, and the judgment dismissing the second suit in the circuit court on the same cause of action is therefore affirmed.

FREE *v.* JORDAN.

Opinion delivered October 29, 1928.

Fred M. Pickens, for appellant.

Elmo CarlLee, for appellee.

SMITH, J. Appellant brought suit in replevin in the court of a justice of the peace on October 31, 1927, to recover possession of a certain dog. Judgment was rendered in his favor by the justice of the peace, but, at the trial on the appeal in the circuit court, before a jury, a verdict was directed against him, on the ground that his cause of action was barred at the time the suit was brought.

Appellant testified that he owned the dog in question, and that he lost it in the summer of 1924 or the early fall of that year. He heard that appellee had the dog, and asked appellee about it, telling him that a Mr. Green had said he might have the dog. Appellee stated that Green was mistaken, and that he did not have the dog. Appellant later found the dog in appellee's posses-

sion, and, when demand was made, appellee claimed he had bought the dog, and refused to surrender it.

Green testified that he found the dog in the summer or early fall of 1924, and told appellee about having it. Appellee saw the dog while it was in Green's possession. The dog disappeared, and witness had not seen it since.

John Adams testified that he saw the dog at appellee's home, and recognized it as the dog of Arthur Johnston. Appellant testified that he had bought the dog from Arthur Johnston.

The trial court was correct in holding that a suit in replevin is barred unless brought within three years of the date when the cause of action accrues; but it was held, in the case of *Conditt* v. *Holden,* 92 Ark. 618, 123 S. W. 765, that, where there has been a fraudulent concealment of a cause of action, the statute of limitations does not begin to run until the discovery of the fraud. The case cited was a suit in replevin for the possession of a mule, of which the defendant had been in possession for over four years when suit was brought against him to recover the possession.

The jury might have found in the instant case, from the testimony we have summarized, that appellee had concealed from appellant the fact that he was in possession of a dog which he knew appellant claimed.

We conclude therefore that, as was said in *Conditt* v. *Holden, supra,* the question of ownership, as well as the question of fraudulent concealment from appellant of his right of action, should have been submitted to the jury, with directions to find for appellant if it were found that he was the owner of the dog and that appellee had concealed his possession of it from appellant. See 34 Cyc., title, "Replevin," pp. 1423-1424; *Dee* v. *Hyland,* 3 Utah 308, 3 Pac. 388; *Wells* v. *Halpin,* 59 Mo. 92.

It is urged that there is no proper bill of exceptions presenting the question of fact which we have discussed, for the reason that the caption to the transcript is

entitled: "Pleas before the Hon. S. M. Bone, judge of the Third Judicial Circuit of Arkansas, and before Hon. C. M. Erwin, acting as special judge, * * *" whereas the bill of exceptions was signed by Judge Bone alone.

It is true, as appellee contends, that, where the proceedings occur before different judges, each should sign the bill of exceptions as to the proceedings before him (*Cowell* v. *Altchul,* 40 Ark. 172); but it does not appear that any one presided at the trial except Judge Bone. The certification of the bill of exceptions reads as follows: "I, S. M. Bone, judge of the Third Judicial Circuit of Arkansas, having presided in the trial of the above-entitled cause, and having examined the above bill of exceptions presented to me," etc.

The bill of exceptions appears therefore to be properly certified, and, for the error of directing a verdict in appellee's favor, the judgment must be reversed, and it is so ordered.

ALSUP *v.* STATE.

Opinion delivered October 29, 1928.

Sidney L. Graham and *Cleveland Cabler,* for appellant.

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

SMITH, J. Appellant was convicted of operating an employment agency without procuring a license authorizing him so to do, in violation of act No. 4, Acts Special Session of 1923, page 3.

It is not contended that the act in question was passed as a revenue measure imposing an occupation tax. *Sims* v. *Ahrens,* 167 Ark. 557, 271 S. W. 720. It is insisted that, while the act was passed in an attempt to exercise the State's police power, it is in excess of that power and is violative of the 14th Amendment to the Federal Constitution. The essential provisions of the act are as follows:

Section 1 prohibits the operation or maintenance of a private employment agency for hire without first obtaining a license so to do from the Commissioner of Labor, for which an annual fee of $200 is to be paid. In addition, the Commissioner of Labor shall require of each applicant a bond in the sum of $1,000, conditioned that the licensee will not violate any of the duties, terms, conditions, provisions or requirements of the act, and authority is given to the Labor Commissioner to revoke the license for a violation of the provisions of the act.

Section 2 provides that no labor agency shall be operated until a license has been first obtained, and that the application for the license shall state fully the condition, nature, terms and place of employment for which labor is solicited.

Section 3 requires the agency to keep a register, in which shall be recorded the name and address of all applicants for positions, etc. The agency is prohibited from publishing any false or misleading information, and may not send any person to any place where a strike or other labor trouble exists without notifying the applicant of that fact. No agency is permitted to divide

fees with an employer or an agent of an employer. The agency is prohibited from sending any female to any place kept for immoral purposes. The agency fee for filing or receiving applications or securing employment or help shall in no case exceed the sum of $2, and, if the applicant does not obtain employment within one month after registration, the agency shall, on demand, return the fee; provided, if the applicant is sent beyond the limits of the city in which the agency is located, and, without fault on his part, fails to secure employment, the agency shall return the fee and repay the applicant's actual expenses incurred in going to and returning from the place to which he was sent; or, if the employment lasts less than seven days, the agency is required to return the fee, or such portion thereof as the Labor Commissioner orders.

Section 4 authorizes the Commissioner of Labor to maintain, in sections of the State where the convenience of the greater number of people may be served, a "free employment bureau." The Commissioner of Labor is authorized to cooperate with the Federal Government in the establishment and maintenance of employment bureaus. The Commissioner of Labor is required to keep in touch with employers of labor, and may advertise in newspapers for such situations as they have applications to fill.

Section 5 defines a private employment agency and other terms used in the act.

Section 6 requires the Commissioner of Labor to make an itemized report of his disbursements under the act.

Section 7 provides that any person convicted of a violation of any of the provisions of the act shall be fined not less than $50 nor more than $250 for each offense, or be imprisoned for a period not exceeding thirty days.

Section 8 provides that, if any section or sections of the act shall be held invalid by the courts, "it shall

not thereby be understood as affecting, and shall not affect, the other provisions of this act."

It is unnecessary to determine how much, if any, of § 3 of the act is violative of the Constitution of this State, but it is certain that the part of that section which attempts to fix the fee which the agency may charge for service to the applicant is violative of the 14th Amendment to the Federal Constitution. In the recent case of *Ribnik* v. *McBride,* Commissioner of Labor of New Jersey, 277 U. S. 350, 48 S. Ct. 545, it was so held.

In the case cited the provisions of a similar law of the State of New Jersey, which had been upheld by the Court of Errors and Appeals of that State, were declared to be violative of the 14th Amendment to the Federal Constitution as an arbitrary interference with the right to contract in respect of terms of private employment.

It is conceded by the Attorney General that the provisions of § 3 of the statute of this State relating to the remuneration of an employment agency must fail on account of the decision of the Supreme Court of the United States, *supra,* and we so hold.

But appellant was not charged with violating any provision of § 3 of the act, the charge against him being that he operated an employment agency without a license, and the Supreme Court of the United States, in the case cited, held that the State has power to require a license to regulate the business of an employment agency, and we think that this exercise of the police power does not offend against any provision of our Constitution.

Our statute is a complete one without any of the provisions of § 3, and, as we have stated, § 8 of the act provides that, if any section of the act shall be held invalid, that fact shall not affect other provisions of the act. The validity of such provisions has been frequently recognized by this court. *Nixon* v. *Allen,* 150 Ark. 244, 234 S. W. 45; *Marshall* v. *Holland,* 168 Ark. 449, 270 S. W. 609.

As the act which appellant has violated is valid, although § 3 thereof may be invalid, in whole or in part, it follows that the judgment of the court below must be affirmed, and it is so ordered.

MYERS *v.* SHAIN LUMBER COMPANY.

Opinion delivered October 29, 1928.

Woods & Greenhaw, for appellant.

Shouse & Rowland and *Gaston & Hipps,* for appellee.

HUMPHREYS, J. The questions presented by this appeal are whether a chattel mortgage executed by appellee, Shain Lumber Company, to W. J. Myers, appellant, on the 23d day of February, 1925, secured an existing indebtedness of $5,382.56, by said appellee to said appellant, for money advanced by appellant to it to operate its lumber business in Harrison, Arkansas. Between the dates of October 24, 1924, and February 23, 1925, appellee borrowed on open account from appellant $8,310.56 to operate its business, and paid appellant on said indebtedness during said period $2,927.99, leaving a balance due appellee on book account of $5,382.56. Appellee was unable to pay the indebtedness, and needed additional money from time to time to operate its business. Appellant was willing, if secured, to make further advances to appellee for such purpose, pro-

vided appellant's son was employed to manage the business, except the actual operation of the mill, which W. F. Shain, sole owner of the Shain Lumber Company, continued to do. Pursuant to such arrangement, the mortgage in question and a contract for the management of the business were executed. The mortgage and contract are as follows:

"CHATTEL MORTGAGE WITH POWER OF SALE.

"This indenture, made this 23d day of February, 1925, between the Shain Lumber Company, owned by W. F. Shain, party of the first part, and W. J. Myers, party of the second part, witnesseth that, for and in consideration of the sum of $10,000, the receipt of which is hereby acknowledged, the party of the first part has bargained, sold, granted and conveyed and by these presents hereby bargains, sells and conveys to the party of the second part, executors, administrators and assigns, the following described property, to-wit: Now on lots 1, 3, 5, 7 and 8, in block 8, Fair Ground Addition to the town, now city, of Harrison, Arkansas. Said lands and findings being used by party of the first part to saw and manufacture lumber and saw materials and for the purpose of receiving lumber, lumber materials for manufacture and shipment. Said party of first part has on said lands 2 rip-saws, 2 bolting machines, 4 saws, 1 cut-off saw, 5-horse power motor electric, all belts, 1 gum-saw; materials about 10,000 feet of walnut and oak and linn timber, and all other tools, implements, lumber and property on said lands. Party of the first part is to operate said plant, to make new improvements, to add new machinery and new tools and new timber material, but all the aforesaid are to be included in this mortgage; and party of the second part may advance additional money, and all of the aforesaid property is hereby mortgaged to secure payment of same. Party of the first part places Charles P. Myers in charge as general manager, to protect interest of party of second part.

"To have and to hold the same unto the party of the second part, his executors, administrators and assigns forever, conditioned, however, as follows: Whereas, the party of the first part is indebted to the party of the second part in the sum of $10,000, due one day after date, bearing 10 per cent. interest per annum from date until paid, evidenced by note of even date, due 1 day after date. In addition, if other materials, machinery are installed in said plant, same are included herein, and if more money is advanced it is also included, and on same terms, and Charles P. Myers is agent in charge for party of second part, and must O. K. all purchases and sales.

"Now, if the party of the first part shall well and truly pay to the party of the second part the sum hereinafter mentioned, and all other indebtedness which may then be due the party of the second part by the party of the first part, together with the cost of this trust, on or before the one day after date, 1925, then this conveyance shall be void; otherwise to remain in full force and effect. And in case default shall be made in the payment of said indebtedness, as herein set forth, or should the party of the first part, prior to said one day after date, 1925, sell, attempt to sell, ship, remove, or otherwise dispose of the property herein conveyed, or any part thereof, without the consent of the party of the second part in writing, then, in either event, the party, his agent or attorney or assigns, is hereby authorized to take charge of said property on demand, without process of law, and sell and dispose of same, or so much as will be necessary, at public sale, at south courthouse door in Harrison, Arkansas, for cash in hand, upon two weeks' notice in some newspaper published in the county, or by written notices posted in five conspicuous places near the property, at which sale any of the parties hereto may purchase as other parties; and out of the proceeds of said sale the said party of the second part to retain the sum due him as herein set forth, and the cost of this trust and of said sale, rendering the surplus,

if any, to the party of the first part, his executors, administrators or assigns.

"Given under my hand and seal this 23d day of February, 1925.

"Shain Lumber Co.

"By W. Shain, proprietor and manager."

"CONTRACT.

"Know all men by these presents that, under the name of Shain Lumber Company of Harrison, Arkansas, said Shain Lumber Company is owned exclusively and solely by W. F. Shain of Harrison, Arkansas, as the sole general manager of said lumber company; said Charles P. Myers is son and agent in charge for W. J. Myers, mortgagor. Said Myers is to receive one-half of the net profits from said company. In order to fully protect his interest, said lumber company agrees for him to pay all bills out of money belonging to said company, to do all the selling of said products and property of said lumber company, handle and control exclusively all moneys, raw and finished materials of same, to sell all materials and property of said company, and Shain Lumber Company, for his said services, agrees and binds itself not to buy or sell except through him as its exclusive and sole agent in charge for his father. All shipments to be made by him, to him, and in his name, and through no one else. He is to keep all books, pay all hands, taxes, and for necessary repairs and improvements and materials. Said Shain Lumber Company reserves the right to examine books, settlement sheets and correspondence, and to be consulted about improvements, investments, purchases and sales, and to have, at short intervals, settlements, but not to contract new debts until agent O. K.'s same. Said Myers is not to be responsible for payments for materials, wages, or any other expenses that he did not authorize in writing, and in no event for negligence or accidents. He is to be merely an employee and not in any sense a partner. Complete inventories, statements of accounts and settlements shall be made on January 1 of each year, or any

other time said employer or employee shall demand same.

"Myers accepts above terms and employment. This contract to be placed in the Farmers' & Merchants' Bank of Harrison, Arkansas, in escrow, either party to have a copy.

"Shain Lumber Co.,
"W. F. Shain, employer.
"C. P. Myers, employee."

"This February 23, 1925."

After the execution of the mortgage and contract, and prior to the institution of this suit by appellee against appellant for an accounting, on the theory that they were partners, the business was continued under the management of Charles P. Myers, during which time appellant furnished appellee $17,108.12, upon which appellee paid appellant $17,169.25, which liquidated the principal advanced, with interest thereon, leaving unpaid the money loaned on book account by appellant to appellee up to February 23, 1925, the day the mortgage and contract were executed.

In the course of the trial of the cause appellant's attorneys admitted that the note for $10,000 mentioned in the mortgage was never executed. At a later date in the trial they attempted to prove that the note was executed and lost, but the court refused to allow them to do so, because the trial had proceeded on the theory of an open account, and under that theory a master had been appointed to state an account, and, pursuant to the appointment, had filed a final report. At the time of the execution of the mortgage and contract the only indebtedness owed by appellee to appellant was the book account of $5,382.56.

The trial court found that appellee never executed a note for $10,000 to appellant on the 23d day of February, 1925, and adjudged that said mortgage did not secure the indebtedness due appellant by appellee at the time on account. He also adjudged that, because the mortgage became due one day after date, it did not

secure advances made after the maturity of said mortgage.

Appellant contends that the trial court incorrectly interpreted the purpose and intent of the mortgage. It is unnecessary to determine the correctness of the construction placed upon the mortgage by the trial court, to the effect that it did not secure advances after the maturity of the mortgage, since all the advances made after maturity were paid during the operation of the business and before this suit was instituted. The payment of the advances eliminated that question.

We cannot agree with the trial court's construction of the mortgage, that it was not intended to and did not secure the book account which appellee owed appellant at the time of the execution of the mortgage and contract. The mortgage recites that it was executed to secure a note of $10,000 of even date, which seems not to have been executed, and does not refer specifically to the book account. Certainly the mortgage and contract were executed to secure an indebtedness. According to the interpretation of the trial court, it was executed without any purpose or intent to secure any indebtedness, its execution being an idle ceremony. The only existing indebtedness at the time was the book account. The defeasance clause in the mortgage indicates very clearly that the purpose of its execution was to secure an indebtedness then existing. There can be no question that the purpose and intent was to execute a note for $10,000 to secure an indebtedness for that amount. As the only indebtedness then existing was the book account, it is quite apparent that the note was intended to include that sum, and a reading of the mortgage, in connection with the contract providing for a continuation of the business, indicates very clearly that the $10,000 note which was to be executed should also embrace future advances. The mortgage provided that, during the continuation of the business, all machinery and equipment which should be purchased was to be included in the mortgage as security for the indebtedness.

Appellee cites and relies upon the case of *First National Bank of Corning* v. *Corning Bank & Trust Company,* 168 Ark. 17, 268 S. W. 606, as decisive of its contention that the book account was not sufficiently identified in the mortgage to be secured thereby. In the case cited the mortgage described an $80.02 note of even date therewith, and did not mention two notes executed prior thereto. The mortgage contained a defeasance clause which recited that, on payment of the note, together with all other indebtedness which may be due, the mortgage should be void. The court ruled that the defeasance clause related to and secured only indebtedness created by additional advances and not to the indebtedness evidenced by the prior notes. In the case cited the $80.02 note was actually executed and was of even date with the mortgage, and the prior notes were not mentioned. Future advances were mentioned. The distinction between that case and this is that no note was executed in the instant case. There was no note to be secured specifically mentioned as in the case cited. In the instant case an indebtedness was to be secured which was to be covered in a $10,000 note. The only indebtedness existing at the time was a book account, and necessarily was the indebtedness which was to be covered by or embraced in the note. This court ruled in the case of *Carnall* v. *Duval*, 22 Ark. 136, that: "It is no objection to the validity of a mortgage, if given to secure an existing debt, that such debt is not evidenced by a note or bond, nor that a specified time is not limited for its becoming absolute, or for its foreclosure."

Our interpretation of the mortgage, when read in connection with the contract, is that one of the intentions was to secure the only existing indebtedness between the parties at the time, and that all of the assets of appellee were pledged to secure said indebtedness.

On account of the error indicated the decree of the court dismissing appellant's cross-complaint asking for a foreclosure of its mortgage will be reversed, and the cause is remanded with directions to the trial court to

foreclose the mortgage for the payment of the indebtedness existing between the parties at the time said mortgage was executed, together with interest thereon.

CLARK *v.* STATE.

Opinion delivered October 29, 1928.

J. O. A. Bush and *Dexter Bush,* for appellant.

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

HUMPHREYS, J. Appellants were indicted and convicted in the circuit court of Nevada County for manufacturing liquor, and, as a punishment therefor, were adjudged to serve a term of one year in the State Penitentiary, from which they have duly prosecuted an appeal to this court.

The only error assigned for a reversal of the judgment is that the court erred in refusing to give appellants' requested instruction No. 1, which reads as follows:

"If you find from the evidence in this case that the defendants just happened upon this still, and stayed there for fifteen or twenty minutes, and did not act toward the manufacturing of the whiskey which was made there, then you will find them not guilty."

The requested instruction singled out or emphasized the testimony of appellants, and, on that account, amounted to a request upon the weight of the evidence. It was not error to refuse the request. The court gave general instructions covering the law applicable to the facts in the case, which was all he was required to do. *Smith* v. *State,* 162 Ark. 458, 258 S. W. 349.

The general instructions given by the court were as follows:

"The defendants are on trial charged with the making or manufacturing, or being interested in making and manufacturing, alcoholic, vinous, malt, spirituous and fermented liquors. The burden is on the State to prove the defendants' guilt by the evidence beyond a reasonable doubt. If you entertain a reasonable doubt of the defendants' guilt, it will be your duty to give them the benefit of the doubt, and acquit them. They are presumed to be innocent of the offense for which they are being tried. That presumption accompanies them, shields them and protects them against conviction until it is overcome by the evidence in the case, convincing you beyond a reasonable doubt of their guilt.

"If you find from the evidence in this case, beyond a reasonable doubt, that the defendants, in Nevada County, Arkansas, at any time within three years before this indictment was returned into court, were engaged in the manufacture of alcoholic, vinous, malt, spirituous or fermented liquors, or if you find from the evidence, beyond a reasonable doubt, that they assisted in the manufacture of such liquors, it will be your duty to convict them and assess their punishment at imprisonment in the penitentiary for one year.

"Should you convict these defendants, the form of your verdict should be: 'We, the jury, find the defendants guilty,' and assess their punishment as I have indicated. Should you acquit them, the form of your verdict should be: 'We, the jury, find the defendants not guilty.' One of you sign the verdict as foreman."

No error appearing, the judgment is affirmed.

WALKER *v.* ELLER.

Opinion delivered October 29, 1928.

Steel & Edwards and *DuLaney & Steel,* for appellant.

Collins & Collins, Lake, Lake & Carlton and *E. F. Friedell,* for appellee.

HUMPHREYS, J. Appellants, except Penn Walker, are the only legal heirs of Lucy Walker, deceased, who died intestate on the 22d day of January, 1926, Penn Walker being her husband and the other appellants her children. Lucy Walker was a niece of John H. Hamilton, an aged bachelor, who died on March 8, 1926, holding the

legal title and residing upon the following real estate, to-wit: "The southwest quarter of the northeast quarter, part of the northeast quarter of southwest quarter, section 8, township 11 south, range 29: west half of the east half and the east half of the west half, section 17, township 11 south, range 29 west, containing in all 275 acres, more or less, all in Sevier County, Arkansas." Appellees are the only other legal heirs of John H. Hamilton, deceased, and are either nieces and nephews or grandnieces and grandnephews.

The appellants were residing with and caring for John H. Hamilton at the time of his death, and continued to reside upon and operate the farm after his death, and are still residing thereon.

On the 16th day of August, 1926, appellees brought this suit against appellants in the chancery court of Sevier County, for partition of said lands and an accounting for rents and profits derived therefrom, alleging that they owned an undivided three-fourths interest and appellants an undivided one-fourth interest therein. Appellants filed a demurrer to the complaint, alleging, among other grounds, that the chancery court had no jurisdiction of the subject-matter contained in the complaint. No reason was assigned in the demurrer why said court was without jurisdiction. The court overruled the demurrer, over appellants' objection and exception.

On December 4, 1926, appellants filed an answer, reserving their exception to the overruling of their demurrer, denying the material allegations of the complaint, and a cross-complaint, alleging sole ownership of the lands under and by virtue of an executed oral contract whereby John H. Hamilton agreed with them, about the first of June, 1919, to convey them the land by deed or will, in consideration that they take care of him the rest of his life, by furnishing him with such moneys, clothes, food and home comforts as he needed, and pay the taxes and keep up the repairs on the land. They further alleged that, pursuant to the agreement,

John H. Hamilton executed a will on the 10th day of June, 1919, in which, after making specific legacies to all his other heirs, he devised the lands in question to Lucy Walker, the wife of Penn Walker and the mother of the other two appellants, which will was duly proved and probated. They further alleged that, in the performance of the contract on their part, they expended large sums for improvements, repairs, taxes, and in the care and support of John H. Hamilton for each year from the year 1919 to the year 1926, inclusive, for which amounts they prayed a lien upon the lands in the event the court should find the contract and will ineffective to vest such an equitable title to the lands in them as would warrant the court in vesting the legal title thereto in them.

Appellees filed a reply to the cross-complaint, denying all the material allegations therein, and interposed the additional defenses of the three-year statute of limitations, and the statute of non-claims, and an offset of rents against the claim, and a prayer for a lien against the lands for improvements, repairs, taxes and the care and support of John H. Hamilton during the years 1919 to 1926, inclusive.

The cause was heard upon the pleadings and testimony, which resulted in the following findings and decree by the court: That no oral contract as alleged was entered into between Walker and the testator, John H. Hamilton; that the legacy to Lucy Walker had lapsed, because she predeceased the testator by two months; but that said taxes paid and certain improvements made upon the real estate were relevant to the will, to-wit: Cost of tenant house, $200; cost of addition to dwelling house, $400; cost for drilling well, pump and equipment, $500; cost of shed to barn, $100; cost of repairs to hay barn, $75; cost of bridge built to pass from one side of the farm to the other, $100; amount paid for road improvement taxes, $591.73; expenses paid in the last illness and for funeral expenses of the deceased, John H. Hamilton, $495; cost of clearing seven acres of land,

$70; amounting in all to $2,531.73. That appellee should be allowed an offset against said total amount for the rental value of the lands for the years 1926 and 1927, amounting to $800; and decreed a lien upon the land for balance due for said improvements made and taxes paid by Penn Walker; that appellees and appellants were owners and tenants in common of said land, and that a partition could be had when so desired by the parties. Each party appealed from the findings and decree in so far as same were adverse to them respectively.

The record reveals, according to the undisputed facts, that John H. Hamilton, an aged bachelor, was the owner of a farm consisting of 275 acres, of the value of $14,000, in Sevier County. He was residing upon the farm alone in 1918, and, in order to be more comfortable, rented the farm to Penn Walker for the year 1918 for $400 and the payment of the taxes and upkeep or repairs of the place. Walker and his family, consisting of Lucy, his wife, and Louis and Edna, their two children, moved from where they were residing to the Hamilton farm, where they all resided as one family. In July, 1918, Penn Walker and John H. Hamilton entered into a written rental contract by the terms of which Walker was to take the place for a period of ten years, commencing in the year 1919, for which he was to pay an annual rental of $400, the taxes and the upkeep or repairs of the place, including ditches and fences. The rental contract was not acknowledged or placed on record at the time of its execution. The parties all continued to reside in the Hamilton home as one family until the death of Lucy Walker, January 22, 1926, and after her death they all remained there just as before until the death of John H. Hamilton, on the 8th day of March, 1926, and after his death Penn and his two children remained, and are still there. On the 10th day of June, 1919, Hamilton made a will, in which, after specific legacies to others, he devised the residue of his property, including said farm, to Lucy Walker, who was his niece. Four days thereafter, or on the 14th

day of June, 1919, Hamilton and Walker appeared before George B. Milford, a notary public, and acknowledged the ten-year lease contract made in July, 1918, and on the 16th day of June, 1919, they filed the lease for record in the office of the recorder of Sevier County. Penn Walker paid John H. Hamilton the rent for 1918, but never paid any stated amount of rent thereafter, but paid the taxes, kept up the repairs, and made some permanent improvements on the property, furnished Hamilton such money as he needed from time to time, and paid Hamilton's doctor and hospital bills whenever he was sick. The receipt for the taxes was taken in the name of John H. Hamilton for all, except a few acres, of the land during his lifetime. The total amount paid out by Penn Walker for improvements, taxes and the last illness and funeral expenses of John H. Hamilton amounted to $2,531.73. The parties to this suit and Penn Walker are the only heirs of John H. Hamilton, deceased.

According to the testimony introduced by appellants, which must be regarded as disputed on account of the interest of the witnesses testifying in the result, and on account of contradictory circumstances, an oral contract was entered into, about two weeks before the execution of the will, or before the first of June, 1919, between the Walkers and John H. Hamilton, whereby Hamilton obligated himself to convey, either by will or deed, the lands in question to the Walkers, in consideration that they would care for and support him in health and sickness during his lifetime, and that, pursuant to said agreement, the will was executed.

Appellants first contend for a reversal of the decree because the court overruled their demurrer to the jurisdiction of the court. Their demurrer did not state that they were in possession of the lands, claiming the legal title thereto, and that they were entitled to have their title determined in a court of law before an equity court could partition same. Even in their answer they only

set up an equitable title by way of defense, dependent on an alleged executed oral contract.

A court of equity has jurisdiction to determine whether a party has an equitable title to land. A court of equity also has jurisdiction to partition lands among tenants in common, according to their several interests; so the court, under the allegations of the complaint, had jurisdiction of the parties and subject-matter. The defects in the complaint pointed out by learned counsel in their brief should have been reached by a motion to make the complaint more definite and certain, and not by demurrer. The court therefore properly overruled the demurrer.

Appellants' next contention for a reversal of the decree is that the finding of the trial court that the alleged oral contract was not entered into between the Walkers and John H. Hamilton is contrary to a preponderance of the testimony. It is true that appellants testified that a contract was entered into, and that the will was made pursuant thereto, but it will be observed that Hamilton devised the lands and personal property, except specific bequests, to Lucy Walker, and not to them all, or to Lucy and Penn Walker in accordance with the tenor and effect of the oral agreement. The ten-year lease, which was acknowledged and put on record after the will was executed, is contradictory of the oral contract testified to by appellants. In fact, it superseded the oral agreement, if such an agreement was ever made. The acknowledgment and recording of the lease was a recognition of John H. Hamilton's title to the lands after the execution of the will. There is no inconsistency between the will and the ten-year lease. It is a perfectly consistent act for one to lease lands which he has devised by will to others. The will, however, was inconsistent with the alleged oral contract, because not made to both Penn and Lucy Walker, or to all the Walkers, and the oral contract was, if made, inconsistent with the ten-year lease and was displaced by it.

Again, it was necessary to establish the oral contract by clear, decisive and convincing testimony. With this rule in mind it cannot be said that the finding of the trial court, to the effect that no oral contract was made, is contrary to the weight of the evidence.

Appellees contend for a reversal of that part of the decree declaring a lien upon the land for repairs, improvements, taxes, etc. They contend the claims for these expenditures should have been presented against the estate of John H. Hamilton within the statutory period prescribed for presenting claims, and that the claims are barred by the three-year statute of limitations and the statute of non-claim.

Under the facts in this case their contention is without merit. According to the testimony of appellants, they paid the taxes and made permanent improvements upon the farm under the honest belief that they had acquired title thereto under an oral contract for the maintenance and support of John H. Hamilton, together with the will which he afterwards made to Lucy, in which he devised the lands to her. They perhaps would have succeeded in establishing their oral contract had the test been that they could establish it by the weight of the testimony instead of by the clear, decisive, and convincing rule of evidence. We think, under the circumstances of the case, it would be inequitable to allow appellees to ask a partition of the lands at the expiration of the ten-year lease without a lien being declared thereon for the amounts appellants expended under the honest belief that the lands belonged to them.

We think the wholesome rule, that one asking equity must do equity, is applicable to the facts in this case.

No error appearing, the decree is affirmed on the direct and cross appeals.

BLANKENSHIP *v.* STATE.

Opinion delivered October 29, 1928.

[redacted]

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

KIRBY, J. This appeal is prosecuted from a conviction for having in possession a still.

The officers testified that they had the still under surveillance, being concealed near it, and that appellant and his companion appeared about 7 o'clock, and moved some wood back and began to dip water out of the branch and pour it into the mash barrels. Two barrels of mash had been run and the mash in two more was ready to run, and the still was warm from the last run, which must have been made that night. The boys were filling up the two barrels with more water. Appellant unscrewed the connection and let the refuse run out of the pot, and in carrying it away discovered the officers, and ran. The still was on his grandmother's place, in the pasture, and he said that he had discovered it before, and that he was down there that morning putting the water in the mash to keep the cows from eating the shorts, under the instruction of his grandmother, who had lost a yearling from eating mash at a still. Said he did not own the still and the mash, and had no control over it, and ran away when he saw the officers because he was frightened.

He was found present at the still, which was yet warm from the last run made, and making the necessary preparations for making another run, and ran away upon ascertaining that his presence was discovered. The

testimony is sufficient to support the charge that appellant was in possession of the still, the proof of ownership not being necessary. *Day* v. *State*, 170 Ark. 790, 281 S. W. 11.

No error was assigned as to the admission and exclusion of testimony, and the court correctly declared the law. The judgment must be affirmed, and it is so ordered.

ELLIS *v.* CITIZENS' STATE BANK.

Opinion delivered October 29, 1928.

Caraway, Baker & Gautney, for appellant.

O. H. Hurst, for appellee.

KIRBY, J., (after stating the facts). The court erred in directing a verdict against appellant, as contended. The justice of the peace had rendered a judgment against the garnishee bank, directing the payment of money due from it to the drawer of the check into the court for satisfaction of the amount due on the check. It also adjudged C. B.

Gregg, the interpleader, was entitled, as against appellee herein, to payment of this money, which was ordered to be done.

The cashier of the garnishee bank testified that the money in satisfaction of the judgment against it as garnishee had been paid into court, upon the order of the justice, in payment of the amount the check was drawn for, and charged up to the account of Ellis, appellant.

Appellant here did not complain of being aggrieved by the judgment of the justice of the peace, nor did he attempt to appeal therefrom. The justice decided, in effect, that he owed the amount of the check to the holder of it, and directed its payment by the garnishee, who did pay the money into the court in accordance with the order, and charged it against this appellant's account.

The suit having been brought upon the check, purporting to have been executed by appellant, and the signature not having been denied under oath, the cause could have been proceeded with, whether the plaintiff appeared or not; the justice having heard it on the interplea and determined that Gregg, the interpleader, was entitled to the amount of the check, as against the plaintiff in the suit, and ordered same paid to him by the garnishee, he necessarily could not dismiss the suit for want of prosecution so as to prevent the plaintiff in such suit from taking an appeal therefrom without moving to set aside the judgment of the justice of the peace. Sections 6444, 6445, 6448, C. & M. Digest.

The circuit court did not err therefore in overruling the motion to dismiss the appeal, but erred in directing a verdict against the appellant, since no appeal bond had been given in the justice court, and the money due from appellant upon the check had been paid by the garnishee by the order of the court and charged against appellant's account. The controversy in the circuit court was not therefore between the bank and the appellant, but between it and the interpleader, who had won the suit in the court below. The court had the right

to direct the verdict, but not against the appellant, whose liability upon the check had been discharged by payment by the garnishee of the amount to the interpleader, who was adjudged entitled to recover it.

The judgment will accordingly be reversed, and the cause as to appellant dismissed. It is so ordered.

HOT SPRINGS CONCRETE COMPANY *v.* ROSAMOND.

Opinion delivered October 29, 1928.

E. R. Parham, for appellant.

MEHAFFY, J. This suit was begun in the Saline Circuit Court, plaintiff alleging that T. A. Rosamond and Taylor Rosamond, Jr., were indebted to him for material in the sum of $1,002.59, for which it asked judgment, and it also prayed judgment against the Continental Casualty Company for $209.08 and against the American Surety Company for $793.59, alleging that T. A. Rosamond and Taylor Rosamond had entered into a contract to do certain work, and that the two surety companies were sureties on his bonds. Plaintiff also filed allegations and interrogatories and bonds for gar-

nishment, and writs of garnishment were issued and served on the garnishees, W. P. George, George Hughes, trustee, and Dr. J. B. Shaw.

The defendants, T. A. Rosamond and Taylor Rosamond, filed a forthcoming bond, and all of the defendants filed answer, denying the allegations of plaintiff's complaint. Thereafter the defendants filed motion to dismiss for want of jurisdiction, alleging that the suit was based on an alleged breach of contract on the part of the defendants, T. A. Rosamond and Taylor Rosamond, the said contract having been entered into by and between them and the United States of America, for certain improvements to be made on the United States Reservation at Hot Springs, Arkansas. That, under and pursuant to the provisions of § 6923 of the United States Compiled Statutes, 1916 (40 U. S. C. A., § 270), relating to the bonds of contractors who enter into a formal contract with the United States for the construction of any public building or the prosecution and completion of any public work, the contractors are required to execute a bond with good and sufficient sureties, with the additional obligation that such contractors shall promptly make payments to all persons supplying them with labor or material in the prosecution of the work. That the said statute further provides that any person who has furnished labor or material used in the construction or repair of any public work, where payment has not been made, shall have the right to intervene and be made a party to any action instituted by the United States on the bond of the contractor. They allege that the act further provided that suit should be brought in the district court in which said contract was to be performed, irrespective of the amount in controversy, and not elsewhere.

Defendants alleged that suit had already been instituted in the United States District Court for the benefit of the Arkansas Foundry Company, and that said suit was then pending; that under the statute only one suit can be maintained on said bond, and this suit must be

in the United States District Court. They therefore alleged that the plaintiffs had no right to bring this action, but that any suit growing out of the breach of said contract and said bond must be brought in the name of the United States, and that neither the Saline Chancery Court nor the Saline Circuit Court had any jurisdiction; that their only remedy was to file an intervention and be made a party in the United States District Court.

The plaintiffs moved to dismiss as to the Continental Casualty Company but not as to the American Surety Company. The court thereupon dismissed the cause as to all the defendants for want of jurisdiction, and from this judgment of the court dismissing the cause this appeal is prosecuted.

The only question for the consideration of this court is whether the court erred in dismissing as to all the defendants.

No suit against the sureties on this bond could be brought in any court other than the United States District Court, and only one suit could be brought there; and, when it is begun, the statute provides that all other claimants may intervene. 40 U. S. Code Annotated, § 270; *Miller* v. *American Bonding Co.,* 275 U. S. 304; *United States ex rel. Texas Portland Cement Co.* v. *McCord,* 233 U. S. 157, 42 S. Ct. 98; *Ill. Surety Co.* v. *United States,* 240 U. S. 214, 36 S. Ct. 321; *United States* v. *Congress Construction Co.,* 222 U. S. 199, 32 S. Ct. 44.

Since no suit could be brought against the sureties on the bond in any court other than the United States District Court, the State court had no jurisdiction as to the surety companies in suit on the bond, and it was therefore the duty of the court to dismiss as to sureties on the bond. However, plaintiff's complaint states a complete cause of action against the defendants T. A. Rosamond and Taylor Rosamond, without reference to the bond or the sureties. It alleges that these defendants are indebted to it in the sum of $1,002.59, and prays judgment against them for that amount. The court

therefore erred in dismissing the cause as to the defendants T. A. Rosamond and Taylor Rosamond.

Our statute provides: "The court may, at any time, in furtherance of justice, and on such terms as may be proper, amend any pleadings or proceedings by adding or striking out the name of any party, or by correcting a mistake in the name of a party, or a mistake in any other respect, or by inserting other allegations material to the case; or, when the amendment does not change substantially the claim or defense, by conforming the pleading or proceeding to the facts proved." Section 1239, Crawford & Moses' Digest.

Under this section the court could have struck out the name of the sureties, and this it should have done. One of the grounds of demurrer mentioned in our statute is "that the court has no jurisdiction of the person of the defendant or the subject of the action." Section 1189, Crawford & Moses' Digest.

"When objection is taken to the jurisdiction of the court as to some of the parties, and they are not indispensable parties, that is, their interests are severable, and a decree without prejudice to their rights can be made, the jurisdiction of the court should be retained and the suit dismissed as to them. Though there may be misjoinder of parties defendant in equity, a defendant against whom there is a sufficient complaint cannot object that others who have no interest in the subject-matter of the suit are made defendants, unless it also appears that his interests are affected thereby." 20 R. C. L. 709.

"Persons severally liable on the same contract, including parties to bills of exchange, promissory notes, common orders and checks and sureties on the same, or separate instruments, may all, or any of them, or the representatives of such as may have died, be included in the same action, at the plaintiff's option." Crawford & Moses' Digest, 1099.

A suit even on the bond in this case might be against the principals or the sureties, any one of them,

or all of them, the obligation under our statute being joint and several; but, as we have said, the cause of action stated in the complaint against the defendants, the contractors, is not a suit on the bond, but is a suit that the plaintiff had a right to maintain without reference to the bond. A person might sell material to a contractor who was doing work under several contracts, some of which might be with the United States Government and others with private individuals. Material might be sold to him, relying on him alone, and without even knowing whether there was a bond of any kind given. The Federal statute referred to does not undertake to regulate suits between seller and purchaser, except to regulate suits brought against the sureties on the bond given in pursuance to such statute.

"Although a contrary rule prevails in some jurisdictions, the majority rule is that, in an action against several defendants on a joint and several contract, plaintiff may dismiss, discontinue, or enter a *nolle prosequi* against one or more of the defendants and proceed to judgment against the others; but the rule, it has been held, does not permit plaintiff to dismiss where the rights of the others would be so impaired that they would be placed in a worse condition than if defendant dismissed had been omitted in bringing the action." 18 C. J. 1164.

"A suit against principal and surety may be dismissed as to the principal and continued as to the surety when they are joint makers and not indorsers, where the dismissal will not prejudice the surety, or where, under the statute, the principal is not a necessary party to the suit. * * * A suit also may be dismissed as to the surety and proceeded with as to the principal, if the surety is not a necessary or proper party to the suit, or where the surety is not served with process, or, under some statutes, where there cannot be a joint recovery against both." 18 C. J. 1165-6.

In the instant case the contractor would be liable in any event if he purchased the material and did not pay

for it. Therefore a dismissal as to the sureties would not prejudice or affect his interests.

The court should have dismissed as to the sureties and proceeded to trial as to the defendants T. A. Rosamond and Taylor Rosamond. For the error indicated the decree is reversed, and the cause remanded with directions to dismiss as to the sureties on the bond and to proceed with the trial of the case against the defendants and garnishees.

DIERKS LUMBER & COAL COMPANY *v.* TOLLETT.

Opinion delivered October 29, 1928.

Collins & Collins and *Lake, Lake & Carlton,* for appellant.

Feazel & Steel, for appellee.

McHaney, J. Appellee sued appellant to recover damages for personal injuries received by him by reason of the alleged negligence of a fellow-servant in cutting a tree, which, it is alleged, fell on appellee and injured him. Appellant defended on the ground that it had been guilty of no negligence; that appellant was not injured at the time and in the manner alleged; that he was guilty of contributory negligence; and that he assumed the risk. The trial resulted in a verdict and judgment against appellant for $5,500.

It is conceded that there is sufficient dispute in the testimony to take the case to the jury, and it will therefore not be necessary to set out the facts, the errors relied on being errors of law and not of fact.

1. The first error relied upon is covered in the fourth assignment, relating to the action of the court in permitting the witness Anderson Tackett to testify

that he sent the slip furnished appellee by appellant's examining physician, showing appellee's condition to be good or average, to Mr. Hulse, who had charge of its employment department. Tackett was a witness for appellant, and had testified that, when appellee applied for employment to him, he being assistant woods foreman, with authority to employ labor, he gave him a slip and sent him to appellant's examining physician to be examined to determine his physical condition. He was so examined, returned the slip to the witness, who testified that he turned it over to Mr. Hulse, the foreman in charge of the employment department. It is said that this testimony was prejudicial because it was an effort on the part of appellee to make it appear to the jury that appellant had the slips referred to in its possession, and was concealing them and refusing to produce them. We do not think this was the necessary effect, or that appellant was prejudiced thereby. The object of this testimony was to show appellee's physical condition at the time he was employed by appellant. The production of these slips would, no doubt, have shown the physical condition of appellee at that time, as appellant's own physician had made the examination. We therefore overrule this assignment of error.

2. The next error urged is covered by the fifth and eighth assignments, relating to the testimony of two witnesses to the effect that the appellee was a hard-working man up to the time of his alleged injury. This was competent testimony, as the matter in dispute was whether he had been injured at all, and his ability to perform labor prior to the alleged injury was competent to show his physical condition prior thereto.

3. The next error urged is covered by the sixth and seventh assignments. Appellee was permitted to testify, on direct examination, over the objections and exceptions of appellant, as follows: "He (Mr. Clawson, woods foreman for appellant) told me that if I did not sue them they would settle with me, and they kept on with me that way until early March, and I wrote them

a letter and stated that if they did not settle within twenty days, I would sue them, and then Mr. Hulse came to see me." He was further permitted to testify, over appellant's objection, that he received information from Mr. Hulse also that it would not be necessary for him to bring suit in this matter. It is said that this constituted error, for the reason that it permitted appellee to prove an offer of compromise, in violation of §§ 1337 and 1338, C. & M. Digest, and also in violation of the rule announced in many decisions of this court. The alleged injury occurred on the 9th day of June, 1925, and this action was not commenced until July 30, 1927. This testimony was elicited by counsel for appellee in response to the following question: "Why is it you waited so long to bring a suit against the Dierks Lumber & Coal Company on account of your injury?" During the course of the examination and argument over the admissibility of this testimony, Mr. Steel, counsel for appellee, stated that it was offered for the purpose of explaining the action of appellee in waiting so long to bring his suit. And it was stated in oral argument, although not in the record, that it was brought out in response to statements of counsel for appellant in the opening statement of the case to the jury. However that may be, the majority of the court have reached the conclusion that it was competent for this purpose, not for the purpose of showing or proving an offer of compromise, but to explain his delay in bringing the action, and that, if counsel for appellant had requested the court to so limit the testimony by instructing the jury to consider it for this purpose only, it would have been the duty of the court to do so. Mr. Justice SMITH and the writer do not agree to this view, as we think it was incompetent for any purpose, unless brought out in response to remarks of counsel in the opening statement, in which event the record should so show. The majority are of the opinion that the statement of counsel disclaiming any purpose in the offered testimony to show a proposition of compromise, but merely to explain

the delay of appellee in bringing the action, amounted to limiting the testimony to that purpose, in the absence of a request of counsel for appellant for the court to so limit it.

4. It is next urged that the court erred in permitting appellee to testify in rebuttal contradictory to the witness Rabb, the foreman who discharged him, that, at the time he was discharged by Rabb, he told appellee that he was physically unable to work. This was offered in rebuttal, and was limited by the court as going to the impeachment of Rabb. It is now said that appellee was not asked the same questions as had been asked the witness Rabb, but the record discloses that counsel did not object to this testimony on that ground in the trial below, but only on the ground that Rabb was not a doctor, and that it had not been shown he had any knowledge of the fact about which he was speaking. We think there was no error in this regard, since the court limited the consideration of this testimony by the jury to the impeachment of Rabb.

5. Objection is also made to the testimony of George Steel as to certain statements made to him by Dr. R. L. Hopkins, contradictory to the testimony of Hopkins, on the ground that the identical questions asked Hopkins were not asked Steel. We have examined the record, and think that there was no error in this regard, as substantially the same questions were asked Dr. Hopkins on cross-examination as were asked Mr. Steel.

It is urged that the court committed reversible error in the giving of certain instructions asked by appellee and the refusal to give certain instructions requested by appellant. We have examined carefully all the instructions given by the court, as well as those refused, and find no error in either the giving or refusal to give said instructions.

We think it would serve no useful purpose to set these instructions out and comment upon them separately. Its objection to instruction No. 1, given at appellee's request, was settled contrary to appellant's contention

in *Arkansas General Utilities Co.* v. *Culbreath,* 177 Ark. 359. Instruction No. 2, given at appellee's request, correctly stated the law under the circumstances in this case. Appellee's instruction No. 3 is as follows:

"If you find for the plaintiff, you will assess his damages at such a sum as, in your judgment, 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, or that which you find he will endure in the future, if any, by reason of said injury; for loss of time, if any; and for pecuniary loss from his diminished capacity for earning money in the future, in any; and from these elements, if shown by the evidence, assess his damages as, in your opinion, will compensate him for the injuries received, unless you further find he was guilty of contributory negligence himself."

It is contended that this instruction is erroneous in that it failed to limit appellee's right to recover to the present value of his decreased earning capacity, and pain and suffering in the future. We do not think the instruction is open to this objection, for they were plainly limited in the instruction to the matter of compensating him for the injury sustained, the word "compensate" having been used twice in said instruction. Moreover, under the undisputed proof in the case, the jury has not returned a verdict in excess of the present value of the damages he has sustained by reason of his decreased earning capacity, without regard to pain and suffering, and the court's failure to so limit the instruction could not therefore be prejudicial.

There was no error in the refusal of the court to give appellant's requested instruction No. 2, as the latter part of it is argumentative and unduly stresses certain negative testimony in the record, to the effect that appellee's injuries were the result of an accident in early life, and the first and only correct part of the instruction was covered by other instructions given by the court.

No error appearing, the judgment is affirmed.

MUTUAL RELIEF ASSOCIATON *v.* POINDEXTER.

Opinion delivered October 29, 1928.

John P. Roberts, for appellant.

Evans & Evans, for appellee.

McHANEY, J. Appellee brought this action against appellants, Mutual Relief Association and John P. Roberts, W. T. Roberts and C. H. Williams, its bondsmen, and the Interstate Protective Association, F. E. Schooley, E. E. Randall and L. T. Little, its bondsmen, to recover a maximum amount of $500 on a life insurance policy issued by the Mutual Relief Association on the life of John H. Poindexter, in which the appellee was named as the beneficiary.

The policy was issued on the 4th day of March, 1921. On the 14th day of May, 1926, the appellant, Interstate Protective Association, acquired all the assets and property of the Mutual Relief Association, and assumed all of its liabilities. Thereafter John H. Poindexter, or the appellee for him, paid all assessments which became due under this policy to the Interstate Protective Asso-

ciation until the time of his death, which occurred in March, 1927. The policy provided that the death benefits named in the policy were payable out of any sum or sums that might be realized from an assessment of the members of the company or circle to which the deceased belonged, and provided further, "that the liability of the Mutual Relief Association hereunder shall in no event exceed the amount produced by one assessment on the members of the circle in which said member may be placed, less the cost of collecting said assessment."

Both the Mutual and Interstate companies executed and filed a bond with the Insurance Commissioner, "conditioned for the prompt payment of all assessments to the parties or beneficiaries entitled thereto, and the makers of said bond shall be liable thereon for any violation of the conditions thereof, or any loss which may accrue to the policyholders or beneficiaries of such company."

The testimony of the secretary of the Interstate Association, which is undisputed in the record, was to the effect that a double assessment was levied after the death of John H. Poindexter, covering two deaths, for the month of April, and that the total amount received was $116.49, which, after deducting the cost of collection, $23.35, left $93.14, or $46.57 for this death claim. The secretary had the records showing his collections for April, with every man's name thereon from whom money was received. This was all the evidence touching upon the amount realized from the assessment.

Appellant, Mutual Relief Association, and its bondsmen, and the bondsmen of the Interstate Protective Association, requested an instructed verdict in their favor, which the court refused, over their exceptions.

Over the objections and exceptions of appellants, the court refused to give the following instruction requested by them: "If you find that the plaintiff had paid all the assessments due, then you are instructed to find for the plaintiff the amount of one assessment of

the members in the group or circle to which the plaintiff belongs, less the cost of collection, which in this case is shown to be the sum of $46.57."

There was a verdict and judgment for appellee against all the appellants for $500, 12 per cent. penalty, and an attorney's fee of $100.

We are of the opinion that the court erred in failing to direct a verdict in favor of the Mutual Relief Association and its bondsmen, for the reason that all of its property and assets of every kind and character, including its records, papers and documents, had been taken over and all of its liabilities assumed by the appellant, Interstate Protective Association, some ten or eleven months prior to the death of the insured, and the insured and his beneficiary, the appellee, had thereafter paid all dues and assessments under said policy of insurance to the Interstate Protective Association. The merger or consolidation of these two companies was authorized by act 139 of the Acts of 1925, and the agreement of consolidation or merger was approved by both companies and filed with and approved by the Insurance Department of the State of Arkansas. By thereafter paying assessments to the Interstate Protective Association, appellee must be held to have consented to the merger or consolidation, and therefore he must look to it for whatever rights he has under the policy sued upon. There was therefore no liability on this policy against the Mutual Relief Association or its bondsmen, and the judgment as to them will be reversed and dismissed.

The next question that arises is, what is the liability of the appellant, Interstate Protective Association? By the terms of the policy in question, all liability thereunder which it assumed by virtue of the merger contract provides, as heretofore set out, that its liability in no event shall exceed the amount produced by one assessment on the members of the circle or group in which the member is placed, less the cost of collecting same. And, as heretofore stated, the undisputed proof in this record

is that only $46.57 net was realized by one assessment, and we think that sum to be the limit of the liability of the appellant, Interstate Protective Association, thereon. This appellant had the books showing the collection present, and he was cross-examined thereon by appellee, and it showed on the assessment made in April, after the insured's death in March, every man's name from whom any money was received.

This case in this respect differs from *Mutual Relief Association* v. *Weatherly,* 172 Ark. 991, 291 S. W. 74. The court there held again that the provisions in policies of insurance or certificates of this kind to the effect that the company will pay a certain amount upon condition that one assessment on the members of a circle or group in which the member is placed will produce such an amount, less the cost of collection, are valid and binding; that the burden of proof is on the company or association to show the amount produced by such assessment; and in that case it was held that the company did not meet the burden thus placed upon it. But here, in the case at bar, the secretary of the association testified positively from the books of the association to the amount realized on one assessment. See also the recent case of *Young* v. *Farmers' Mutual Life Insurance Co.,* 175 Ark. 1045, 1 S. W. (2d) 74.

The judgment against the Interstate Protective Association will therefore be modified by reducing the recovery to $46.57, with interest and costs, but without any penalty or attorney's fee, as it is well settled that no penalty or attorney's fee can be collected where plaintiff does not recover the amount sued for—the sum demanded. *American Alliance Ins. Co.* v. *Paul,* 173 Ark. 960, 294 S. W. 58; *Pacific Life Insurance Co.* v. *Carter,* 92 Ark. 378, 124 S. W. 764.

HIRSCH *v.* CADRIN & STATEN.

Opinion delivered October 29, 1928.

Saxon, Wade & Warren, for appellant.

Eugene H. Murphy and *Francis T. Murphy,* for appellee.

McHANEY, J. Appellant, being the owner of a 20-acre lease in Ouachita County, permitting him to salvage waste oil and to operate a pick-up station for said purpose, and also the owner of certain personal property thereon, entered into a written contract of sale thereof with appellees, Cadrin and Staten, under date of July 12, 1926, the pertinent parts of which are as follows:

"Whereas, the undersigned, Sylvain Hirsch, is now the owner of the above described lease, together with all rights, personal property, consisting of the following: One boiler, number.....; one 10x12 National Mud Hog pump; one 6x6 pump; 500 feet of 4-inch pipe, unions, nipples; 2,500 feet of 2-inch pipe, unions and nipples; 150 feet of 1¼-inch pipe, together with unions and nipples; two oil-field shacks; 85 metal barrels; one ice-box; three tables; three beds and bedding; cooking utensils; one set of glasses; 4 wooden dams; and all other personal property now located on the above described premises used in the operation of the pick-up station. Now therefore, for and in consideration of the sum of $15,000, paid and to be paid as follows: Two thousand dollars payable out of one-half of the seven-eighths of the first oil saved and marketed from said premises; the

balance $13,000 payable out of one-fourth of the first oil saved and marketed from said premises; I, Sylvain Hirsch, do hereby assign, set over and deliver unto J. L. Cadrin and J. B. Staten, and unto their successors and assigns, all my right, title and interest in and to the aforesaid lease, and in so far as it affects the south half of the southeast quarter of the northeast quarter of section 28, township 15 south and range 15 west, Ouachita County, Arkansas. A vendor's lien is expressly retained on said leasehold interest until this purchase money is paid in full, and the title to the aforesaid personal property is expressly retained in Sylvain Hirsch until the aforesaid purchase money is paid in full.

"To have and to hold unto the said Cadrin and Staten, and unto their heirs and assigns and successors, subject to the conditions herein expressed. All conditions and covenants herein shall be binding on all assignees and grantees. It is hereby agreed that the grantees shall have thirty days in which to start operation, and that the amount due hereunder shall be paid within a reasonable time.

"Executed July 12, 1926."

A short time thereafter, Cadrin & Staten assigned a one-third interest in this lease to appellee Alice Cordell. Appellees operated said pick-up station on said lease for a period of time, and salvaged, treated and sold to the Penn-Liberty Oil Company 1,455.57 barrels of oil of the net value, after deducting the severance tax and royalty, of $1,179.69, all of which was paid to Cadrin & Staten, at the direction of appellant. This was all the oil accounted for, although a very large quantity of waste oil had been captured and impounded in a lake covering about 1,000 acres on which the Hirsch lease bordered at the upper end. The upper end of the lease extended into the lake about 150 feet, and about 2 or 3 feet at the lower end. Appellees operated this pick-up station for nearly a year, and were unable to succeed in picking up much of the oil in the lake. They spent about $4,300 of their own funds in attempting to do so,

without success. Suit was brought by appellant to enforce a vendor's lien to collect the $15,000 mentioned in the contract, and the trial court dismissed appellant's complaint for want of equity.

The chancellor, no doubt, had in mind the rule announced in the recent decision of this court in *Gilbert* v. *Patterson,* 174 Ark. 61, 295 S. W. 386, where one Haskell had taken over the oil lease holdings of the Columbia Oil & Gas Company, and agreed to pay it therefor "the sum of $60,000 out of one-third of the first oil accruing to said Haskell from said lease." Haskell assigned said lease to other parties, and the question was whether the $60,000 was payable in any event, or only if oil was produced in sufficient quantities to pay said amount "out of one-third of the first oil accruing to said Haskell" therefrom. This court held that there was no obligation to pay except out of the oil, and, no oil having been produced, there was no liability. We are unable to distinguish this case from that. Here the contract provided that Cadrin & Staten would pay "two thousand dollars, payable out of one-half of the seven-eighths of the first oil saved and marketed from said premises; the balance, $13,000, payable out of one-fourth of the first oil saved and marketed from said premises." They only succeeded in saving and marketing the quantity of oil of the value heretofore stated, appellant's share of which was released to appellees to further improve the property. We therefore hold that this case is ruled by that.

For a second ground of reversal, appellant says appellees were guilty of fraud in that they acquired a lease lower down, on the same stream, operated a pick-up station thereon, and fraudulently permitted appellant's oil to escape and be picked up in the lower station. We have examined the evidence in this regard carefully, and have reached the conclusion that the decree is not against the clear preponderance of the evidence. Cadrin testified that the lower lease and station belonged to Bob Staten, not the appellee, J. B. Staten, and that neither

of the appellees had any interest in it. The evidence is also in conflict that the oil salvaged in the Bob Staten lease, or Reynolds lease, as it is referred to, was oil that came over appellant's lease.

We find no error, and the decree is affirmed.

ROBERTS *v.* STATE.

Opinion delivered November 5, 1928.

W. S. Atkins and *Shaver, Shaver & Williams,* for appellant.

H. W. Applegate, Attorney General, and *Effie Combs,* Assistant, for appellee.

HART, C. J. Dan Roberts prosecutes this appeal to reverse a judgment of conviction against him for the crime of burglary and of grand larceny.

The first assignment of error is that the evidence is not legally sufficient to warrant the verdict.

The record shows that on Friday night, December 16, 1927, the mercantile establishment of the Dover Mercantile Company, at Hatfield, Polk County, Arkansas, was broken into and merchandise of the invoice price of something over $600 was taken from it. Mark Dover was the manager of the store, and the burglary was reported to him about four o'clock in the morning. Dover immediately went to the store, and ascertained that nineteen suits of clothing and nine overcoats, which were on hangers in the store, had been taken therefrom. A small amount of cash was taken from the register, and some Ingersoll watches. One of the Ingersoll watches had a mainspring broken and two dents in the case. The clothing was worth about $600. About 300 yards from the store, Dover and others found where an automobile with two Fisk casings on it had been backed up to the side of the road. There was frost on the ground, and the print of the tires was fairly plain. The casings were 29 by 45. A short distance away, on the side of the road, from where the car had been backed up, Dover found nineteen of the coat hangers which had been taken from the store. He also found a bottle with four figures on it, which smelled like it had had whiskey in it. He carried the bottle and hangers back to the store, and then started to follow the tracks of the automobile. He first went to DeQueen, and then to Lockesburg and to Nashville. He returned home from Nashville that same day, and received a telephone call from the town of Ben Lomond, in Sevier County, that

they had the parties who had broken into his store. He went to Ben Lomond the next morning, and found nineteen suits and nine overcoats in the possession of the constable, which he identified as the clothing which had been taken from his store. He identified them by the manufacturer's mark and by the store mark. From there, in company with the sheriff, he went to Fulton, in Hempstead County, and then on to Hope. When they got to Hope they found out that the parties who were suspected of burglarizing his store were in jail at Washington. They then went to Washington, and the sheriff took possession of Dan Roberts, D. L. Griffin and Roy Edwards, who were charged with burglary and larceny. Warrants had been issued for all three of these persons. The jailer delivered to Dover an Ingersoll watch, which the latter identified by means of two dents and a broken spring, as being a watch which had been taken from his store on the night of the burglary. There was also turned over to him a bottle containing whiskey which was of the same kind and appearance as the one found by him with the coat-hangers near the store.

Other evidence for the State tends to show that, on the morning after the robbery, Dan Roberts and two other persons riding in a Chrysler No. 50 sedan car were going towards the river near Ben Lomond. The constable of that township was flagging cars, because the bridge across the river was burned, and travelers would have to make a detour to Fulton and cross the river there. He recognized Dan Roberts as one of the men in a car which failed to stop when flagged. The car, instead of stopping, went on to the river. It came back, and went on down the road towards Fulton. The car then went off the side of the road, and was ditched. A farmer living near the place where the car was wrecked was employed by the defendant to help pull the car out of the ditch. The car then proceeded on its way towards Fulton. The constable was informed of the wreck, and thinking that the car might have contained

whiskey, went down to the scene of the accident to investigate. He found tracks leading from where the car had been wrecked across a field into the timber. He followed the tracks, and found the clothing which was later identified by Mark Dover as being the clothing which had been taken from his store on the night before it was found. The constable and mayor of Fulton then followed the car tracks to the river, and found a car with the defendant and two other persons in it, waiting to be carried across the river. The defendant was on the back seat, and pretended to be asleep. After the defendant and his companions were arrested they were searched, and two watches were taken from the person of the defendant. One of them was an Ingersoll watch, and the other was one of more value. A bottle of whiskey was also taken from a handbag of the defendant, which had four figures on the bottom of it. The defendant and his companions were first carried to Hope, and then to Washington, where they were confined in the jail until the arrival of Mark Dover and the sheriff of Polk County, when they were turned over to said sheriff. The defendant and his companions were riding in a car which had two tires which made tracks that were like the tire tracks found by Dover not far from his store, the morning after the burglary. The clothing was found the morning after the burglary, and, although there was a heavy frost on the ground where it was found, there was no frost on the clothing.

The testimony was legally sufficient to warrant the jury in returning a verdict of guilty. The coat-hangers were found about 300 yards from the store, near the side of the road. A car with two Fisk casings had been backed up at that place. The defendant and his companions, when arrested, were in a car having two tires of the same description. After they started down the road from Hatfield towards Fulton, their car was wrecked, and the defendant hired a farmer to pull them out of the ditch. The officers who went to the place where the car was turned over, found tracks leading

from there to the woods near by, and there found hidden the clothing identified later by Dover as that taken from his store on the night previous to which it was found. There was no frost on the clothing, but there was a heavy frost on the ground where it lay. The jury might have inferred from this that the clothing had been carried from the car when it was wrecked, and hidden in the woods. It might have inferred that the defendant was guilty, because he was in possession of the car and therefore in possession of the clothing. It would not make any difference that two other persons were also present aiding and abetting him. He would be equally guilty as if he had acted by himself in the matter. Later on, on the same morning, the defendant and his two companions were arrested, and an Ingersoll watch was taken from the person of the defendant. The accused parties were then confined in the jail at Washington, and were later turned over to the sheriff of Polk County as persons charged with burglarizing the store of the Dover Mercantile Company at Hatfield, two nights before. At the same time the jailer turned over an Ingersoll watch to Dover. The latter identified this watch by some marks on it as one of the watches taken from the store on the night of the burglary. There was some other proof tending to connect the defendant with the burglary and larceny. The undisputed evidence shows that the store was broken into, and about $600 worth of clothing taken from it. The fact that the clothing was found on the same morning in the woods, and that there were tracks leading to the place of hiding from the place where a car in the possession of the defendant had been ditched, tended to show that he was connected with the burglary and larceny. The jury might have inferred that he was in possession of the stolen goods, and, from the other attendant circumstances, might have found that he was one of the parties who had burglarized the store and had taken the clothing and other articles of merchandise from it. Hence

we hold that the evidence was legally sufficient to warrant the verdict.

The next assignment of error is that the judgment should be reversed because the court allowed Mark Dover to testify that the Ingersoll watch which was delivered to him by the jailer in Washington was one of the watches which was taken from the store when it was burglarized. It was insisted that the evidence is improper, because there was no testimony to show that the Ingersoll watch which the jailer delivered to Dover was the watch taken from the person of the defendant. Reliance is placed by counsel on the case of *Oliver* v. *State,* 120 Ark. 188, 179 S. W. 366. In that case it was held that, in a criminal charge for burglary, it was error to admit in evidence a knife alleged to have been stolen by the defendant, when it was not identified by any witness. In that case, however, the knife in question was not identified as one of those taken from the store when it was burglarized. The court said that it might have been a new and unused knife, and that the jury might have improperly inferred from that that it was a knife stolen when the store was burglarized. Mark Dover positively identified the watch which was delivered to him by the jailer at Washington as one of the watches which had been taken from his store when it was burglarized. He knew the watch by some marks on the outside of the case and from a broken spring. The defendant was traced in a car all the way from the scene of the burglary. The clothes which had been taken from the store were found near were the car had been wrecked, and this tended to show that they were in the defendant's possession. The defendant then proceeded from the place where his car had been wrecked to Fulton, and was arrested there. An Ingersoll watch was found on him there. He was lodged in the jail at Washington soon after his arrest. It is true that the watch which the jailer delivered to Dover, when he and the sheriff of Polk County came to carry the defendant and his companions back to said county, was not identified by

the jailer as the one taken from the person of the defendant when arrested; but, when Dover identified it positively as a watch which had been taken from his store on the night of the burglary, this, considered in connection with the fact that the defendant was traced from the scene of the burglary until he was delivered to the jailer at Washington, and that an Ingersoll watch was taken from him when he was arrested, warranted the jury in finding that the watch which the jailer delivered to Dover was the one which had been taken from the person of the defendant when he was arrested.

The next assignment of error is that it was not proper for the court to have given instruction No. 8, which reads as follows:

"You are instructed that the possession of property recently stolen, without reasonable explanation of that possession, is evidence which goes to you for your consideration under all the circumstances in the case, to be weighed as tending to show the guilt of the one in whose hands such property is found, but such evidence alone does not imperatively impose upon you the duty of convicting, even though it be not rebutted."

It is contended that this instruction was erroneous because there was no evidence in the case tending to show that the watch which the jailer delivered to Mark Dover and which was identified by Dover as being one of the watches taken from his store on the night of the burglary, was the watch which was taken from the person of the defendant. We have already stated the circumstances which tend to show that the jury might have legally inferred that the watch was the same one and that it was a part of the stolen property in the possession of the defendant.

The fact that the clothes were so recently hidden tended to show that they had been taken from the car of the defendant and that he was still in possession of them. Having hidden the merchandise, the jury might have found that it was still in his possession. There was nothing in its appearance to indicate that he had

intended to throw it away. It was piled up and hidden, and this indicated that the defendant was still in possession of them. Besides this, the defendant asked for a similar instruction, and the court gave it.

The defendant did not make any specific objection to instruction No. 8, and we can only pass on general objections. *Keirsey* v. *State,* 131 Ark. 487, 199 S. W. 532.

The next assignment of error is that the court erred in not excluding the testimony regarding the bottles of whiskey. We do not agree with counsel in this contention. A bottle of whiskey was taken from a grip belonging to the defendant when he was arrested, and a similar bottle of whiskey was found with the coat-hangers near the store, soon after the burglary was discovered. This testimony was competent to be considered by the jury for what it was worth in identifying the man who had deposited the coat-hangers by the side of the road, and thus indicating that he was one of the parties who had broken into the store and taken the clothing from it.

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

MOREHART *v.* MABELVALE ROAD IMPROVEMENT DISTRICT No. 29.

Opinion delivered November 5, 1928.

A. L. Rotenberry, for appellant.

Wallace Townsend, for appellee.

HART, C. J., (after stating the facts). The road improvement district in question was organized under the provisions of act 126 of Acts of 1923. General Acts of 1923, p. 84. No complaint is made that the improvement district was not legally formed under the provisions of the act or that the commissioners are not carrying on the construction of the improvement in the manner provided by the act.

The sole ground of attack is that the act under which the improvement district is formed is unconstitutional. The act under consideration has been upheld in the following cases: *Moyer* v. *Altheimer,* 168 Ark. 271, 270 S. W. 91; *Newton* v. *Altheimer,* 170 Ark. 376, 280 S. W. 641; and *Reed* v. *Paving District No. 21 of Jefferson County,* 171 Ark. 710, 286 S. W. 829.

Counsel for appellants earnestly insist, however, that in none of these cases was the question of the constitutionality of the act directly and expressly discussed and decided. We cannot agree with counsel in this contention. In the case of *Newton* v. *Altheimer, supra,* there was a dissenting opinion, and, when we consider the majority opinion and minority opinion together, it is plain that every contention made by counsel for appellants in this case with regard to the constitutionality of the act was thoroughly discussed, and decided adversely to the present contention. In the case of *Reed* v. *Paving District No. 21, supra,* it was expressly stated by a majority of the court that the act now under consideration, authorizing county courts to create suburban improvement districts upon petition of a majority of property owners in the territory adjacent to the proposed improvement, was not unconstitutional as invading the jurisdiction of the county court. The reason given was that the county court itself in reality creates the district, at the will of a majority of the landowners, by affirmative action in the matter, and that it would refuse to create a district if the road to be improved was not already a public highway. The court, in express terms, said that the constitutionality of the act had been passed on in the case of *Newton* v. *Altheimer,* 170 Ark. 367, 280 S. W. 641. No useful purpose could be served by taking up the matter and considering it again, for the court has already passed upon it three times.

Again, it is insisted that the act is unconstitutional because, under its terms, the commissioners may continue in office after the road has been completed. This has been expressly decided contrary to the present contention of appellants, as is very clear when we consider the opinions and dissenting opinions in the following cases: *Easley* v. *Patterson,* 142 Ark. 52, 218 S. W. 381; and *Dickerson* v. *Reeder,* 143 Ark. 228, 220 S. W. 32. Numerous other later decisions might be cited showing that the majority of the court held to its original view,

and no useful purpose would be served by discussing this subject again.

It is also insisted that the act is unconstitutional because, under § 5, the assessors are given the power, in making the assessment of benefits, to assess damages that will accrue to any landowner by reason of the proposed improvement, including all injury to lands taken or damaged. This point has also been decided against appellant. *Dickerson* v. *Tri-County Drainage District,* 138 Ark. 471, 212 S. W. 334, and later decisions of this court.

Finally, it is insisted that the act is unconstitutional because it was amended by act 183 of the Acts of 1927, so as to provide that a district may be formed under act No. 126, embracing lands in two or more counties. Acts of 1927, p. 636. We do not consider or decide this point, for two reasons. In the first place, if we should decide that the amendment by the Legislature of 1927 to the original act passed by the Legislature in 1923 was unconstitutional, the amendment would be just as though it had not been passed, and the original act of 1923 would be left in force and unimpaired. *State* v. *Williams-Echols Dry Goods Co.,* 176 Ark. 324, 3 S. W. (2d) 340. In the next place, the amendment in question could be stricken out without affecting the validity of the rest of the act. If the amendment was stricken out, there would still be a complete, workable act without it. *Cribbs* v. *Benedict,* 64 Ark. 555, 44 S. W. 707; and *Snetzer* v. *Gregg,* 129 Ark. 542, 196 S. W. 925, L. R. A. 1917F, 999.

The decree will be affirmed.

TAYLOR *v.* MCKENNON.

Opinion delivered November 5, 1928.

John Baxter, for appellant.

Williamson & Williamson, for appellee.

HART, C. J., (after stating the facts). The sole ground relied upon by appellant for a reversal of the decree is that the transfer of the shares of stock by

McKennon to Thane was not made in strict compliance with the provisions of § 3 of act 496 of the Acts of 1921, and that, on account of failure in this respect, the transfer was not effective as against the creditors of the insolvent bank.

The first act on our statute books relative to the transfer of shares of stock was an act to provide for the creation and organization of incorporated companies, passed by the Legislature of 1869. Acts of 1869, p. 179. A part of § 12 of this act relating to the transfer of stock is now § 1716 of Crawford & Moses' Digest, and reads as follows:

"Whenever any stockholder shall transfer his stock in any such corporation, a certificate of such transfer shall forthwith be deposited with the county clerk aforesaid, who shall note the time of said deposit, and record it at full length in a book to be kept by him for that purpose; and no transfer of stock shall be valid as against any creditor of such stockholder until such certificate shall have been so deposited."

This act has been construed by this court in the following cases: *Warren* v. *Nix,* 97 Ark. 374, 135 S. W. 896, and *Bank of Midland* v. *Harris,* 114 Ark. 344, 170 S. W. 67, Ann. Cas. 1916B, 1255. In the case first cited a stockholder, in good faith, before the insolvency of the bank, transferred his stock to the cashier, and gave him full power to note the transfer upon the books of the bank and to file a statement of the transfer with the county clerk. The transfer was held to be valid, and that there was no liability under the statute, because the stockholder had done all that could be expected of a reasonably prudent business man. In the case last cited the court again held that a transfer of capital stock without same being recorded on the books of the corporation is efficacious to sever the relation between a stockholder and the bank, if the sale had been made honestly and in good faith, and the seller or transferrer of the stock had done all that could be done by a careful and prudent business man in order to make such transfer.

In the case at bar the undisputed facts are that the stock was sold to the president of the bank at a time when it was solvent, and there is no suspicion of fraud in the transaction. The seller and the purchaser were perfectly solvent at that time. The stock certificates were duly transferred on the printed forms on the backs of the certificates, and power of attorney was given, authorizing the change of ownership to be made upon the books of the bank, and the same were delivered to the president of the bank, who was also the purchaser of the stock. Thereafter McKennon was no longer considered a stockholder of the bank, and his place as holder of the certificates of stock in question was taken by Henry Thane, the president of the bank, who thereafter voted the shares of stock at the meetings of stockholders and collected the dividends on the same.

It is conceded that McKennon cannot be held liable for the double liability of stockholders imposed by statute unless the rule above announced has been changed by subsequent statute. It is contended, however, that subsequently the Legislature passed a mandatory statute, intending to protect depositors and other creditors of banks which become insolvent, by making it the duty of the transferrer of stock to see that the stock was transferred in the manner provided by the statute, in order to escape the double stockholders' liability under the statute for the benefit of creditors of an insolvent bank.

The Legislature of 1913 passed an act for the organization and control of banks. The act created the State Banking Department, and provided for the appointment of a State Bank Commissioner and prescribed his duties. Crawford & Moses' Digest, chapter 15. Section 21 of the act, which is § 686 of the Digest, regulates the transfer of stock, and reads as follows:

"The stock of every bank shall be deemed personal property, and in case of sale shall be transferred only on the books of such corporation, in such form as the commissioner shall prescribe, and, whenever any stock-

holder has sold and may wish to transfer his stock, a certificate of such transfer, signed by the president and cashier, or secretary, shall be deposited with the county clerk of the county in which it is located, who shall note the time of filing thereof, and record it in a book to be kept by him for that purpose, for which the clerk shall be entitled to a fee of twenty-five cents; and no sale or transfer of stock shall be valid as against creditors of such stockholder until such certificate has been deposited."

This section was amended by the Legislature of 1921. Acts of 1921, p. 514. Section 3 of that act reads as follows:

"The stock of every bank shall be deemed personal property, and in case of sale shall be transferred only on the books of such corporation, in such form as the commissioner shall prescribe, and, whenever any stockholder has sold and may wish to transfer his stock, a certificate of such transfer, signed by the president and cashier, or secretary, and setting forth the name and residence of the transferee, shall be deposited by said transferrer with the commissioner, who, after he has indorsed it as having been filed with him, shall return it for filing with the county clerk of the county in which the said bank is located. The said county clerk shall note the time of the filing thereon, and record it in a book to be kept for that purpose, for which the clerk shall be entitled to a fee of twenty-five cents. No sale or transfer of stock shall be valid as against creditors of the transferrer until such certificate so filed with, and indorsed and returned by, the commissioner, has been filed for record with said county clerk."

Now it is contended that provisions of this section, that, whenever any stockholder may wish to transfer his stock, the certificate of such transfer, properly signed, and setting forth the name and residence of the transferee, shall be deposited by said transferrer with the State Bank Commissioner, who, after he has indorsed it as having been filed with him, shall return it for

filing with the proper county clerk, changes the rule laid down in our former decisions, and that the rule now is that the transfer of stock by a shareholder in a bank does not relieve him from the stockholder's double liability until the transfer is perfected by being deposited with the Bank Commissioner and otherwise complying with the provisions of the act of 1921 above referred to.

Our act creating the State Banking Department was passed March 3, 1913, and the case of *Bank of Midland* v. *Harris, supra,* was decided by this court on June 29, 1914. Hence it is earnestly insisted that the act of 1921 was passed for the purpose of changing the rule laid down in that case and in our previous decisions relating to the subject. We do not agree with counsel in this contention. It will be noted that the concluding part of the section in each of the acts is the one which renders the transfer of the stock invalid as to creditors under certain conditions. Each act is practically the same on this subject. Each act, in effect, provides that no sale or transfer of stock shall be valid as against creditors of the transferrer until such certificate of stock has been filed with the county clerk. In the Bank of Midland case the court recognized that there was a very wide difference in the authorities in construing clauses of this kind, but it was expressly stated that the court must treat it as settled by the case of *Warren* v. *Nix.* The reason for requiring the certificate of stock to be filed for record with the county clerk is to provide a public record, where persons dealing with the corporation or stockholders could readily secure knowledge of the stockholders of the corporation, in order to ascertain who would be liable under the stockholders' double liability statute. It was as much the duty of the transferrer of the certificate of stock to see that the same was filed for record with the county clerk before the act of 1921 was passed as it was afterwards. The act of 1921 only added the requirement that the certificate should be indorsed by the State Bank Commissioner. The vital part of the act was that the transfer should

be filed with the county clerk in order that persons dealing with the bank or the stockholders should have knowledge of the holders of its capital stock and the amount thereof. It could add nothing that an additional requirement was made that the Bank Commissioner should indorse the transfer. No record was to be kept by the Bank Commissioner, and the fact that he should indorse the transfer could add nothing to the duty of the transferrer to see that it was filed for record with the county clerk in order that persons dealing with the corporation or the stockholders might have trustworthy knowledge of the stockholders thereof. Hence we do not think that the act of 1921 would warrant us in treating the ruling made by the court in *Warren* v. *Nix, supra,* and the *Bank of Midland* v. *Harris* as having been changed by statutory enactment. In the case of *Bank of Midland* v. *Harris* the court expressly stated that the rule announced in our earlier decisions must be treated as settling the question in this State. Therefore we adhere to our former ruling on the subject, and are of the opinion that the rule was not changed by the section of the act of 1921 relating to the transfer of the stock of banks in this State, and that the transfer involved in this case complies with the provisions of that act.

Counsel for the defendant contends that act 496 of the Acts of 1921 has been repealed by act 387 of the Acts of 1923, which is an act to regulate the transfer of corporate stock and whose provisions were substantially complied with. General Acts of 1923, p. 358. We do not deem it necessary to pass on this question, for two reasons. In the first place, the conclusion we have reached renders it unnecessary to do so. In the second place, § 23 of the act says that the provisions thereof shall apply only to certificates issued after the passage of the act. The certificates in this case were issued before the act of 1923 went into effect.

Therefore the decree will be affirmed.

H. G. PUGH & CO. *v.* AHRENS.

Opinion delivered November 5, 1928.

Walter M. Purvis, for appellant.

Fred A. Isgrig and *Philip McNemer,* for appellee.

SMITH, J. Appellee sued the appellant, a corporation, of which H. G. Pugh is president, for the premiums due on two policies of insurance on the life of its president.

In support of his cause of action appellee testified that he wrote two policies of insurance on the life of H. G. Pugh, payable to the company of which Pugh was president, for $5,000 each, with the understanding that appellee would pay the insurance company the premiums and would accept from the appellant goods, wares and merchandise in which appellant dealt, in payment for the premuims, and that, pursuant to this arrangement, the policies were issued and delivered to appellant and retained by it for nine months, when appellant returned the policies to the insurance company and

caused them to be canceled; that, upon issuance of the policies, the premiums therefor were charged to appellee, and he became responsible therefor to the company, and that he later made a settlement of this and all other accounts due by him to the company by executing to it a note for the net balance due by him, the same to be repaid out of annual renewals in which he had acquired an interest through his agency as district agent of the company issuing the policies.

But, as the trial court directed a verdict in appellee's favor, we must give to the testimony offered in appellant's behalf its highest probative value, and must assume that the jury would have accepted that testimony as true. As thus viewed, we summarize the testimony offered in appellant's behalf as stated in its brief. Mr. Pugh testified that he gave appellee an application for a policy which was to be issued on his life in favor of the appellant company. The premiums thereon were to be paid for in office equipment in which appellant dealt. Two policies, each for $5,000, were written upon the same terms, and of these Mr. Pugh testified, "We decided to take one of the policies when the policy arrived, the other one having been written for our approval."

As to the second policy, he testified: "The second policy was held in abeyance. It was on my desk for a good while. There was nothing done. We received no premium notice, had no dealings from the company, and we were looking for payment to be made on this trade. There was no transaction in connection with the trade and no payments made of merchandise furnished."

He further testified that, about the first of June (after the issuance and delivery of the policy in February), witness wanted to know the status of the policies, and wrote the company, and received a reply signed by C. W. Nugent, as general counsel for the company, in which a detailed report was promised to be made at a later date, but that appellee came in and assured him

that the policy was all right and "the deal would be all right, and we then—I believe it was at that time—we decided to take the two."

The witness further testified that the company did not comply with his request to advise him as to the status of the policies. "They delayed, and gave excuses for not replying the entire year up to within a few days of the time of the due date of the second year." Witness returned the policies to the company on October 26, and received a letter from the company advising that they had been canceled.

On August 1 witness received from the company the following letter:

"Dear Mr. Pugh: On account of the fact that Mr. J. D. Ahrens of Little Rock has severed his connection with the company, any matters pertaining to your policy No. 142710, either premium payments or otherwise, should be taken direct with the home office.

"Hoping that we many continue to serve you from the home office in an efficient manner, I beg to remain,

"Very truly yours,
"W. J. Barr,
"Manager renewal department."

The credit man of the appellant company testified that appellee did not order supplies in payment of the premiums, but he also testified, "I had a suspicion that the insurance had not been settled for, and I didn't care to let the furniture go out, because I would have to look to Mr. Ahrens personally for payment." While appellee was testifying as a witness in his own behalf, he stated that the premiums on the two policies had been paid, and that they were paid by being charged to witness' account with the insurance company, and that the statements received by him of his account from the company showed this to be a fact. Appellant objected to this testimony, and asked the court to withdraw the submission of the case, to permit it to take testimony to show that the insurance company had never treated

the premiums as being paid. The court overruled the motion to withdraw the submission upon the ground that this was an issue raised by the pleadings which appellant should have been prepared to meet.

The original complaint was filed March 2, 1926, and an amended complaint was filed March 31, 1926, in which the appellee specifically alleged that his cause of action was based upon the failure of appellants to pay the premium on the two policies, and these allegations were made more specific in response to a motion to that effect, which response was filed January 22, 1927.

Appellant filed an answer and cross-complaint on May 20, 1927, in which it was alleged, in effect, that the policies were at all times void for the reason that appellant had never accepted them. In its cross-complaint appellant prayed judgment for the sum of $70.60 due it by appellee on open account. The trial from which this appeal comes was had February 14, 1928.

In support of the motion for a withdrawal of the submission and a postponement of the trial a letter was exhibited, dated May 26, 1926, written to appellant's counsel and signed by Frank S. Anderson, written on the stationery of the general counsel of the insurance company, in which it was stated that the premiums had never been paid, and the opinion was expressed that the appellee had no right to maintain this suit.

The court properly treated this letter as hearsay, and did not abuse its discretion in refusing to permit the submission to be withdrawn to permit appellant to take depositions. As we have said, the letter was dated May 26, 1926, which was more than a year before the trial, and related to the point in issue, which was whether appellee was entitled to receive these premiums.

Pugh testified that he returned the policies in October because he was uncertain whether they were in force, and one of the reasons for his uncertainty was that he had received no premium notice from the company, nor did he receive a binding receipt. There was, how-

ever, no reason to expect a notice in regard to the premiums if appellee had paid them, as he at all times insisted he had done, and there was no necessity for a "binding receipt," when the policies themselves had been delivered.

The only letter from the insurance company properly identified was the one dated August 1, copied above, advising that appellee had severed his connection with the company, and, while it refers to only one of the policies, it refers to it as a subsisting contract. But, even after the receipt of this letter, when appellant had already been in possession of the policies since February, appellant continued to hold them until the latter part of October, and, in so doing, appellant must be held as a matter of law to have accepted both policies. The law on this question was declared in *People's Savings Bank* v. *Raines,* 175 Ark. 1155, 2 S. W. (2d) 20, and cases there cited. In that case the insured had kept in his possession a policy of insurance delivered to him about the first of February until some time in April, when it was returned. But the court held that this constituted an unreasonable delay, and that the insured must be held as a matter of law to have accepted the policy for the reason, as was there said, "it was the duty of the insured to examine the policy in a reasonable time after its delivery to him—that is, in such a time as he could have done so—and to reject it if it was not what he had contracted for, and, if he failed to do this, he will be deemed to have accepted it, and cannot avoid liability for payment of the premium note."

Here the policies were retained for a much longer period of time, and the court, in directing a verdict in favor of appellee, permitted a recovery of such portion of the annual premium as covered the time during which the insurance had been in force, until the insured voluntarily canceled it, and from that amount deducted the sum claimed by the appellant in its cross-complaint.

The judgment of the court below appears to be correct, and it is therefore affirmed.

HETHCOX *v.* STEWART.

Opinion delivered November 5, 1928.

Pinnix & Pinnix, for appellant.

Tom Kidd, for appellee.

HUMPHREYS, J. This suit was brought by appellee against appellant, in the circuit court of Pike County, to recover compensatory damages in the sum of $10,000 and punitive damages in the sum of $5,000 for slander.

It was alleged particularly in the complaint that appellant, A. L. Hethcox, did, on or about the 20th day of November, 1927, in the town of Glenwood, Pike County, in the presence of A. J. Ligon, H. C. Lawless, C. F. Stewart and divers others persons, unlawfully, falsely, and maliciously speak, utter and publish of and concerning the appellee the following false, malicious and defamatory words, in the presence of A. J. Ligon: "That Stewart had stole a yearling or steer, and that he had been trying to catch him for two years, and that he had him this time;" and in the presence of H. C. Lawless: "That Stewart went down in his field and drove one of Brown & Lawless' steers off and made away with it, and that they searched the fields and pasture and had been unable to find the yearling or

steer, and he had been trying to catch him for two years, and had two witnesses that saw him;" and in the presence of C. F. Stewart and divers other persons: "That Stewart had butchered one of Brown & Lawless' steers, and three of us saw him, and the thing to do is to settle it, and I will dodge the grand jury. Now, he stole the steer, for three of us saw him."

The complaint contained allegations and prayer for compensatory damages in the sum of $10,000 and punitive damages in the sum of $5,000.

The appellant answered, and made general denial, and pleaded the language used by him was privileged.

The cause was submitted upon the pleadings, the testimony, and instructions of the court, which resulted in a verdict and consequent judgment against appellant in favor of appellee for $500, from which is this appeal.

Appellant contends for a reversal of the judgment on the alleged ground that, although the communication was defamatory, the undisputed testimony discloses that the words were not maliciously spoken, but spoken in good faith, touching a matter in which appellant had an interest, or in reference to which he had a duty, and to persons having a corresponding interest or duty, and were therefore qualifiedly privileged.

Of course, if the undisputed testimony reflected these facts, it would have been the duty of the court to direct a verdict for appellant. The record does not, however, disclose, according to the undisputed testimony, that the communications were made to persons having an interest in the matter. There is testimony in the record to the effect that it was made to parties who had no interest in the steer or yearling appellant charged appellee with stealing. We refer to the following excerpts from the testimony of A. J. Ligon and H. C. Lawless:

"A. J. Ligon: Q. State whether or not you heard a conversation in Glenwood, Pike County, Arkansas, on or about November, 1927, made by Mr. A. L. Hethcox

about Mr. Stewart, had stole a yearling or steer, and that he had been trying to catch him for two years, and that he had him this time? A. Yes sir. Q. You heard him make that statement? A. Yes sir. Q. How many people were standing there? A. Several. I don't know how many. Q. State what you saw and heard there? A. I just heard him say that Stewart stole a yearling—somebody stole a yearling, and I asked him who, and he said Mr. Stewart. Q. He said Mr. Stewart had stole a yearling? A. Yes sir."

"H. C. Lawless: Q. I will ask you if, in that conversation, Hethcox stated that Stewart went down in his field and drove one of Brown & Lawless' steers off and made away with it, and that they searched the field and pasture and had been unable to find the yearling or steer, and that he had been trying to catch him for two years, but they had him now, and had two witnesses that saw him? A. Yes sir, something to that effect. Q. Did he make the statement? A. Yes sir."

The record also reflects that appellant told C. F. Stewart that appellee had stolen a steer and butchered it; that three of them saw him, and that if they would give him $40 he would compromise with Brown and skip the grand jury. The record also shows that he stated to J. P. O'Connor that appellant had taken the steer, stole the steer, and drove it direct to his slaughter-pen and butchered it.

None of these witnesses had any interest in the steer, and none of them were connected in any way with the theft.

In view of this testimony, it cannot be said that, under the undisputed evidence, appellant was entitled to an instructed verdict on the theory that what he said to the witnesses at the time and place he spoke the words were qualifiedly privileged communications.

Appellant also contends for a reversal of the judgment because the court submitted the question of

whether the words spoken by appellant to the jury, at the time and place he spoke the words, were qualifiedly privileged communications, under erroneous instructions.

Appellant failed to abstract all the instructions given by the court in the trial of the cause, so this court must presume on appeal that the court submitted the issue involved under correct instructions. *U. S. Auto Co.* v. *Arkadelphia Milling Co.,* 140 Ark. 73, 215 S. W. 641; *Covill* v. *Gerschmay,* 145 Ark. 269, 224 S. W. 609; *Ermon* v. *Thomason,* 149 Ark. 669, 235 S. W. 54.

No error appearing, the judgment is affirmed.

CONLEE *v.* LOVE.

Opinion delivered November 5, 1928.

Tom F. Digby, for appellant.

Sam T. Poe, Tom Poe and *McDonald Poe,* for appellee.

HUMPHREYS, J. Appellee obtained a decree for money against A. B. Cox, in the chancery court of Yell County, and was unable to find any property belonging to him in said county upon which to levy an execu-

tion to satisfy the judgment, whereupon he caused an execution to be issued on said judgment directed to the sheriff of Pulaski County. The sheriff of Pulaski County levied the execution upon the Oakland coupe automobile as the property of A. B. Cox. Before the sale thereof, Cox-Ellis Lumber Company, a corporation, instituted an action of replevin for the automobile against the sheriff, and obtained the possession thereof on delivery bond signed by itself as principal and S. C. Ellis and the appellant herein as sureties.

Appellee intervened, and defended the suit in his own right and in the name of the sheriff. The intervener and sheriff prevailed in the trial of the cause, and a judgment was rendered against the principal and sureties on the delivery bond in the alternative in favor of the sheriff, for the benefit of appellee herein, either for the return of the automobile or the payment of $700, its value.

Cox-Ellis Lumber Company appealed the case to this court, and stayed further proceedings thereunder by the execution of a supersedeas bond, signed by itself as principal and S. C. Ellis as surety. The appellant herein did not sign the supersedeas bond. Almost a year thereafter the judgment was affirmed by the Supreme Court. Appellee then procured an alias execution on his judgment against A. B. Cox in the chancery court of Yell County, directed to the sheriff of Pulaski County. The sheriff found said automobile in the possession of the Cox-Ellis Lumber Company, where it had remained during the pendency of the appeal from the judgment in the replevin suit, and levied upon and sold it for $100. During the pendency of said appeal, both the Cox-Ellis Lumber Company and S. C. Ellis became insolvent. Appellee herein then brought suit against appellant herein on an alleged breach of the condition of the delivery bond given in the replevin action to return the automobile in like good order and condition as when levied upon under the first execution. The suit was

based upon the alleged right of appellee herein to recover from the surety, appellant herein, by reason of damages sustained in the depreciation in value of the automobile while it was wrongfully withheld from the sheriff and sale thereof prevented.

Appellant filed an answer, denying the material allegations of the complaint, and, by way of an affirmative defense, pleaded a release from liability on the delivery bond by reason of the execution of a supersedeas bond on the appeal from the judgment in the replevin suit.

The cause proceeded to a hearing, and at the conclusion of the testimony appellant requested the court to instruct the jury to return a verdict for him, which request was refused, over his objection and exception. The trial of the cause upon the pleadings, testimony and instructions of the court resulted in a verdict and judgment in favor of appellee for $500, from which is this appeal.

We deem it unnecessary to discuss and determine the questions presented by appellant for a reversal of the judgment, or to allude to the reasons assigned by appellee for an affirmance thereof, because the delivery bond sued upon, or made the basis of this action, had already merged into a judgment in favor of appellee against appellant before this suit was instituted. In the replevin suit, in which the delivery bond was given, the court rendered a judgment against appellant in favor of appellee for the return of the automobile or $700, its value. The automobile was never returned by appellant or those who signed the delivery bond with him. It was levied upon and sold under a general alias execution, after the affirmance of the judgment in the replevin suit, issued out of the chancery court of Yell County, on appellee's original money judgment against A. B. Cox, and only brought $100, on account of its depreciated condition during the pendency of the replevin suit on appeal in the Supreme Court. The judgment was

rendered against appellant in favor of appellee under § 8643 of Crawford & Moses' Digest, and, by the execution of that bond, appellant became a party to the replevin suit, and it was proper to render a judgment against him in that action for the return of the automobile, if to be had, and if not, for the value thereof. *Glenn* v. *Porter*, 68 Ark. 320, 57 S. W. 1109; *Walker* v. *Files*, 94 Ark. 453, 127 S. W. 739. The judgment was binding upon all the parties to the replevin suit, and, after the bond had merged into judgment under § 8656 of Crawford & Moses' Digest, it could not be made the basis of a subsequent suit between the same parties for depreciation in value of the property seized during the pendency of an appeal from the judgment in the replevin suit. Appellee's only remedy was to enforce the judgment he already had against appellant by execution, and not by bringing a second suit against him on the same delivery bond.

On account of the error indicated the judgment is reversed, and the cause is dismissed.

HART, C. J., not participating.

HAMILTON *v.* HAMILTON.

Opinion delivered November 5, 1928.

W. R. Donham and *Morris & Barron,* for appellant.

Creed Caldwell and *Chas. A. Walls,* for appellee.

HUMPHREYS, J. The circuit court of Lonoke County adjudged, on appeal from the probate court, admitting a written instrument to probate, dated November 17, 1926, as the last will and testament of Fannie Nobles, deceased, that said instrument was her last will and testament. From the verdict and judgment of the circuit court finding said instrument to be the last will and testament of Fannie Nobles, deceased, appellants, heirs at law of the deceased and contestants of the will, have duly prosecuted an appeal to this court.

Appellee, a nephew of the deceased, to whom she bequeathed the bulk of her estate, was the proponent of the will.

There were no written pleadings filed either in the probate court or in the circuit court on appeal, so appellants maintain that the cause proceeded to a trial on the general issue of will or no will, in accordance with § 10525 of Crawford & Moses' Digest, which reads in part as follows:

"When the proceeding is taken to the circuit court, all necessary parties shall be brought before the court, and, upon the demand of any of them, a jury shall be impaneled to try which or how much of any testamentary paper produced is or is not the last will of the testator."

Appellee maintains that the only issue presented by the testimony was whether the will was genuine or a forgery.

The testimony introduced by appellants tended to show that the will was a forgery. The expert witnesses introduced by them, when shown the genuine signatures of the testatrix and C. M. Acklin, one of the attesting witnesses, testified that, in their opinion, the signatures of both were traced forgeries. The whereabouts of C. M. Acklin between November 10, 1926, until his death in February, 1927, was accounted for by the testimony of relatives and acquaintances, and, according to their testimony, he was not at the home of the testatrix in England during the time and was not physically able to have ridden in an automobile from Humphrey to England and back at any time between those dates to attest the will. There were many circumstances in the case tending strongly to support the alleged forgery of the will.

The testimony introduced by appellee tended to show that the will was duly executed on or about the 28th day of November, 1926, by the testatrix, at her home in England. Expert witnesses introduced by appellee, when shown the genuine signatures of the testatrix and

Acklin on other papers, testified that, in their opinion, their signatures to the will were genuine, and not forgeries. Appellee and E. M. Harrington, one of the attesting witnesses to the will, testified that, in company with C. M. Acklin, they drove from Humphrey to England, by way of Stuttgart, and stopped at the home of the testatrix in the town of England, and witnessed the execution of the will, and then returned, reaching Humphrey about 2 o'clock in the afternoon. Appellee thought the will was executed about the 28th of November, and Harrington thought it was executed some time in November, 1926. The will on its face shows that it was executed on the 17th day of November, 1926, according to all of the statutory requirements, and both appellee and Harrington testified that it was. There are a number of circumstances in the record tending to support the testimony of appellee and Harrington to the effect that the signatures to the will were genuine. There is no testimony in the record tending to show that the will was not executed in accordance with all statutory requirements, except the testimony tending to show that the signatures of the testatrix and C. M. Acklin were forged.

Appellants contend for a reversal of the judgment on the ground that the evidence is insufficient to support the verdict. Appellants argue that the witnesses introduced by appellee should not be credited or any weight attached to their evidence on account of contradictory statements made by some, the unreasonable story of others, and the certain and complete alibi established for C. M. Acklin at the time the will was executed.

We cannot concur in the interpretation placed by appellants upon the testimony introduced by appellee. The testimony introduced by him is not entirely unbelievable. The character of his witnesses was not assailed. Witness Harrington, one of the attesting witnesses, gave positive testimony to the effect that he was present when

the will was executed, and that he saw the testatrix sign the will, and saw Acklin sign same as an attesting witness, and that he signed it himself; that they all signed it in the presence of each other, and that he and Acklin signed it at the request of the testatrix. This witness was not impeached, and, as far as the record discloses, he had no interest whatever in the matter. Appellee corroborates his testimony in every particular, and there are other circumstances to support the testimony of both. One of the strong circumstances was that appellee had lived with the testatrix and her husband on their farm for about eight years, coming to their home when he was fifteen years old and remaining with them until he enlisted in the World War. This will was in tenor and effect like one the testatrix had theretofore made. The credibility of witnesses and the weight to be attached to their testimony are questions for juries, and not for courts. Courts will not invade the province of juries and pass upon the credibility of witnesses and the weight of their testimony, unless wholly and entirely unbelievable. There is substantial testimony in the record supporting the verdict of the jury in the instant case.

Appellants also contend for a reversal of the judgment upon the ground that, at the request of appellee, the court eliminated the issue of whether the will was executed according to statutory requirements by giving instruction No. 8, which reads as follows:

"Gentlemen of the jury, the plaintiffs, W. T. Hamilton *et al.*, are contesting the will in controversy upon the sole ground that the two signatures to the will are a forgery. There are no other issues for you to decide in this case. Therefore, if you find from the evidence in this case that the will in fact was executed by Fannie Nobles, and that the signatures attached thereto are the signatures of Fannie Nobles, deceased, and C. M. Acklin, then your verdict in this case will be for the contestee, W. E. Hamilton."

This instruction did send the case to the jury upon the sole issue of whether the signatures of the testatrix and the attesting witness, C. M. Acklin, were forgeries or genuine signatures; but the instruction was responsive to the issue joined by the evidence. It is true that the court instructed, at appellants' request, upon both issues of whether the signatures were forgeries and whether the will was executed in accordance with statutory requirements, but the latter issue was abstract, and more favorable to that extent to appellants than they were entitled to. Instruction No. 8, which correctly submitted the only issue made by the evidence, conflicted with the instructions given at appellants' request, submitting both issues, but the conflict related to an issue not in the case, and was not therefore prejudicial.

That part of the instructions requested by appellants and given by the court, submitting the issue of forgery to the jury, did not conflict with instruction No. 8, given at the request of appellee. If appellants had introduced any evidence tending to show that the will was not executed in accordance with the statutory requirements, other than the evidence tending to establish that the signatures were forged, then it would have been proper to have submitted that issue to the jury, but, not having done so, the submission of that issue at appellants' request was abstract, and in no sense prejudicial to them.

Appellants also contend for a reversal of the judgment because the court gave appellee's requested instruction No. 7, on the ground that it was incomplete in failing to tell the jury that a will must be attested at the request of the testator. This is a statutory requirement, but the testimony did not present that issue, so it would have been abstract to have instructed the jury to that effect. It is true that the instruction purported to cover the entire case, and should not have omitted any issue presented by the testimony. *Temple Cotton Co.* v. *Skinner,* 176 Ark. 17, 2 S. W. (2d) 676; *Dickerson* v. *St. Louis & San Francisco Ry. Co.,* 177 Ark. 136, 5 S.

W. (2d) 943. The instruction covered the entire case presented by the testimony when it submitted the issue of whether the signatures to the will were forgeries.

Appellants also contend for a reversal of the judgment upon the ground that the court told the jury, in instructions Nos. 5, 9 and 13, that the burden of proof was upon appellants. In cases involving the issues of insanity, incompetency and undue influence, this court has ruled that the burden rests upon the contestants of the will, when it appears upon its face to have been executed in accordance with the statutory requirements and when properly proved and probated. *McCulloch* v. *Campbell,* 49 Ark. 367, 5 S. W. 590; *Smith* v. *Boswell,* 93 Ark. 66, 124 S. W. 264; *Miller* v. *Carr,* 94 Ark. 176, 126 S. W. 1068. Section 10514 of Crawford & Moses' Digest provides that a will so proved, recorded, and signed by the clerk of the court of probate and attested by the seal of office, may be read as evidence, without any further proof thereof. In other words, when such a will is introduced, it makes a *prima facie* case which must be overcome by the proof introduced by the contestants of such a will. We are unable to see why the rule thus established, when the issues mentioned were involved, should not apply to issues of fraud and forgery as well. The Supreme Court of Nebraska, in the case of *Re O'Connor's Will,* 179 N. W. 401, seems to have decided otherwise, but we do not think the Nebraska case is in accord with the general rule. It is stated in Remsen on Preparation and Contest of Wills, page 385, that: "Where the issue is based on forgery, the line of contest is substantially the same as similar issues in general litigation."

In the cases of *McDonald* v. *McDonald,* 142 Ind. 55, 41 N. E. 336, and *Mears* v. *Mears,* 15 Ohio State 90, and *Behrens* v. *Behrens,* 47 Ohio State 323, 25 N. E. 209, 21 Am. St. Rep. 820, the rule is announced that contestants have the burden of proof under an allegation that the will was forged.

Appellants also contend for a reversal of the judgment because the court refused to give instruction No. 5, requested by them, to the effect that the intention of the alleged testatrix was entitled to no consideration in determining whether or not the purported will was properly executed. We think a will executed in accordance with the declared intention of a testator would be a very strong circumstance tending to show the genuineness of a will assailed on the ground that the signatures thereto were forgeries. We cannot think of a stronger circumstance tending to establish the genuineness of a will under such circumstances. The case of *Johnson* v. *Hinton,* 130 Ark. 394, 197 S. W. 706, cited by appellants in support of their contention on this point, is not applicable. In that case the issue was whether the will had been properly executed in accordance with the statutory requirements. Of course, the intention of a testator under such circumstances could have no effect. The testator, in order to give validity to his will, must execute his will in accordance with statutory requirements, irrespective of what his declared intention might or might not have been. The court did not err in refusing to give appellants' requested instruction No. 5.

Appellants also contend for a reversal of the judgment on the ground that the court erred in giving instruction No. 9 at appellee's request. Instruction No. 9, in part, is as follows:

"A number of witnesses have testified as experts upon the question as to whether or not the signature to the will is the signature of Fannie Nobles, deceased. Under the law, the opinions of expert witnesses are admissible in evidence, and are to be given such weight and value as the jury may think right and proper under the circumstances. The value of expert testimony depends not only upon the qualifications and experience of the witness, but upon the facts which he takes into consideration, and upon which he bases his opinion. If the facts assumed, and which are made the basis of the

opinion, are not established by the proof, then the opinion would have no basis upon which to rest, and would be of no value; and, in weighing such opinion, the jury must look to see whether the facts assumed are established by the proof or not; and you cannot take the facts assumed by the witness to be true simply because they are so assumed, but you will look to the proof to determine whether they are proved or not."

It is argued that the instruction is an incorrect declaration of law applicable to the testimony of expert witnesses, because in the instant case the experts did not testify from an assumed state of facts, but from evidence admitted to be true.

Documents bearing the genuine signatures of the testatrix and Acklin were introduced in evidence and used by the experts as a basis for ascertaining whether the signatures on the will were forgeries. Their respective opinions were formulated by a comparison with the genuine signatures on the documents. It is true that the instruction was abstract in the sense that it told the jury that the facts as a basis for formulating opinions by expert witnesses must be proved in order to give value to their opinion, but we are unable to see how this harmed or prejudiced appellant. Reasonable intelligence must always be accorded to jurors, and, if that be done, certainly the jury was not induced by the instruction to give less weight to the opinions of the expert witnesses based upon admitted, rather than assumed, facts which have to be established by proof. The instruction is the one usually given when hypothetical questions are propounded to expert witnesses, and may be characterized as a slight misfit where the foundation facts are considered and not assumed, but it did not result in rendering the opinions of the expert witnesses less valuable or prejudicial to appellants. We do not think the instruction was one on the weight of the evidence, as it applied alike to the opinions expressed by all the expert

witnesses testifying in the case. The instruction did not single out or emphasize the testimony of any particular expert witness.

No error appearing, the judgment is affirmed.

SALIBA *v.* SALIBA.

Opinion delivered November 5, 1928.

Moore, Gray & Burrow, Reid & Everard and *Everett B. Gibson, Jr.*, for appellant.

Bruce Ivy and *J. T. Coston*, for appellee.

KIRBY, J., (after stating the facts). It is insisted, first, for reversal, and the question was raised by both the demurrer and the answer, that the court was without jurisdiction to try the cause, it being against a citizen and resident of the other judicial district of the county. The process, however, was issued and served upon the defendant in the district of the county where the suit was filed, and the fact that defendant was a resident and citizen of the other judicial district of the county did not deprive the court of the district where the suit was brought and the defendant was found of jurisdiction of the action, which was a transitory one. It is true the act creating the two judicial districts of Mississippi County, act 81 of 1901, and the amendatory act 468 of 1919, contain the provision, § 4 of the original act and § 1 of the amendatory act, that "no citizen of either the Osceola or the Chickasawba District of said county shall be liable to be sued in any action in said courts, in the other district." But § 6 of the original act provides that, in order to ascertain the jurisdiction of actions cognizable in the circuit and chancery courts, "the said districts for all purposes * * * shall be considered as separate and distinct counties, and the mode and place for trying suits and determining causes shall be determined by the general law applicable to different counties." It is further provided that certain processes shall run through the whole county, but that none, except subpoenas for witnesses, criminal processes and executions issued from the circuit court and chancery court of the Osceola District, shall be served on any citizen or resident of the Chickasawba District. If there were no provision in the act except the one of the fourth section, that no citizen of either of the districts shall be liable to be sued in any action in the courts in the other district, appellant's contention would not be without merit, but, construing the whole act together, and especially said § 6, which specifically provides that the jurisdiction of actions shall be determined as between the two districts as though they were separate and distinct counties, it can-

not be sustained. The cause of action for damages, being a transitory one, could be brought in any county in the State where the defendant could be found, and his having been served with process in the district in the county where the suit was brought gave that court jurisdiction to determine the cause.

The court correctly declared the law requiring the exercise of ordinary care by the driver of the car to prevent injury to appellee, who had been expressly invited by him to help push the car in getting it out of the ditch. We have held the owner or driver of the car is bound to the exercise of ordinary care in operating it to prevent injury to invited guests riding therein, and certainly one who, at the express invitation of such driver or operator of an automobile, gets in behind the car to assist in removing it from a ditch, is not a volunteer in any sense that would reduce the degree of care required to be exercised by the operator of the car to prevent injury to him to less than ordinary care.

No error was committed in not including a definition of contributory negligence in the instruction No. 1 complained about, wherein the court declared the law and told the jury, if they found such condition to exist, that plaintiff was entitled to recover, unless he was guilty of contributory negligence, contributory negligence being defined in other instructions.

It is next insisted that the court erred in giving instruction No. 2, which, it is claimed, was abstract, there being no allegation of the complaint or testimony in support of it. It is true that the negligence was alleged to consist in suddenly and carelessly reversing the lever or gear of the car and increasing the supply of gasoline, thereby causing it to lurch and roll backward, creating the necessity for plaintiff's protecting himself against it. Some of the witnesses testified that the injury resulted from the negligence as alleged. Dr. Saliba, who was in the car with appellant, stated that he stood on

the right of it, and the appellee and the others walked around to the rear of the car for the purpose of pushing and helping him out of the ditch, and "he placed his car in gear and started forward, and with their and my assistance had his car almost out of the ditch, when suddenly, and without warning, he reversed his car and ran backward toward them at a very rapid rate of speed. It seemed that he reversed the car and suddenly pressed his foot on the accelerator, and that, together with the weight of the car, ran it back very suddenly." One witness testified the car rolled back rapidly, but did not come back suddenly like it had been thrown in reverse, and, as it came back, the plaintiff put his hands under the glass, and they slipped and crashed through the glass. This was the only testimony contrary to that of the plaintiff in proof of the allegation of the negligence that caused the injury, and it was unobjected to. Of course it only created an inference that the injury might have been caused by the failure to put on the brakes at the proper time, but, since the negligence in fact consisted in allowing the car to lurch and roll suddenly backward without warning, the instruction relative to the failure to apply the brakes cannot be regarded as abstract, in view of the undisputed testimony disclosing that the injury might have occurred because of that fact.

No error was committed in the giving of instruction No. 4. It was objected to only as inherently wrong. The instruction as given related to either party, and told the jury that, if either party had withheld any evidence under his control, the law presumed that it would be against him if it had been introduced. The defendant in the suit, who was driving the car, and who knew whether the injury was caused as alleged by putting the car in reverse, was present in court at the trial, and made no statement about it, and it was disclosed that only one of the four boys who saw the accident testified, stating the car did not appear to jerk as though it had been reversed, but rather to have rolled suddenly backward. The ap-

pellant's testimony would not have been trivial and could not have been considered as merely cumulative, and appellee was not bound to take a chance in calling upon him to testify about the transaction. The question as to whether the car was reversed was an important one of fact, and the fact rested peculiarly within the knowledge of appellant, who was driving the car, and he failed to give his version of it as a witness on the stand. The court did not err in giving said instruction to the jury. *Miller* v. *Jones,* 32 Ark. 346; *Ramey* v. *Fletcher,* 176 Ark. 196, 2 S. W. (2d) 84; *Hollon* v. *Ry.,* 133 N. Y. Supp. 206; *Kirby* v. *Talmage,* 160 U. S. 383, 16 S. Ct. 379, 10 R. C. L. 886.

Instruction No. 5, authorizing the jury to allow interest in its verdict from the time of the injury rather than the judgment, should not have been given. 8 R. C. L. 533; *Western Union* v. *Davis Cotton Co.,* 170 Ark. 506, 280 S. W. 977. The most of the damage was unliquidated, and, although the jury might have taken the delay in consideration as an element of damages in fixing the amount of the recovery, it should not have added the interest to the amount of the verdict, but, since that is a definite amount, and the judgment can be reduced accordingly, the error will be rendered harmless. The amount of the interest, as shown by the verdict, can be deducted from the amount of the judgment, relieving against any prejudice that could have resulted from the giving of the instruction. The verdict is not otherwise excessive. It is true the testimony showed that appellee is receiving the same salary in compensation for his services now as he did before the injury occurred, but this was a severe injury, which has permanently disabled him, the hand being virtually useless henceforth, and may be the cause of pain and suffering to appellee in the future. Then, too, it was shown that $1,500 had been expended for medical attention.

We find no other errors in the record, and the judgment will be modified by the reduction of the amount of

the interest found in the verdict, interest being recoverable only upon the amount of the judgment from its rendition, and, as modified, will be affirmed. It is so ordered.

SMITH, J., dissents.

RURAL-DALE CONSOLIDATED SCHOOL DISTRICT No. 64 *v.* CARDEN.

Opinion delivered November 5, 1928.

W. A. Utley, for appellant.

N. A. McDaniel, for appellee.

KIRBY, J. This appeal challenges the correctness of a decree of the chancery court of Saline County holding invalid and enjoining the collection of a tax levied for building purposes in the Garland County territory of a consolidated school district.

It appears that School District No. 53 of Saline County was duly consolidated with School District No. 8 of Garland County, after which the directors of the consolidated district held an election for the purpose of voting on various other matters and a tax for a building fund.

It was alleged that the tax was illegal and void because no notice had been given of the holding of the election as required by law, and also that the district was not properly consolidated. A demurrer was filed, challenging the jurisdiction of the court and the complaint as insufficient and not stating a cause of action.

The evidence was in slight conflict as to whether the notices of the election and the matters to be voted on had been posted the time required, allowing the 15 days before the election held and of the place where it should be held. It was shown, however, that the notices were written and posted 15 days before the date of the holding of the election. The ones in the territory formerly the old School District No. 8 of Garland County provided that the school election was to be held at the Baptist Church, which, it was claimed, is insufficient, there being two Baptist churches in that territory, and rendered the election void, as the chancellor held. Some of the witnesses testified that, when they saw the notices of the election posted, the time of it appeared to have been changed from 2 o'clock P. M. to 9 o'clock A. M. The secretary of the board testified that the form for notices of elections in common school districts had been used, and the time for the holding of the election changed with a typewriter, before the notices were issued, to 9 o'clock A. M., and the preponderance of the testimony showed that the notices were posted in time to allow the 15 days' notice required by law. The testimony also showed that the school elections since the burning of the schoolhouse, as well as the schools of the old district, had been held in the Baptist Church at Lonsdale, where this called election also took place; that the place for school elections was well known, and of the 60 voters shown to be residents and qualified electors of the Garland County portion of the district, from the list of voters prepared by the collector of the county in accordance with the law, 55 had voted at the election so held, and all but 10 of them voted for the tax for the building fund. It was not shown that any elector who desired to vote was denied the privilege or failed

to have an opportunity for casting his vote because of the place of holding the election not being more definitely fixed. There was no question about the regularity or result of the election held in the Saline County territory of the consolidated district, the court holding only that the tax voted for the building fund in the other portion of the consolidated district, formerly District No. 8 of Garland County, was invalid because of the place of the election not being properly designated.

In *Hodgkin* v. *Fry,* 33 Ark. 716, the court said: "It is the duty of the directors to designate the place of the annual meeting, and notice of the time and place is essential to the validity of a tax voted at such meeting." In *Bordwell* v. *State,* 77 Ark. 161, 91 S. W. 555, it was decided that an election held at a place other than, but near by, the place designated for the purpose, was valid. The court said: "Election was not void because, instead of being held at the place lawfully fixed for that purpose, it was held at another place near at hand, if persons attending the latter place could be seen from the former place, and it did not appear that any one was misled." It is true there is nothing in the testimony indicating the nearness of the other Baptist Church in the territory of the old district of Garland County to the Baptist Church at Lonsdale, intended to be designated as the place for holding it, where this election was held, and where the schools of the district had been taught and the elections had been held since the destruction of the schoolhouse by fire two years before, but the general expectation was, as stated by some of the witnesses, that the election would be held at the Baptist Church in Lonsdale, where the other school elections had been held, and a great majority, 55 of the 60 electors of the district, voted at the election, and it was not shown that any elector desiring to vote had been deprived of the right and privilege of doing so because of the uncertain designation of the place for holding the election. Such being the case, the designation of the place for the holding of the election cannot have had effect to obstruct the free and intelligent

casting of the votes of the electors of that portion of the district, and the court erred in holding the election invalid on that account. *Wallace* v. *K. C. S. Ry. Co.*, 169 Ark. 905, 279 S. W. 1.

The demurrer did not raise the question of the jurisdiction of the chancery court to determine the cause of the election having been held in the territory of Garland County, and, since the consolidated district was a legal entity, we see no objection to the Saline Chancery Court's jurisdiction to determine the question raised, even though it had been objected to on that account. It appears to be conceded that no error was committed in the court's finding and holding that the consolidation of the district had been duly effected, and no question is made on that point here.

For the error designated the decree will be reversed, and the cause remanded with directions to dismiss the complaint for want of equity. It is so ordered.

HATFIELD *v.* SCHOOL DISTRICT NO. 58.

Opinion delivered November 5, 1928.

R. W. Robins, for appellant.

J. C. & Wm. J. Clark, for appellee.

MEHAFFY, J. School District No. 58, in Faulkner County, Arkansas, inhabited principally by negroes, entered into a contract with appellant, Lester Hatfield, for the erection of a school building for $12,949. The officials of the school district had given notice by publication, and Hatfield was the only bidder. Two of the directors were colored and one white. The contract was as follows:

"This agreement, made this the 26th day of May, 1925, by and between Lester Hatfield, hereinafter called the contractor, and the school directors of District No. 58, in the county of Faulkner, State of Arkansas, hereinafter called the owner, witnesseth: That the contractor and the owner, for the consideration hereinafter named, agree as follows:

"Article 1. The contractor agrees to furnish all necessary material and labor with which to construct a school building according to the plans and specifications as furnished by the State Department of Education of the State of Arkansas, and to do everything required by

the general conditions of the contract, the specifications and the drawings.

"Article 2. The owner agrees to pay the contractor in current funds, for the performance of this contract, the sum of $12,949, subject to additions and deductions as provided in the general conditions of the contract; provided any and all changes, additions, or deductions shall have been agreed to and signed by both parties; and to make payments on account thereof as follows: 85 per cent. of the value of all material and work put into the building, as the construction progresses.

"Article 3. That contractor agrees to complete the building ready for occupancy in.....working days from the date of contract.

"Article 4. The contractor and the owner agree that the general conditions of the contract, specifications, and the drawings, together with this agreement, form the contract, and that they are fully a part of the contract as if hereto attached.

"The contractor and the owner, for themselves, their successors, executors, administrators and assigns, hereby agree to the full performance of the covenants herein contained.

"In witness whereof they have hereunto set their hands and seals, the day and year first written above.

"Lester Hatfield, contractor.
"Jacob Brame.
"Troy C. Hill, owner.
"Lewis Mason."

Hatfield was paid $1,100 through the Rosenwald fund, and $867 out of the district's building fund, and when the building was completed the district issued and turned over to him school warrants amounting to approximately $10,987. The warrants were all in the same form, and the following is a copy of one of them:

"District School Fund, District No. 58

"No. 22. August 21, 1925.

"Treasurer of Faulkner County, Arkansas:

"Pay to Lester Hatfield, or order, the sum of twen-

ty-five ($25) dollars, for the construction of schoolhouse, out of the building funds.

(Signed) "Jacob Brame,
"Troy C. Hill,
"L. N. Mason,
"Directors."

Suit was brought by the appellee to prevent and restrain the contractor from collecting any warrants held by him and to restrain him from disposing of any warrants, and to enjoin the treasurer from paying the warrants, and asking judgment against Hatfield for the sum of $4,082.70. Appellee alleged that, while the contract mentioned the sum of $12,949, the bid of the contractor was for $6,500 cash, but that it was the understanding that he would be paid in school warrants over a period of 21 years.

The school district issued and delivered to Hatfield 21 warrants for $500 each, 18 warrants for $25 each, and one warrant for $32. The building was constructed and accepted by the district, and the payments of $1,100 and $867 were paid to the contractor upon the completion of the building. After the building was completed the district obtained two policies of insurance for $9,500. The district gave a mortgage to Hatfield to secure the payment of the warrants or the balance due for constructing the building.

The building was thereafter destroyed by fire, and Hatfield learned that the school directors had taken no steps to collect the insurance, and he employed an attorney and prepared proof of loss, which was signed by the directors.

The insurance companies declined to pay, and suit was filed against each of them. The suits were removed to the Federal court, and, after the removal to the Federal court, a compromise was effected whereby the insurance companies paid Mr. Hatfield $8,525. His attorney's fees were $850. When the settlement was made the insurance companies made their checks payable to the district

and Mr. Hatfield jointly. Therefore, in order to get the checks cashed, it was of course necessary to have them indorsed by the district, and, at the request of Mr. Hatfield, the president and secretary of the school board indorsed the checks and Mr. Hatfield received the money.

The plaintiffs alleged that Mr. Hatfield offered to construct the building for $6,500 cash, or for said sum plus 10 per cent. interest on deferred portions thereof; that it was estimated that the payment of said sum would have to be distributed over a period of 21 years, and that the accruing interest, at 10 per cent., would approximate $6,449; that in drafting the contract it was, by mistake, oversight or fraud, stipulated that the consideration for the performance of the contract to be paid Hatfield was $12,949.

The appellant filed his answer, denying all the material allegations in plaintiff's complaint. Thereafter an amendment to the complaint was filed, alleging that the Cleburne County Bank and Loyd's Investment Company, of Little Rock, were claiming some interest in the warrants, and asked that they be made parties defendant.

Appellee's witnesses testified that the price of $12,949 was the cash price plus interest, and that the appellant gave them an estimate or made a bid of $6,500 cash. In addition to that, the county superintendent testified that he showed the plans to Hatfield, and that Hatfield bid $6,500 cash, and some other witnesses testified to the same effect. It is also shown that two or three houses similar to the one constructed by appellant cost approximately $6,500 each.

Troy C. Hill, one of the directors of District 58, testified that the minutes of the meeting at which bids were opened showed that Hatfield's bid was $12,949, and this was to be paid out of the building fund now on hand and out of the Rosenwald fund, and to be in warrants extending over a period of 21 years. The minutes also showed that a resolution was adopted to issue to Lester Hatfield 21 warrants in the sum of $500 each, 18 warrants in the sum of $25 each, and one warrant for $32, in full settle-

ment of the balance due him. That the warrants were duly issued and signed by each member of the board, and turned over to Hatfield, and were numbered one to forty, inclusive, the first 21 warrants being for the sum of $500 each. There is no dispute about this testimony nor about what the minutes show.

Hatfield testifies that his bid did not show that it was to be paid out of warrants extending over 21 years.

Appellant's witnesses testify that there was never a bid of $6,500, and that the only bid made was for $12,-949, and that that is what the contract shows.

The court, after hearing the evidence, entered a decree that plaintiff's complaint praying for reformation of contract and for money judgment against Hatfield, was denied, and dismissed for want of equity, but restrained Hatfield, and the other persons who were made parties, from cashing or attempting to cash the school warrants in their possession, and ordering and directing them to surrender the warrants to the treasurer of Faulkner County. The treasurer of Faulkner County was ordered to cancel the warrants. From this decree this appeal was taken.

It is first contended by the appellant that the appellee sought to reform a written contract, and that the evidence was not clear, convincing and decisive, and, for that reason, the contract could not be reformed. Appellant cites numerous Arkansas cases where it has been held that the evidence to show fraud or mistake must be clear, unequivocal and decisive, but the chancellor did not reform the contract and did not undertake to reform it. What the court did was to construe the contract. If the board of directors had authority to make this contract and did make it, the law became a part of the contract.

"A school district or township can contract only in its corporate capacity, and has the power of entering into such contracts, and such only, as are expressly or impliedly authorized by a statute, and as are authorized by legal votes passed at a regularly called district meeting." 35 Cyc. 949.

If the board of directors passed a resolution authorizing the making of this contract, according to the undisputed testimony, that resolution provided for the payment of $12,949 over a period of 21 years. There can be no dispute about this. The testimony shows that this is what the minutes showed. It is also undisputed that 21 warrants were issued. The minutes record the action of the directors as a board. They provide for the payment over a period of 21 years. This is a limit on the authority of the directors to make a contract; a limit on the authority of the directors to make a contract and a limit of which the contractor must take notice.

"All persons dealing with district boards, committees or officers are bound to ascertain the limits of their authority as fixed by statutory or organic law, and are therefore chargeable with notice of any limitations thereon, as in respect to the amount they are authorized to expend." 35 Cyc. 951.

"The power of a district board, committee, or other officers to enter into a contract for the construction of a school building is controlled by statute, under which it is usually provided that a school board may enter into a contract for the erection of a schoolhouse only upon the petition or authority of the voters of the district, at an annual meeting on a designated day, and then only within the limits of the power so conferred; that such contract can be entered into only to the extent of funds provided and available for that purpose; or that no contract can be made relative to the erection of a school building, the cost of which will exceed the amount appropriated therefor or which will exceed a given amount." 35 Cyc. 951.

The contractor was bound to know and did know the amount of funds the district had on hand. He was bound to know the limit of the tax that could be levied and collected in the district, and was therefore bound to know that $500 annually was approximately the school revenue of the district for building fund.

"The directors have charge of the school affairs and educational interests in their districts, and the care and

custody of schoolhouses, grounds, and other 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." *Arkansas National Bank* v. *School Dist. 99,* 152 Ark. 507, 238 S. W. 630.

Again, the warrants accepted by the contractor himself showed on their face that the payment was to be made out of the building fund. This building fund, or the amount of it, as the contractor was bound to know, was limited. Again, when the contract was completed, there was issued to and accepted by the contractor warrants payable out of the building fund, which could not have been paid for something like 20 years. It is true that the contractor says that the board of directors intended to organize a special school district so that they could borrow money, but, in the first place, they might have been unable to form a special school district, and, in the next place, there was no certainty that they could borrow the money if they did. And we are therefore of opinion that the contract itself, taken in connection with the law and the minutes of the board of directors, shows that the contractor did not expect, and that it was not the intention of the parties, that all of the warrants should be taken up at once or that the price should be paid in cash.

There are two important rules that it is well to keep in mind in construing any contract. One is that the intention of the parties is to be given effect, if it can be done consistently with legal principles; and another well established rule is that the construction that the parties themselves put on the contract is entitled to great weight. *Temple Cotton Oil Co.* v. *Southern Cotton Oil Co.,* 176 Ark. 601, 3 S. W. (2d) 673.

"For the law is that, when the parties to a contract have given it a particular construction, such construction will generally be adopted by the court in giving effect to

its provisions, and the subsequent acts of the parties showing the construction they have put upon the agreement themselves are to be looked to by the court, and, in some cases, may be controlling." *Webster* v. *Telle,* 176 Ark. 1149, 6 S. W. (2d) 28; 9 Cyc. 588; 6 R. C. L. 862.

Our conclusion is that the chancellor properly construed the contract. It is contended, however, by cross-appellants that they have overpaid the contractor, and that the chancellor therefore erred in refusing to enter a decree against the contractor for the amount claimed. Whatever payment was made was voluntarily made by the school board, and at the time it was made probably neither party had made any calculation as to its correctness.

It is the contention of the school district that the cash price agreed on was $6,500, and that the balance was interest calculated over a period of 21 years. So that, according to their own contention, what they are seeking to recover is interest that has already been paid to the contractor. The rule applies here that, where interest is paid in advance and the principal is paid before the time at which it was to be paid, no part of such interest can be recovered back.

"Where interest is given in advance on a note, and the principal is voluntarily paid during the period for which the interest was paid, no part of such interest can be recovered back, in the absence of a promise by the payee to return the unearned interest, or of a reservation of the right to bring suit within the time for which interest has been paid." 15 R. C. L. 13.

We have reached the conclusion that the decree of the chancellor is correct, and it is therefore affirmed, both on the appeal and cross-appeal.

STEVENS *v.* SHULL.

Opinion delivered November 12, 1928.

Frank S. Quinn, for appellant.

J. M. Carter and *B. E. Carter,* for appellee.

HART, C. J., (after stating the facts). Section 5666 of Crawford & Moses' Digest, providing for the payment and collection of assessments in municipal improvement districts, contains the following:

"Provided, no single improvement shall be undertaken which alone will exceed in cost twenty per centum of the value of the real property in such district as shown by the last county assessment."

The words "last county assessment" were construed by this court in *Board of Improvement* v. *Offenhauser,* 84 Ark. 257, 105 S. W. 265, and in *Watson* v. *Boydstun,* 141 Ark. 184, 216 S. W. 721, to mean the last completed assessment in force, with additions made by the board of equalization, at the time of the passage of the ordinance levying the assessment of benefits. The court said that the statute was a general and continuing one for the organization of improvement districts in cities and towns.

The correctness of this construction of that statute is conceded by counsel for plaintiff, but it is contended that the rule has been changed by act No. 395 of the Acts of the General Assembly of 1921, and by act 184 of the Acts of 1925. See General Acts of 1921, p. 416, and Acts of 1925, p. 548.

Act 184 amends act 395 so as to read as follows:

"The petition for such improvement, signed by a majority in value of the owners of real property in the district, shall specify what percentage of the value of

the real property in the district, as shown by the last county assessment, the said improvement shall not exceed in cost; provided, no single improvement shall be undertaken which alone will exceed in cost fifty per centum of the value of the real property in such district as shown by the last county assessment; but, in determining what shall be fifty per centum of the value of the real property in the district, interest upon borrowed money shall not be computed as a part of the cost. Provided, further, an improvement may be made which does not exceed 100 per cent. of the assessed value determined as above if 75 per cent. of the property owners, in value, in said district petition therefor."

It will be noted that this section provides that the petition signed by the majority in value of the owners of real property in the district shall specify what percentage of the value of the real property as shown by the last county assessment the improvement shall not exceed in cost. Following this is a proviso that no single improvement shall be undertaken which alone shall exceed in cost fifty per centum of the value of the real property in the district as shown by the last county assessment. Now, the last county assessment, as used in the first part of the section, manifestly means the assessment in force at the time the majority petition is circulated. Hence it is contended that this county assessment should also govern in determining whether the estimated cost of the improvement will exceed in cost fifty per centum of the value of the real property in the district. We do not agree with counsel in this contention. The use of the words, "the last county assessment," is merely a method of procedure in determining the value of the property at the time specified.

In *Improvement District No. 1* v. *St. Louis Southwestern Ry. Co.*, 99 Ark. 508, 139 S. W. 308, in construing the provision of the statute providing that, in ascertaining whether the petition is signed by a majority of the property owners in value, the council shall be concluded by the last county assessment on file, the city

council was concluded by the last county assessment, and could not consider omitted property. The court recognized that it was jurisdictional to obtain the majority in value of the property owners, and that this was in the nature of a condition precedent for the exercise of the power of forming the district by the municipal council. It was held that it was lawful for the Legislature to prescribe a reasonable method of procedure to determine that value. The court said that it was a matter of common knowledge that it was difficult to determine the value of property, and that intelligent individuals frequently differed in estimating its value. It was considered that the use of the last county assessment was a proper and reasonable method of fixing a uniform valuation of all the real property in the improvement district. At that time the last county assessment might have been different when a majority in value of the real property owners was to be determined from the one in force when the assessment of benefits was made and the estimated cost of the improvement was fixed by the council.

We have already seen that the court construed the words, "the last county assessment," as used in reference to the assessment of benefits, to be the one in force at the time the council passed the ordinance levying the assessment to pay for the improvement. We do not think that the present statute changes the rule. If the lawmakers intended to fix, as the basis of the cost of the improvement, the last county assessment existing at the time the petition for the improvement signed by a majority in value of the real property owners of the district should govern, it would have stated that fact in plain terms, and not merely have used the words "as shown by the last county assessment." The act provides that no single improvement shall be undertaken which alone will exceed in cost fifty per centum of the value of the real property in the district as shown by the last county assessment. According to the interpretation of these words,

"the last county assessment" means the assessment in force at the time the acts required to be done are performed. If a different meaning was intended and the meaning now contended for should govern, it would have been very easy to have said that no single improvement shall be undertaken which alone will exceed in cost fifty per centum of the real property in the district as shown by the assessment on file at the time the petition purporting to be signed by a majority in value of the real property owners was filed. In other words, the court having held that the words, "the last county assessment," means the assessment in force at the time the acts required to be done are performed, this construction should govern, unless the Legislature should plainly and unequivocably manifest a contrary intention.

As we have already seen, under the former act, as construed, one county assessment might be used in determining whether a majority in value of the owners of real property in the district had signed the petition for the improvement and another county assessment might be used in determining whether the cost of the improvement exceeded fifty per centum of the value of the real property. This having become a rule of construction, we do not think it should be changed by amending the statute so as to require the majority petition to signify the percentage of the value of the real property which the improvement should or should not exceed in cost.

The undisputed facts show that the estimated cost was less than fifty per centum of the value of the real property in the district as shown by the last assessment in force when the assessment of benefits was made and the estimate of the cost of the improvement filed with the council. Therefore the decree is affirmed.

HATCH *v.* LOWRANCE.

Opinion delivered November 5, 1928.

R. G. Davies, for appellant.

C. T. Cotham and *Geo. P. Whittington,* for appellee.

McHANEY, J. Appellant purchased from appellee Lowrance, lot 6, block 24, of South Hot Springs Addition to the city of Hot Springs, for a consideration of $3,000, on January 4, 1927. Appellee Price held a deed of trust against said property, executed by Lowrance, on which there was a balance due of $1,564.58. The deed of trust provided that, when the indebtedness secured by it was

paid, the property should be released from the deed of trust by the mortgagee or grantee, at the expense of the grantor. The Arkansas National Bank was the trustee in the deed of trust, and appellant, at Price's direction, paid the Arkansas National Bank the balance due on account of the mortgage, and at the same time paid Lowrance the difference between the purchase price and the amount due on the mortgage, receiving from Lowrance a warranty deed to the property. Price, being a non-resident, executed a release deed, reciting the payment of the balance due, and releasing the lien of the deed of trust in satisfaction of said indebtedness, forwarded it to the Arkansas National Bank, who, in turn, delivered it to Lowrance to be placed of record. Lowrance took it to appellant, who refused to receive it and have same recorded at an expense of $1.50, for the reason that, as he contends, it was the duty of Lowrance to have the instrument recorded and satisfy the record, which Lowrance refused to do.

Appellant also demanded that appellee Lowrance pay the amount of taxes due for 1926 on the property, in the sum of $18.35, which Lowrance refused to pay, and appellant was compelled to pay same to protect his property from sale. He thereafter brought this action, which we will treat as the chancellor apparently did, as a suit to remove a cloud on title. A decree was entered canceling the mortgage of record, and rendering judgment in favor of appellant against Lowrance, the sum of $1.50, and dismissing the complaint as to appellee Price, at the cost of appellant.

The court was correct in dismissing the action as to Price. The undisputed proof shows that, upon payment of the balance due on his note and deed of trust, he immediately executed a release deed and caused the same to be delivered to Lowrance, whose clear duty it was to put same of record, under his agreement to pay the expense of satisfying the record contained in the deed of trust. It was not appellant's legal duty to record the release deed, nor to pay the $1.50, but it was his

duty to minimize any damages he might sustain by reason of §§ 7395 and 7396, C. & M. Digest. The real basis of his action in the chancery court was to recover the statutory penalty provided by § 7396, as he claimed in his complaint a large amount of damage. By paying the recording fee and having the release deed recorded, he would have eliminated any damages that he might have sustained by reason of the refusal of Lowrance to record the instrument. He would then have had a cause of action against Lowrance to recover $1.50, the amount of the recording fee.

The court sustained a demurrer to that part of appellant's complaint claiming damages for neglect to satisfy the record, and there was therefore no error in this regard. The undisputed evidence shows that the sale of this land was made and executed after the first Monday of January, 1927, and that there was no agreement between appellant and appellee, Lowrance, regarding the payment of the taxes for the year 1926. Under § 10023, C. & M. Digest, as between grantor and grantee, the lien for taxes attached on the first Monday in January, 1927, which was January 3. The sale not having taken place until the next day, January 4, there was a valid lien subsisting on said property for the taxes for the year 1926, and, under Lowrance's warranty deed, he was liable to appellant for the taxes in the sum of $18.35. The court correctly canceled the lien of the deed of trust as a cloud on appellant's title, and there will therefore be no necessity of recording Price's release deed.

The decree will therefore be modified by giving appellant a judgment here for $18.35, with interest at 6 per cent. from April 10, 1927, the last day for payment of taxes, and the judgment for $1.50 in appellant's favor will be set aside. In all other respects the decree is affirmed.

BETHEL AND WALLACE *v.* STATE.

Opinion delivered November 5, 1928.

O. H. Hurst and *E. E. Alexander,* for appellant.

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

McHANEY, J. Appellants were separately indicted, jointly tried by consent, on a charge of rape committed on the person of Mrs. Pearl Jordan, on Sunday evening, April 1, 1928, were convicted, and sentenced to death by electrocution.

Only two questions are presented for our consideration and determination, as follows:

1. That the court erred in permitting Dr. McCall to testify for the State, over the objections and exceptions of appellants, that on Monday, the day after the crime is said to have been committed on Sunday night, at the request of the sheriff's office he made a physical

examination of both defendants, and found Bethel afflicted with acute gonorrhea and Wallace with chronic gonorrhea.

2. That the court erred in permitting the State to prove, over the objection and exception of appellants, the good reputation of the prosecutrix for virtue and chastity.

1. Discussing these assignments of error in this order, we find as to the first point, when objection was made to Dr. McCall's testimony, the court ruled as follows: "It is proper for the State to show any circumstances connected with the alleged offense; the condition of the defendants at the time, together with everything else that was connected with the commission of the alleged offenses. The evidence is competent to show, if the State can, that, at the time of the alleged offense, they were suffering with a venereal disease, if they were."

In support of the ruling of the court the State's attorney cites the case of *People* v. *Glover*, 71 Mich. 303, 38 N. W. 874. But in that case statutory rape was charged, the prosecutrix being only eleven years of age, and the physician, who testified that the defendant, a short time after the commission of the offense, was suffering with gonorrhea, made the examination at the suggestion of the prosecuting attorney, because it had developed that his child victim was suffering with the same disease a short time after the offense was alleged to have been committed. The only evidence of sexual relations with her was her testimony, the defendant denying the same.

The case of *State* v. *Mills*, 45 S. D. 633, 189 N. W. 941, is also cited in support of the admissibility of this testimony. On the original hearing appellant's conviction was affirmed, but on rehearing, 45 S. D. 439, 188 N. W. 49, it was reversed, because the trial court had refused to permit appellant's witness, a physician, to testify as to whether, in his opinion, the appellant had gonorrhea at the time he was examined by the witness for the purpose of ascertaining that fact. This was evidence offered by

the appellant, and not by the State. This was another case of statutory rape. We think these cases have no bearing upon the subject here under investigation, as the crime charged is not statutory rape, and the identity of the accused is not in question. They freely admitted the sexual intercourse declared by the prosecutrix, but denied that it was done by force and violence, and asserted that it was with her full consent.

Mr. Jones, in his commentaries on the law of evidence, vol. 3, § 1391, states the rule as follows:

"The principle is firmly ingrafted upon our Federal and State Constitutions that no accused person shall be compelled to give evidence against himself in any criminal case. But there is a line of authorities which hold that, in a criminal action, the accused may be compelled to furnish evidence by being compelled to submit in some degree to the inspection of his person for the purpose of ascertaining identity. Thus, a defendant has been compelled to exhibit his bare arm to the jury to ascertain whether certain tattoo marks, concerning which testimony had been given, existed. In other cases accused persons have been compelled by officers to submit to such experiments as having the foot placed in tracks to which the testimony related, or to other similar experiments; and the officers or other persons have, under such circumstances, been allowed to state the result. These cases proceed on the view that the constitutional provision to the effect that no person shall be compelled in a criminal case to be a witness against himself is to be construed merely to mean that the defendant cannot be compelled, in the strict meaning of the term, to 'testify' against himself. A far more liberal and, in the opinion of the author, a better construction has been placed upon the constitutional provision in other cases where this class of testimony has been rejected on the ground that the court could not compel a witness to furnish evidence against himself. But, even under such authorities, the right of the accused to refuse to submit to such an inspection is waived when he voluntarily furnishes such evidence, in

the same manner that he waives his constitutional privilege when he voluntarily gives testimony that may criminate himself."

In a case quite similar to this one, *State* v. *Horton,* 247 Mo. 657, 153 S. W. 1051, except that it was a charge of statutory rape committed by a colored school teacher in Kansas City on one of his pupils, eleven years of age, the court said:

"Defendant insists that the physicians who examined him while he was in custody should not have been allowed to testify to the fact that he was suffering from a venereal disease. To meet this insistence, the State contends that the examination complained of was made with defendant's consent. We have read the record carefully, and find that the 'consent' consisted of the failure of defendant to object to the physical examination. When a man is under arrest, without counsel, and, speaking metaphorically, is standing in the shadow of a policeman's club, it requires something much more substantial than silence to justify an invasion of his constitutional right not to be compelled to furnish evidence against himself."

The case was not reversed on this account, because the court held there was no proper objection to the testimony.

In *State* v. *Newcomb,* 220 Mo. 54, 119 S. W. 405, it was said:

"We think the circuit court should have excluded all this testimony of Dr. Crowe and the sheriff as to this examination. We had occasion to examine the law on this subject in *State* v. *Young,* 119 Mo. 495, 24 S. W. 1038, and the authorities are collated there. The facts of this case bring it clearly within the reasoning of that case, and, upon the authority of that decision and those cited and approved therein, this testimony was incompetent and inadmissible, and violative of defendant's constitutional right not to be compelled to testify against himself. See also *State* v. *Height,* 117 Iowa 650, 91 N. W. 935, 59 L. R. A. 437, 94 Am. St. Rep. 323."

As heretofore stated, Dr. McCall made the examination a short time after appellants were put in jail, and at a time, so far as this record discloses, when they were without counsel. An examination was made, not at their suggestion, but at the suggestion of the sheriff's office, and, at the first opportunity presented, they objected to such testimony. There is a provision in both the Constitution of this State and of the United States that no person shall be compelled in any criminal case to be a witness against himself. See 5th article of amendment to the Constitution of the United States and § 8, article 2, Constitution of 1874. This testimony did not tend to prove the crime charged, but only tended to prejudice, degrade and humiliate them before the jury.

A majority of the court is of the opinion that the court committed reversible error in admitting the testimony of Dr. McCall.

2. The court also committed reversible error, in the opinion of the majority, in permitting the State to prove the good reputation of the prosecutrix for virtue and chastity, when her general reputation therefor had not been attacked by appellants. True, they had testified that she had yielded to their lascivious desires freely and voluntarily, conditioned that they would use "rubbers" as a protection against pregnancy, which they did, and which she admits one of them, at least, did. They further testified that she told them, as a reason for requiring such protection, that she had such relations with a man once before without protection, and, as a result, had to spend some weeks in the hospital. It was further testified to, on behalf of appellants, that, while riding in a Chevrolet roadster with these young men (neither of whom, she admits, she had ever seen before) she sat on the lap of the one not driving.

The State insists that this evidence on their part put her reputation for chastity in issue. In so far as this testimony of appellants relates to her consent to the sexual transaction with them and the actual copulation, the majority is of the opinion that her prior reputation

for chastity was not put in issue, and that this case in this regard is ruled by the case of *Smith* v. *State,* 150 Ark. 193, 233 S. W. 1081. There Smith was charged with the crime of assault with intent to rape, and "the defendant admitted that he had intercourse with the prosecuting witness on the night in question, but claimed that it was with her consent. He described in detail their conversation during the ride, and said that there was no resistance whatever on the part of the prosecuting witness." It was there said: "It is next insisted that the judgment should be reversed because the trial court erred in permitting the State to introduce testimony tending to show the good character of the prosecuting witness for chastity, over his objections. We think counsel for the defendant is correct in this contention. In a prosecution for assault with an intent to rape, the character for chastity of the injured party may be impeached, not to justify or excuse the offense, but to raise a presumption of her consent. *Pleasant* v. *State,* 15 Ark. 624, and *Jackson* v. *State,* 92 Ark. 71, 122 S. W. 101. It is only when the accused attacks the chastity of the prosecuting witness by evidence of reputation for unchastity that the prosecution may introduce evidence of her reputation for chastity to discredit such testimony. Underhill on Criminal Evidence (2d ed.), § 418, p. 702.

"In the present case the defendant did not introduce any evidence as to the reputation of the prosecuting witness for unchastity, or of illicit intercourse on her part. Hence the court erred in admitting the State to prove the reputation of the witness for chastity, because her reputation in that respect had not been assailed by the defendant."

What the court meant by the statement that "the defendant did not introduce any evidence as to the reputation of the prosecuting witness for unchastity, or of illicit intercourse on her part," was that there was no attack made on her chastity by the proof of her general reputation for unchastity prior to the admitted occurrence, nor of particular acts of illicit intercourse with

other men. And this is the exact state of the evidence in the case at bar. Appellants admit the intercourse, but did not attack her reputation otherwise. Neither do we think the other testimony, as to what they say she said about her conduct with another man, and the position she occupied while riding with them in the car, sufficient to constitute an attack by them on her general reputation for chastity or proof of other illicit intercourse. In other words, whatever was said or done by any of them at the time of the occurrence did not constitute an attack on her reputation for chastity.

Because of these errors the judgments must be reversed, and the cause remanded for a new trial.

Mr. Justice SMITH dissents.

WISCONSIN & ARKANSAS LUMBER COMPANY *v.* OTTS.

Opinion delivered November 5, 1928.

John L. McClellan, for appellant.

Glover, Glover & Glover, for appellee.

MEHAFFY, J. Clarence Otts, a minor, by his father and next friend, brought suit in the Hot Spring Circuit Court against appellant, seeking to recover damages in the sum of $3,000 for injuries alleged to have been received by Clarence Otts on the 8th day of August, 1927, while in the employ of the appellant lumber company.

He alleges that he is a minor, and that Marion Otts is his father; that in August, 1927, he was in the employ of appellant, and that it was the duty of appellant to exercise ordinary care to furnish him a reasonably safe place, machinery and appliances with which to work, and that appellant, its agents, servants and employees, negligently failed to exercise such care, and, on account of its negligence, he was injured; that at the time he was injured he was working under the orders and directions of appellant's foreman, in its mill at Walco, Arkansas, and that he was ordered by his foreman to run a machine known as a molder; that defendant was negligent in operating the machine with a defective, old and worn belt, and that, while he was operating this machine, this belt broke, and struck him, knocking him several feet to the floor, rendering him unconscious; that the appellant was also negligent in operating the machine with a defective belt without a guard; that he had requested a guard to be placed on the machine, and his foreman stated it was not necessary; that he had also complained of the belt, and his foreman assured him it was safe; that, when the belt broke, it struck him with such force and violence that it severely injured him in the back and spinal cord, and from said injury he was left in an exceedingly nervous condition; that before the injury he was earning $2.75 a day, but since his injury he has been unable to do hard manual labor, and his earning capacity has been permanently impaired.

The defendant answered, denying all of the material allegations in the complaint with reference to negligence, and alleged that the injury was caused by appellee's own negligence, and that he assumed the risk. The fact that the belt broke and injured plaintiff is not disputed, and it is not disputed that the machine was being operated without a guard, and all agree that a guard is a necessary protection; that it would have prevented the belt from striking him.

There was a trial, and judgment for the plaintiff in the sum of $400, whereupon appellant filed its motion for a new trial, which was by the court overruled, exceptions saved, and appeal prosecuted by appellant.

The testimony was conflicting, and appellant's first contention is that the court should have directed a verdict in its favor, because it is contended that the undisputed testimony shows that the appellee knew of and fully appreciated all of the dangers incident to the work he was doing.

This case was tried in January, and appellee testified that he was twenty years old in the preceding November, and that the injury occurred in August.

Appellant relies on the testimony of the plaintiff himself, who testified, when cross-examined, that he knew that the machine was dangerous to operate without a guard, and that he asked for a guard, and knew he was liable to get hurt because they did not have it. He testified that he had worked at this machine approximately two months. Some of the witnesses testify that he had worked at this machine somewhat longer than that, but anyway it is contended that his own testimony showed that he appreciated the danger, and therefore assumed the risk.

It is true that, where the danger is so obvious that a knowledge of it and appreciation thereof should be imputed to the servant, it would be the duty of the court to declare as matter of law that the servant was not entitled to recover. If the danger was so obvious that a prudent person would not have continued to work there,

as the appellant did, it would then be a risk assumed by him, and he would not be entitled to recover. But a young man 19 or 20 years old would not have and would not be expected to have the same judgment and appreciation about dangers of this kind that an older person would have.

The appellee testified that the appellant had a belt so old that they changed it and put another one on, and that it broke; that he asked the belt man for a belt, and the belt man said there wasn't anything over at the supply house, and they took one from another machine; that he asked the belt man for another belt, and the belt man said they did not have any other at the supply house, and, when appellee asked him if it wasn't liable to break and hurt him, the belt man said it would not hurt him if it did break. He testified that there was no guard there at any time he worked there, and that he would not have run the old belt unless the foreman had told him it was safe, and would not break.

A number of witnesses testified about the belt and about the guard, and the undisputed proof shows that the edges of the belt had become frayed, and the belt man cut about an inch off from one side before puting it on this machine.

While the testimony is conflicting, and the testimony tending to show that appellee did not appreciate the danger is not very strong, yet we think it was sufficient to take the question of assumed risk to the jury. The smallness of the verdict, $400, indicates that the jury found that the appellee was guilty of contributory negligence, and took this into consideration in fixing the amount of his damages. The questions of negligence, contributory negligence and assumed risk, under the facts in this case, were all proper questions for the jury, and the jury's verdict, if there is any substantial evidence to sustain it, cannot be disturbed by this court.

This court has said: "The charge of the court submitted the questions of negligence, contributory negligence, and assumed risk, upon instructions that were

exceptionally free from error. The charge as a whole evinced a clear comprehension of the law in such cases, as it has been declared by authorities generally and the numerous decisions of this court." *St. Louis Stave & Lumber Co.* v. *Sawyer,* 90 Ark. 473, 119 S. W. 830.

In the above case the court also said in its statement of facts that the appellee in that case was an illiterate young man, about nineteen years of age, and had never worked around machinery like that before. He had been around another stave mill about two or three weeks. That the superintendent knew that, if the belt came off the pulley and down on the line shaft, the ravelings were likely to take hold of it. He did not tell appellee that, if they let the belt get down on the line shaft, the ravelings were likely to get caught on it.

The appellee in this case testified that he would not have continued work if his foreman had not told him that the belt was safe, and of course, in this case, if the belt had been safe there would have been no injury. It certainly could not be said then that he appreciated the danger of the belt breaking and striking him.

This court, speaking through Chief Justice COCKRILL, said:

"But service about the unblocked rails was attended with danger, and the knowledge of the fact that the rails were unblocked did not necessarily imply knowledge of the attendant danger. Knowledge of the danger was itself a question of fact; and, if the jury believed that the deceased, by reason of his youth and inexperience, did not know of or appreciate the danger incident to service about the unblocked rails, and that the company had exposed him to the danger without warning him of it, they should have found that the risk was not one he had assumed by entering the service." *Davis* v. *Railway,* 53 Ark. 117, 13 S. W. 801, 7 L. R. A. 283.

Assumed risk is based on contract, either express or implied, from the circumstances of the employment. It is a risk which the employee agrees to assume. In other words, he agrees that he will discharge his duty at the

particular employment at his own risk. But, under the decisions of this court, he does not assume the risk of the negligence of the master nor the risk of the negligence of any other servant of the master, unless he either knows that it exists or unless it is so obvious that a prudent man would not continue the work.

We think there was substantial evidence to go to the jury on the question of assumed risk, since the appellee testified that he would not have continued the work if the foreman had not told him that it was safe.

Appellant calls attention to many decisions of this court on the question of assumed risk. These decisions clearly state the law. It is well settled in this State, as contended by appellant, that, when it appears to be clear that the servant had knowledge of and appreciated the danger incident to his work, or if the danger was so obvious or apparent that knowledge of the danger and appreciation thereof should be imputed to him, then the court should declare as matter of law that the servant is not entitled to recover. But, after a careful consideration of all the evidence in this case, we have reached the conclusion that there was sufficient evidence to take the question of assumed risk to the jury.

It is next contended by appellant that the court erred in permitting appellee's attorney to ask leading questions. The trial court has much discretion in the examination of witnesses, and we do not think in this case there was any abuse of discretion.

It is next contended that the court erred in giving instructions to the jury. We have examined all of the instructions very carefully, and we think that the instructions given by the court fully and fairly submitted the issues to the jury, and the jury's finding on questions of fact is conclusive here.

The judgment is therefore affirmed.

McPherson *v.* Board of Commissioners of Hazelwood Road Improvement District.

Opinion delivered November 12, 1928.

Jeff Bratton, for appellant.

D. G. Beauchamp, for appellee.

Smith, J. Under the provisions of act No. 126 of the Acts of 1919 there was created the Hazelwood Road Improvement District No. 2, and, pursuant to the authority of this act, betterments were assessed amount-

ing to $397,203.92. The preliminary work and expenses of organizing the district amounted to $20,434.53, exclusive of interest. Before any construction work had been begun or contracts therefor had been let, the General Assembly, at its 1921 session, passed special act No. 590, which repealed the act of 1919 creating the improvement district.

Section 3 of the repealing act provided that all claims against the district should be presented to the commissioners of the district within six months after the passage of the act, and should be barred if not so presented, and that, on the expiration of said six months, it should be the duty of the commissioners "to levy upon the real property of the district a tax sufficient to pay the indebtedness thereof."

The act provides that, as soon as the time for presenting claims has expired, the commissioners shall file with the clerk of the circuit court a certificate setting forth the amount of the claims that have been presented against the district, which certificate the clerk was required to record, and it was further provided that, when all claims have been paid and the affairs of the district closed, the commissioners shall file another certificate with the clerk of the circuit court showing that fact.

The act required the commissioners to certify to the county clerk the proportionate amount of the district's indebtedness which each tract of land in the district would be required to pay.

This litigation involves the correctness of the allowances made against the district by the commissioners.

Pursuant to the authority of the repealing act, the commissioners adopted a resolution, on November 5, 1921, in which the indebtedness of the district was found and declared to be $20,434.53, and it was ordered that the same should bear interest from the first day of August, 1922, until paid. The principal items comprising this indebtedness were a note to the Paragould Trust Company for borrowed money, and the claim of

the engineer. This resolution or finding by the commissioners was filed with the clerk of the circuit court December 21, 1921, and taxes were assessed against the lands of the district to pay these claims.

The repealing act provided that, in cases of delinquency resulting from the failure of the landowners to pay their proportionate part of the demands against the district, the collection thereof should be enforced in the manner provided by §§ 23 and 24 of act 279 of the Acts of 1909, entitled, "An act to provide for the creation of drainage districts in this State."

The act of 1909 provides that, if the drainage district taxes were not paid, the sheriff, as *ex-officio* collector, should not sell the delinquent lands, but should report them to the commissioners of the district, who must bring a proceeding *in rem* to enforce the payment of the taxes, together with a penalty of twenty-five per cent. which the commissioners were directed to add. The taxes were not paid by certain landowners, appellants here being among that number, and in the suit brought against their lands a penalty of twenty-five per cent. was included in the decree of foreclosure. The court also made an allowance of ten per cent. of the taxes as an attorney's fee, to be collected as costs.

Appellants by this appeal question that part of the decree allowing penalty and attorney's fee, and they also insist that there is no authority to pay interest on the claims, as was done.

We think there was authority to pay interest, as the act creating the district conferred authority to make contracts and to borrow money, as well as to issue bonds, although no bonds were issued. But we are also of the opinion that this question has not been raised in apt time.

The repealing act contemplated the greatest expedition in winding up the affairs of the district, and that the indebtedness of the district should be determined in six months after the passage of the act. The act provided that, if the commissioners reject a claim, the

holder shall be barred unless he proceeds within ninety days to enforce the same by suit, and that all suits shall be advanced as matters of public interest, and all appeals therein must be taken and perfected within thirty days. The certificate of the commissioners showing the indebtedness of the district was not attacked until this suit was brought to enforce the payment of the delinquent taxes, and we think it now too late to litigate these claims.

It is insisted that, even though this be true, there is no authority to pay an attorney's fee as costs of suit, and in no event is there authority to impose a penalty.

We think appellants are correct in their contention that no authority exists to enforce a penalty on the taxes, as no necessity therefor exists. The district does not require this penalty to pay its indebtedness. It will owe interest, but it will also collect interest, and it has authority to do so. *Meek* v. *Christian,* 168 Ark. 313, 270 S. W. 614. Section 23 of act 279 of the Acts of 1909 does allow the commissioners to enforce a penalty of twenty-five per cent. against the delinquent lands; but this is for the benefit of a going district performing its functions, while here we have a defunct district, which can have no obligations except those already determined by the commissioners. So far as this district is concerned, act 279 of the Acts of 1909 merely prescribed the procedure for enforcing the payment of the delinquent taxes, and that is by such a suit as the one brought by the commissioners of the district.

Express authority to charge an attorney's fee was not contained in the repealing act, but this authority is implied as a necessary incident to the institution of the suit. *Thibault* v. *McHaney,* 127 Ark. 1, 192 S. W. 183. The fee allowed was ten per cent. of the delinquent taxes, which does not appear to be excessive, in view of the size of the district and the amount involved.

The decree of the court below, ordering the foreclosure of the lien in favor of the creditors of the district, will therefore be reversed, with directions to

modify it by striking out the portion imposing a penalty of twenty-five per cent. In all other respects it will be affirmed.

EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES *v.* KING.

Opinion delivered November 12, 1928.

W. L. Kincannon and *Rose, Hemingway, Cantrell & Loughborough,* for appellant.

U. C. May and *Evans & Evans,* for appellee.

SMITH, J. On June 18, 1925, the appellant insurance company issued a policy of insurance to appellee in the sum of $2,000. The quarterly premiums in the amount of $28.40 were payable on the 18th day of each September, December, March and June. The policy provided that if the insured became permanently disabled she would be entitled to an annuity to be paid at the rate of $20 per month.

The policy provided that "a grace of thirty-one days, subject to an interest charge at the rate of five

per cent. per annum, will be granted for the payment of every premium after the first, during which period the insurance herein provided shall continue in force." The policy also provided that, if it should lapse in consequence of the nonpayment of any premium when due, it might be reinstated at any time upon the production of evidence of insurability satisfactory to the insurance society and the payment of all overdue premiums, with interest at five per cent. per annum. The policy further provided that "agents are not authorized to modify or, in the event of lapse, to reinstate this policy, or to extend the time for payment of any premium or installment thereof."

The quarterly premiums due in June and September were duly paid to Miss Ruby McConnell, a resident local agent of the appellant insurance society, hereinafter referred to as the company, and on January 18 or 19, 1926, appellee appeared before Miss McConnell to pay the premium due December 18. Appellee had been making collections of accounts due her, and discovered that she had only $23. This she paid to Miss McConnell, with the remark that she would get the balance of $5.40 that day, if this were required. Miss McConnell replied that this would not be required, as she would have the company execute an extension agreement. It was customary, when extension agreements were issued, to send them direct to the insured. Miss McConnell denied having said that full payment of the quarterly premium would not be required.

The $23 payment was remitted to the State agent of the company at Little Rock, to whom all premium payments were made, and payment of the balance of $5.40 was extended by the State agent to February 18, 1926. Appellee testified that Miss McConnell agreed to notify her when the extension had expired, but that she did not do so.

About March 1, G. C. Farrish, a district agent of the company, discovered that the balance of the premium had not been paid, and he sent his check to the State

agent to cover, with the interest. On March 3 the State agent wrote appellee that a check for $5.51 had been received from Mr. Farrish in payment of the balance due on the December premium, but that the remittance had not been received until after the expiration of the extension agreement, and that appellee would have to sign and return a statement in regard to her then existing health.

This application for reinstatement, dated March 5, was received by the State agent on March 6, and, in consideration of the statements there contained that the insured had had no serious illness during the preceding five years, the policy was reinstated. Appellee thereafter paid the quarterly premiums falling due March 18 and June 18, 1926.

On March 14, 1926, appellee fell and sustained internal injuries, which totally and permanently disabled her, and in June thereafter she made proof of her disability, and asked payment of the $20 per month provided for by the policy.

On August 26, 1926, the company advised appellee that it desired to cancel the policy here in suit because of the alleged false and fraudulent statements of appellee in procuring the reinstatement of the policy in March, and tendered to appellee $87.37 as a return of the premiums paid by her, and in December, 1926, appellant brought this suit to cancel the policy on the ground of the alleged fraud of appellee in procuring the reinstatement.

In the application for the reinstatement appellee was asked to state what illness she had had within the previous five years, and she answered that she had had none, whereas in her proof of disability she stated that she had had an operation for appendicitis on April 11, 1921; had had pneumonia in 1923, and had had an attack of flu in February, 1926.

It is not contended that any of these troubles caused or contributed to appellee's disability, but it is insisted that her false answers in regard thereto induced the

insurance company to reinstate appellee, whereas, if truthful answers had been made she would not have been reinstated.

Appellee testified that, as soon as she was advised that Farrish had paid the balance due on the December premium, she repaid that amount to him, her check therefor being dated March 5, 1926, and when she received the blank application for reinstatement she carried it to Miss McConnell to be filled out, and Miss McConnell performed that service for her. In this connection she told Miss McConnell about her operation, and the attack of pneumonia, and the spell of flu, and supposed her answers had been written into the application, but she signed it without having read it.

Miss McConnell testified that she was a local agent for appellant, and that her duties as such were "to solicit applications and look after the policyholders' needs." She denied that appellee had mentioned to her the operation and the sickness.

The chancellor made a general finding in favor of appellee, and denied the prayer of appellant's complaint to cancel the policy, and ordered the monthly payments to be made as provided in the policy.

Under the facts stated, it is the opinion of the majority—in which the writer does not concur—that this case is controlled by the case of *New York Life Ins. Co.* v. *Adams,* 151 Ark. 123, 235 S. W. 412, and that upon the authority of that case the decree of the chancellor should be affirmed.

In this case, as in the Adams case, the policy sued on provided for a reinstatement, and did not require, as a condition precedent, that the answer in an application to reinstate should be treated as warranties. The reinstatement of appellee was therefore not a gratuity on the part of the company, but was a contractual right, and the company had no authority to enlarge the terms upon which the reinstatement could be obtained, and the answers of the insured can, at most, be treated merely as false representations, and not as a breach

of warranty; indeed, the majority are of the opinion that appellee made no false representations, as she truthfully represented to the company's agent, in making the application for reinstatement, what sickness she had had, and she repeated these statements in her proof of disability in June, 1926. The disability claim reached the company in June, 1926, and it was not until August, 1926, that appellant refused to pay the claim and denied liability therefor, and the suit to cancel the policy was not filed until December 14, 1926. Thus, even though the knowledge of Miss McConnell is not imputed to the company, there was a period of sixty days during which appellant apparently speculated on the probable extent and duration of appellee's injury, without returning or offering to return the premiums she had paid.

The majority are therefore of the opinion that, inasmuch as the company did not, within a reasonable time after the discovery of the alleged false representation, cancel the policy for fraud and return the premiums, it waived the forfeiture, if there had been one, and the decree of the court below so holding was correct. It is therefore affirmed.

GILMORE *v.* UNION SAWMILL COMPANY.

Opinion delivered November 12, 1928.

Goodwin & Goodwin, for appellant.

Gaughan & Sifford, for appellee.

HART, C. J., (after stating the facts). Counsel for plaintiff rely for a reversal of the decree in this case upon the authority of *Tays* v. *Johnson,* 173 Ark. 223,

292 S. W. 122. In that case it was held that the decree removing the disabilities of the minor was open to collateral attack. The reason was that the judgment removing the disabilities of the minor in that case had been lost, and no effort was made to supply it at the trial. No presumption of jurisdiction in such case arises from the mere fact of its exercise. The reason is that the court, in removing the disabilities of a minor, exercises only a statutory power, and it is therefore incumbent upon one relying upon a decree of emancipation to show that the court had acquired jurisdiction under the law. 14 R. C. L., par. 6, page 219; and casenote in Ann. Cas. 1915D, page 490.

In *Hindman* v. *O'Connor,* 54 Ark. 627, 16 S. W. 1052, 13 L. R. A. 490, in recognition of these principles, it was held that the requirement of our statute that a person asking for the removal of his legal disabilities as a minor be a resident of the county in which is situated the court in which the application is made, is jurisdictional, and that the record should contain an affirmative recital of this fact. The reason is that the required residence is a condition precedent upon which the court may remove the disabilities of the minor, and no presumptions can be indulged in favor of the irregularity of the judgment. Such exercise of power is in derogation of the common law, and is a special power delegated under the statute. Therefore the facts giving jurisdiction to the court must plainly appear in the judgment of the court.

In *Young* v. *Hiner,* 72 Ark. 299, 79 S. W. 1062, it was held that the jurisdiction of the court could not be attacked collaterally on the ground that the minor was not a resident of the county in which the proceedings were had. In that case the judgment contained the recital required by the statute, and the court held that the court's jurisdiction could not be collaterally attacked.

That principle controls here. The decree of the chancery court removing the disabilities of the minor in the case at bar recited that he was a resident of

Union County, and was eighteen years of age. The trial court, upon proof heard, found that Gilmore was a resident of Union County, and that he was eighteen years of age. This was a necessary finding of the chancery court in determining its jurisdiction in the premises, and its jurisdiction cannot be collaterally attacked in that respect. The distinction is this: in the case of *Tays* v. *Johnson, supra,* there was no proof that the jurisdictional facts were recited in the decree removing the disabilities of the minor. Hence the court held that the judgment was subject to collateral attack. In the case of *Young* v. *Hiner, supra,* the jurisdictional facts did appear upon the face of the record, and, on that account, were held conclusive on collateral attack. In the case at bar the decree removing the disabilities of the minor, as we have already seen, contains a recital that the minor was eighteen years of age, and was a resident of Union County.

We conclude therefore that it was not subject to collateral attack, and the decree of the chancery court will be affirmed.

TURNER *v.* RICE.

Opinion delivered November 12, 1928.

W. D. Brouse, for appellant.

E. G. Shoffner, for appellee.

HUMPHREYS, J. This suit originated in the chancery court of Saline County, and the sole question involved, in both the trial court and this court on appeal, is whether appellee's claim of title to the southwest quarter of the northeast quarter of section 5, township 2 south, range 12 west, is paramount to appellants' claim of title thereto.

The State of Arkansas claimed title to "lot 1 of the northeast quarter of section 5, township 2 south, range 12 west, 40 acres," in an overdue tax proceeding in the Saline Chancery Court in 1882-1883, by purchase for taxes, penalty and costs, amounting to $17.17. After the expiration of the time for redemption, the clerk certified the land by the description designated to the State. The State's title under said description is the source of appellee's title. On October 8, 1909, the State conveyed the land by said description to Wade Grissom as lands bought by it at the overdue tax proceeding for a consideration of $50. On March 8, 1910, Wade Grissom and his wife conveyed the land by identical description to John Shores, and on February 4, 1911, John Shores conveyed the land by identical description to appellee, who assessed and paid taxes on the land by identical description each and every year thereafter until the present time. There was never another forfeiture or sale of the land under the identical description for the nonpayment of the taxes.

Appellants claimed title to the 40-acre tract in question under a tax deed based upon a forfeiture and sale thereof for the nonpayment of the taxes for the year

1913. The land was described on the assessment roll and assessed as the southwest quarter of the northeast quarter, section 5, township 2 south, range 12 west, 40 acres, to W. C. Turner, in 1912. He paid the taxes for 1912 in 1913, and allowed it to forfeit and sell for the taxes of 1913, and purchased same at the sale, and subsequently obtained a tax deed from the clerk which described the land as the southwest quarter of the northeast quarter of said section, township and range. Thereafter he brought a suit in the chancery court of Saline County to confirm the tax title against parties who had no interest in the land, and obtained a decree confirming and quieting his title thereto. Appellee was not made a party to the suit, and had no knowledge of its pendency. After obtaining the decree confirming his tax title, he conveyed the land by the identical description to E. L. Carter, his co-appellant.

According to the original government plat on file in the United States Land Office in Little Rock, of date April 20, 1827, the northeast quarter of section 5, township 2 south, range 12 west, is in a square, and is divided by an east and west line near the center of the two lots, the south lot being designated as No. 1, containing 80 acres, and the north lot being designated as No. 2, containing 87.60 acres. There is another plat of the same land in said office which has no filing or approval date, and according to it the northeast quarter of said section, township and range is divided by a north and south as well as an east and west line so as to divide the 160 acres into 40-acre tracts. As stated above, both plats are in the office, and provide methods for describing the same land by different subdivisions. Appellee acquired whatever title she has to the land in dispute by description according to the original government plat, and appellants acquired whatever title they have to the said forty-acre tract by description according to the other plat.

Appellants contend for a reversal of the decree canceling their muniments of title on the ground that

appellee acquired no title through mesne conveyances from the State of Arkansas because the description contained in her muniments of title are insufficient to identify and locate the land, whereas the description in their muniments of title are sufficient to identify and locate said land. They argue that it is impossible from the description in appellee's muniments of title to determine whether it is the east or west 40-acre tract in lot 1 of said section, township and range. Their argument would be sound if the qualifying words, "40 acres," dominated and controlled the description contained in her muniments of title. The acreage mentioned in a government call of lands does not control or dominate the description. Wherever one is granted land by government call, he takes the whole of the call without reference to the amount of acreage added to the description. In other words, if one is deeded the northeast quarter of any particular section containing any particular number of acres, he would take the whole quarter section, irrespective of the number of acres mentioned. Of course it would be different if a particular number of acres was conveyed to one in any particular portion of a government call. We think the description contained in appellee's deed and in all the deeds in her chain of title convey to her the whole of lot 1 in section 5, township 2 south, range 12 west, which necessarily included the west 40-acre tract in said lot, or the southwest quarter of the northeast quarter of said section, township and range. The agreed statement of facts reflects that, after acquiring her title, she paid the taxes according to the identical description contained in her muniments of title upon the land each year thereafter and until the present time. This being the case, the land was not subject to forfeiture for the nonpayment of taxes under any other description for the year 1913.

We do not agree with appellants that the other plat in the land office abolished or superseded the original government plat. Both plats are still in the office,

and the land may correctly be described according to either plat. Appellee's title to the west half of lot No. 1 or to the southwest quarter of the northeast quarter of section 5, township 2 south, range 12 west, is prior in point of time and paramount to appellant's claim to title thereto under the forfeiture of said 40-acre tract under the description of the southwest quarter of the northeast quarter of said section, township and range, for the nonpayment of taxes for the year 1913. The forty-acre tract was not subject to forfeiture, as the taxes had been paid thereon by another good and sufficient description, and appellants acquired nothing under or by virtue of the forfeiture, which is the source of their title. Appellee was not bound by the decree and the confirmation of appellants' tax title, as she was not made a party thereto and knew nothing of its pendency in the court prior to the rendition of the decree.

No error appearing, the decree canceling the muniments of appellants' title and quieting the title to the said 40-acre tract in appellee as against them, is in all things affirmed.

CENTURY LIFE INSURANCE COMPANY *v.* CUSTER.

Opinion delivered November 12, 1928.

M. R. Perry and *B. G. Clanton,* for appellant.

John P. Vezey, for appellee.

HUMPHREYS, J. This suit was brought by appellee against appellant in the circuit court of Hempstead County to recover $275, as beneficiary, on a life insurance policy alleged to have been issued to his brother, William Custer, by the North Carolina Mutual Life Insurance Company, on August 31, 1925, and on January 1, 1927, reinsured by said North Carolina Company with appellant, a mutual insurance corporation.

Appellant filed an answer, denying any liability on the policy. The cause was sent to a jury upon the pleadings, the testimony introduced by each party, and the instructions of the court, which resulted in a verdict and judgment against appellant for $275, from which is this appeal.

Appellee applied and procured from the North Carolina Mutual Life Insurance Company, through its agent, James Talbert, who resided at Hope, Arkansas, and who had authority to collect premiums on all policies issued in the Hope district, an insurance policy on the life of his brother, William Custer, for his (appellee's) benefit when his brother died. Neither was dependent on the other. Appellee's brother was residing elsewhere at the time the policy was procured, and had no knowledge of it. The policy procured was dated August 31, 1925, and, according to the undisputed testimony, appellee paid the monthly premium thereon until November, 1926.

Appellee testified that he paid the monthly dues or premiums on the policy to James Talbert until August,

1927, at which time he first received news of his brother's death, his brother having died on March 17, 1927.

James Talbert testified that appellee failed to pay the premiums on said life insurance policy in November, 1926, and that he canceled the policy in December following. He also testified that he sold William B. Custer a life insurance policy for appellant on April 18, 1927, upon which he collected monthly premiums from appellee from the date of the policy until August, 1927.

D. D. Shackleford, the supervisor of books and records of appellant, testified that the North Carolina record showed that the policy lapsed on December 13, 1926; that the lapse sheet made up by J. C. Talbert, the then agent of the North Carolina Company, showed deceased insured's policy No. 408854 lapsed before the reinsurance contract went into effect on January 1, 1927.

Appellee testified that William B. Custer never purchased an insurance policy through Talbert from appellant, and that he (appellee) never paid premiums on any policy on the life of his brother except the policy issued August 30, 1925, by the North Carolina Mutual Life Insurance Company.

James Talbert was introduced as a witness by appellee, in the course of the trial, and testified that, prior to January 1, 1927, he was the agent of the North Carolina Mutual Life Insurance Company, with authority to collect premiums on all policies in force in the Hope district, and that, after that time, he was employed by appellant, it having reinsured all life policies of the North Carolina Mutual Life Insurance Company and succeeded to its business, and was instructed by appellant to collect premiums on all policies taken over by it from the North Carolina Insurance Company. The reinsurance contract was introduced in evidence, which, among other things, provided that appellant should be liable upon policies issued by the North Carolina Mutual Life Insurance Company which were in full force on January 1, 1927.

Appellant requested an instructed verdict in its favor upon the theory: (1) That brothers do not have an insurable interest in the life of each other by virtue of the relationship alone. (2) Because the undisputed evidence showed that the policy sued upon lapsed in December, 1926, and, for that reason, was not one of the policies included in the reinsurance contract on January 1, 1927. (3) Because the court permitted provisions of the policy to be proved by secondary evidence.

(1). The question of whether brothers have insurable interests in the lives of each other, by virtue of the relationship alone, has never been decided by this court. Brothers are so closely related that they are naturally interested in the preservation of the life of each other. Generally they will lay down their life for each other. As a rule they care for each other in illness to the extent, if necessary, of furnishing all needed comforts and medical aid. It would be contrary to human nature for them to speculate on the death of each other, so it may well be said that their contracts for insurance on the life of each other should not be classed as wagering contracts. It was ruled in the case of *Ætna Life Ins. Co.* v. *France,* 94 U. S. 561, affirming the case of *France* v. *Ætna Life Ins. Co.,* 9 Fed. Cas. 657, that a sister, by virtue of the relationship alone, has an insurable interest in the life of her brother. The doctrine announced by the Supreme Court of the United States in the case of *Ætna Life Ins. Co.* v. *France, supra,* is supported by the cases of *Hosmer* v. *Welch,* 107 Mich. 407, 65 N. W. 280, 67 N. W. 504; *Williams* v. *Fletcher,* 26 Tex. Civ. App. 85, 62 S. W 1082; *Trenton Mutual Life & Fire Ins Co.* v. *Johnson,* 24 N. J. Law 576; *Lane* v. *Lane,* 99 Tenn. 639, 42 S. W. 1058; *Goodwin* v. *Massachusetts Mut. Life Ins. Co.,* 73 N. Y. 408; *Equitable Life Ins. Co.* v. *Hazlewood,* 75 Tex. 338, 12 S. W. 621, 7 L. R. A. 217, 16 A. S. R. 893; *Hahn* v. *Supreme Lodge of the Pathfinder,* 136 Ky. 823, 125 S. W. 259.

We think the doctrine announced by the Supreme Court of the United States is sound, and have therefore adopted it.

(2). The undisputed evidence does not reflect that the policy lapsed in December, 1926. Appellee testified to the contrary. He said that he paid the premium every month from the date of the policy to August, 1927, at which time he first learned that his brother had died in March, 1927. If the jury believed his testimony in this respect, it may reasonably have inferred, from the further fact that the agent was instructed to collect premiums on all policies issued by the North Carolina Mutual Life Insurance Company which were in force on January 1, 1927, that the policy in question was included in the reinsurance contract. It is true that the witnesses introduced by appellant testified that the policy lapsed and that no premiums were collected on the policy in question for appellant, but this conflict in the testimony presented a disputed question of fact for determination by the jury. This issue of fact was sent to the jury upon proper instructions, and the finding of the jury cannot be disturbed by this court on appeal, as the jury's verdict was supported by some substantial evidence.

(3). It is true that the court permitted some of the provisions of the policy to be proved by oral testimony, but not until it was shown that the policy was returned to appellant or its agent with the proof of death of the insured, and that demand had been made upon it for the policy before the trial of the cause, so that the policy itself might be introduced in evidence. With the policy in possession, appellant cannot be heard to complain because the court permitted its provisions to be established by secondary evidence.

Appellant was not entitled to a peremptory instruction on any theory advanced by it.

Appellant also contends for a reversal of the judgment on account of alleged errors in instructions submitting other disputed questions of fact. We have

examined the instructions carefully, and find the court correctly instructed the jury under the facts in the case, except submitting to them the question of whether or not appellee had an insurable interest in the life of his brother. Under the undisputed facts in the case that was a question of law, which the court itself should have settled. The instruction, however, was favorable to appellant, and it has no right to complain.

No error appearing, the judgment is affirmed.

CITIZENS' PIPE LINE COMPANY *v.* TWIN CITY PIPE LINE COMPANY.

Opinion delivered November 12, 1928.

[redacted]

[redacted]

James B. McDonough, Jr., W. B. Cravens, James B. McDonough and *Fadjo Cravens,* for appellant.

Pryor, Miles & Pryor, for appellee.

KIRBY, J., (after stating the facts). The ordinance of the city of Fort Smith complained of, granting the right to appellant company to construct and operate its gas pipe line and to transport gas through it for consumption and use to the Harding glass plant, was attached as an exhibit to the complaint, and it has long been established that, in suits in equity, exhibits to the pleadings are considered as parts thereof, and such exhibits as constitute the ground of the action, defense or counterclaim will control the allegations of the pleadings. *El Dorado* v. *Citizens' Light & Power Co.,* 158 Ark. 550, 250 S. W. 882; *Beavers* v. *Baucum,* 33 Ark. 722; *American Freehold Land Mortgage Co.* v. *McManus,* 68 Ark. 263, 58 S. W. 250; *Koons* v. *Markle,* 94 Ark. 573, 127 S. W. 959; *Cox* v. *Smith,* 99 Ark. 218, 138 S. W. 978.

It is also true that grants from the sovereign power are to be construed strictly against the grantee and in favor of the city or government making the grant. *El Dorado* v. *Coates,* 175 Ark. 289, 299 S. W. 355. By § 2 of the ordinance, authority or permission is given to the Citizens' Pipe Line Company to construct and operate its gas pipe line "and to transport gas through it for consumption and use at the Harding glass plant." This

language indicates no intention to grant a general franchise for supplying gas to all the consumers, both industrial and domestic, in the city of Fort Smith, who might desire to contract with the appellant company for use of gas, but is limited and restricted to the construction and operation of the pipe line and to transportation of gas for the consumption and use of the Harding glass plant only. It grants only the permission of the city to transport the gas brought from the fields of the appellant company across and along the streets of the city of Fort Smith to the Harding glass plant, the owner of the majority of the stock of appellant company, for use in its manufacturing plant. Appellant company had no right to cross the streets and alleys of the city with its pipe line or to furnish gas to other persons than the Harding glass plant, nor to it without the permission of the city first obtained, authorizing it to do so. *Barnett* v. *Mays,* 153 Ark. 1, 239 S. W. 379; *Sanderson* v. *Texarkana,* 103 Ark. 534, 146 S. W. 105; *Adkins* v. *Harrington,* 164 Ark. 280, 261 S. W. 626. It expressly denied and disclaimed any right of a franchise under the terms of the ordinance and any intention of attempting to transport and supply gas to any consumer within the city of Fort Smith other than to the Harding glass plant, in accordance with the terms of the ordinance granting it this right.

The fact that its charter authorized it to own and control pipe lines for the transportation and sale of gas to operate as a public utility was not sufficient to constitute it a public utility. In *Clear Creek Oil & Gas Co.* v. *Ft. Smith Spelter Co.,* 148 Ark. 260, 230 S. W. 897, the court said:

"It was within the charter rights of the appellant to operate a business as a public utility in the production, transportation or sale of natural gas, but it was not limited to such operations as a public utility, and was not bound to so operate. It was authorized to do business in the production, transportation or sale of the commodities named, other than as a public utility. The question therefore is not merely whether appellant was

authorized to operate as a public utility, but whether it elected to do so under the power thus conferred. It had a right to exercise those powers or not to do so, and, in the event of its election not to do so, it could enter into private contracts not subject to public control or regulation. In other words, appellant was not necessarily a public utility because its charter authorized it to become one in operation of its business, nor was it, under its charter, a public service corporation merely by the operation of a private business of the kind enumerated."

The appellee was without right to question the power of the city to pass this ordinance granting the permission to appellant company to furnish gas to this particular consumer, since it had no exclusive franchise for supplying gas to the consumers of the city of Fort Smith. *El Dorado Gas Co.* v. *Coates,* 175 Ark. 289, 299 S. W. 355; *Natural Gas & Fuel Corp.* v. *Norphlet Gas & Fuel Co.,* 173 Ark. 174, 294 S. W. 52.

The complaint does not allege that any damage will be done to the property of appellee on Sixth Street, or that it owns any property abutting on Sixth Street at or near the point where the pipe line crosses said street, nor does it allege or attempt to prove any specific injury to its property on Sixth Street, or that the construction of the pipe line across such street would constitute a nuisance causing specific injury to its property, and it therefore had no standing as a property owner to enjoin its construction. *Packet Co.* v. *Sorrels,* 50 Ark. 466, 8 S. W. 683; *Welbourn* v. *Davis,* 40 Ark. 83; *Rufner* v. *Phelps,* 65 Ark. 410, 46 S. W. 728.

No other taxpayer joined appellee in the demand for injunctive relief, and certainly the granting of the city's permission to cross its streets and alleys with the pipe line transporting gas to the Harding glass plant did not constitute "an illegal exaction" within the meaning of § 13, article 16, of the Constitution, authorizing appellee to bring the suit as a citizen and taxpayer to protect the inhabitants of the city against the use of

the permit. *Merwin* v. *Fussell,* 93 Ark. 336, 124 S. W. 1021; *Waldrop* v. *K. C. S. Ry.,* 131 Ark. 453, 199 S. W. 369, L. R. A. 1918B, 1081. Although the complaint alleges that the Citizens' Pipe Line Company is not required to pay the city 2 per cent. of its gross earnings from the sale of gas to the Harding Glass Company, which it was permitted to furnish under the ordinance, and, while the testimony shows that appellee company is required under the terms of its franchise to pay to the city 2 per cent. of its gross revenues derived from the sale of gas, appellee cannot complain that this is an illegal exaction on the part of the city, since it voluntarily contracted to pay such percentage of its revenues to the city in consideration of the grant of its franchise. Then, too, the city has authority, under act 124 of 1921, to make reasonable and fair rates to be charged by public utilities, and if the city should exercise this right and lower the rates authorized to be charged by appellee company, certainly it would furnish no ground for a taxpayer to complain in a suit in equity that he was injured because the amount received by the city under the 2 per cent. clause was less on account of the reduction of the rates.

Appellee did not attempt to have the ordinance reviewed by the circuit court as to its legality, validity or fairness within the 60 days allowed therefor under § 19 of act 124 of 1921.

It is next insisted that appellant company acquired no right under the ordinance, not having been organized as a corporation or accepted in writing, as such corporation, the permission granted, within the time allowed therefor. In answer to this it may be said that, even if the corporation was not organized before the passage of the ordinance, the permission had been applied for by those who, it was agreed, should represent it in petitioning the city council, and it was accepted by such individuals for the corporation as "president" and "secretary," and the corporation was legally organized before the expiration of the time granted for acceptance of its terms by the ordinance, and the same persons

who accepted the ordinance elected president and secretary of the corporation, and the undisputed testimony shows that no objection was or has been made by the city to such acceptance of the ordinance granting the permission to construct the pipe line, and, but for the wrongful issuance of injunction, the work thereon would have proceeded to completion already.

It follows that the court erred in holding the ordinance void and enjoining the appellants from proceeding with the construction of the pipe line under the permission granted by the city authorizing it to be done, and the decree must be reversed, and the cause remanded with directions to dismiss the complaint for want of equity, and for any further necessary proceedings in accordance with the principles of equity and not inconsistent with this opinion. It is so ordered.

MEHAFFY, J., dissents.

NEW HAMPSHIRE FIRE INSURANCE COMPANY *v.* WALKER.

Opinion delivered November 12, 1928.

McMillen & Scott, for appellant.

Owens & Ehrman, for appellee.

MEHAFFY, J. Appellee brought suit in the Pulaski Circuit Court against the appellant, alleging that G. W. Wells, agent of appellant, entered into an oral contract with appellee in which it was agreed that a policy would thereafter be issued, but that appellee would be protected from the day of the oral agreement. He alleged that the amount of the policy was to be $500, covering his household belongings. That thereafter the household goods covered by the insurance were destroyed by fire; that the value of the property lost was approximately $1,300, and that the appellant denied liability, and refused to permit appellee to make proof of loss. He prayed judgment for $500, less a year's premium, 12 per cent. penalty, attorney's fee, and costs. The premium was not paid, but it is contended by the appellee that Mr. Wells was to send him a policy, and, when he did that, would let him know the amount of it, and he was to send a check in payment of the premium.

The appellant answered, denying all the material allegations in the complaint, and denied that either the home agency or G. H. Wells was the agent of appellant and authorized to issue any policy or make any contract covering the property which the plaintiff claims was destroyed.

Plaintiff's testimony tended to show that the contract was made as alleged, and defendant's testimony tended to show that no agreement whatever was made. There was a trial, and a verdict in favor of the appellee for $500, the amount claimed by appellee, and the insurance company prosecutes this appeal to reverse the judgment.

It is first contended by the appellant that, the suit being on an oral contract, the burden was upon appellee to show there was a meeting of the minds as to all of the essential elements of a contract. We agree with

this contention of the appellant, but appellant says that the elements as laid down in Cooley's Briefs on Insurance, 2d ed. vol. 1, p. 534, are: (1) the subject-matter; (2) the risk insured against; (3) the amount; (4) the duration of the risk; (5) the premium; and appellant contends that the evidence fails to show the duration of the risk or the premium to be charged.

We do not agree with the appellant in this contention. The appellee testified, in substance, that the duration was to be one year, and that the premium was whatever the regular rate was. This, we think, was sufficient.

On page 535 of the same volume of Cooley's Briefs on Insurance it is stated:

"Though it is regarded as essential that all the elements of the contract be agreed upon, it is not necessary that this be done expressly. In *Concordia Fire Ins. Co.* v. *Heffron,* 84 Ill. App. 610, it was held that an oral contract of insurance will sustain an action, though no express agreement is made as to the amount of premium to be paid or the duration of the policy, if the intention of the parties to the contract in these particulars can be gathered from the circumstances of the case."

The duration of the risk and the premium to be charged may be proved just as any other facts may.

It is next contended that the appellant company had never issued a policy at Hensley, and that no one had any authority to write a policy for it in that place; that, while Wells was an agent of the company at Pine Bluff, he had no authority to issue policies at Hensley or covering property at Hensley.

The undisputed proof shows that the agent had no authority to issue a policy for the appellant on property at Hensley. Wells testifies to this, and Senn, a witness employed by general agents of the New Hampshire Fire Insurance Company at Dallas, also testified that it was his duty to supervise the territory, make inspections, and approve liabilities for the company;

that neither Mr. Wells nor the Home Insurance Agency was authorized to insure any property for the New Hampshire Fire Insurance Company at Hensley. He understood Hensley was an outside town of Pine Bluff, and the New Hampshire Fire Insurance Company objected to any outside business through their Pine Bluff agency; that they were instructed through Trezevant & Cochran not to write any outside business.

The testimony of Wells and Senn is undisputed. It is true the appellee testified that Wells told him that he was giving insurance in the New Hampshire Fire Insurance Company, and represented himself as having authority to issue a policy at Hensley, but it is well settled that neither the fact of agency nor the extent of an agent's authority can be proved by the declaration of the agent, and plaintiff had no proof tending to show that Wells had any authority to issue this policy on property at Hensley, except the declaration of the agent. The law, of course, is well settled that, if an agent enters into a contract for his principal which he has no right to make, or if he exceeds his authority and does not bind the principal, he himself is liable, not on the contract of insurance, but in an action based upon the deceit or upon the contract of warranty or indemnity, but this question is not involved in this suit.

The majority of the court is of opinion that the agent did not have authority to bind the company by making a contract of insurance at Hensley, a territory where the agent had no authority. Mr. Justice HUMPHREYS and the writer are of opinion that, since Mr. Wells had authority to issue policies of insurance for this company, although he had no authority in this particular territory, yet it was in the apparent course of his business and within the apparent scope of his authority, and that limitations as to territory not known to the person with whom he is dealing are of no effect to limit his authority.

The authorities are in conflict on this proposition, and the majority are of opinion that the appellant is

bound only by such acts of the agent as are done in the ordinary course of the business in which he is engaged, and that, since he had no authority to write insurance for the appellant in this territory, the appellant is not bound, even if a contract was made by Wells.

This court has held that an agent authorized to issue policies of fire insurance may make a valid parol executory contract to insure or to issue a policy of insurance. *King* v. *Cox*, 63 Ark. 204, and *Ætna Ins. Co.* v. *Short*, 124 Ark. 505.

Wells, however, was only a local agent, with authority to issue policies in the city of Pine Bluff. It was expressly shown that he had no authority to go to Hensley or other outlying points to solicit or make contracts of insurance for appellant. It is claimed, however, that this was within the apparent scope of his authority. The majority of the court does not think so. His powers as agent were restricted to the territory over which he might issue policies. The majority of the court hold to the views expressed in *North America Co.* v. *Thornton*, 130 Ala. 222, 30 So. 614, 89 A. S. R. 30, 55 L. R. A. 547, to the effect that the fact that one is a general agent of an insurance company for a defined territory gives him no power to bind the company by contracts entered into covering property outside of the territorial limits. The court said that to establish such a doctrine would, in effect, deprive a principal of all power to circumscribe the territory to be covered by the agent, and to deny him the right to confine the exercise of the delegated authority to a particular town or county or State, or even country.

This being the opinion of the majority, it follows that the case must be reversed and dismissed, and it is so ordered.

LILLY *v.* LILLY.

Opinion delivered November 12, 1928.

Trimble & Trimble, for appellant.

Chas. A. Walls, for appellee.

MEHAFFY, J. On the 29th day of May, 1924, W. H. Lilly, a resident of Lonoke County, died intestate, leaving surviving him his widow, Beulah Lilly, and four minor children. He owned a piece of property in Carlisle, Arkansas, but at the time of his death he was living on a rice farm in Lonoke County, Arkansas, upon which he had a lease. He also left one life insurance policy in the State Life Insurance Company for $1,000, one in the Pacific Mutual Insurance Company for $2,000, and one in the Modern Woodmen for $2,000.

Within a day or two after the death of W. H. Lilly his brother, K. L. Lilly, was appointed administrator, and gave bond, and letters were issued to him. The administrator filed an inventory and a report of the assets.

W. H. Lilly and Beulah Lilly had been married only about two months when he died, and, after letters of administration had been issued to K. L. Lilly, brother of the deceased, the bank, which had agreed to furnish Mr. W. H. Lilly to enable him to make his crop, declined to continue to furnish unless some person other than the widow and children would manage the rice farm. A contract was drawn by the bank, and another brother of the deceased agreed to take charge of the rice farm, and did do so. This contract was signed by Mrs. Beulah Lilly. She states that she did not know anything about the effect of the contract; did not know what interest she had in the estate of her deceased husband, and did not know that she had dower, or any other interest. We think, however, it appears from all the evidence that there was no intention on the part of the brothers of W. H. Lilly to take advantage of Beulah Lilly, and no intention on her part to get anything except what she was entitled to.

The property in Carlisle had at one time been the home of W. H. Lilly, but he had left that property, moved away from it in 1919, and, as has already been stated, married Beulah Lilly about two months before he died, the 29th of May, 1924. It is earnestly insisted by the appellant that this property at Carlisle was his homestead, and that the appellant is entitled to this property as a homestead. The law with reference to a homestead of a widow is well settled in this State, and there is no dispute about the principles of law in this case.

The appellant insists that there is no evidence of abandonment by Lilly during his lifetime, and that it was still his homestead at the time of his death. While there is no direct testimony that he abandoned it or said he had abandoned it, yet abandonment may be proved by conduct, circumstances and actions, as well as by direct testimony. Whether it was his homestead at the time of his death and whether he had abandoned it, were questions of fact, and the chancellor found against the

appellant, and we cannot say that the finding of the chancellor as to the homestead was against the weight of evidence.

There was an indebtedness against the homestead of approximately $900. This indebtedness was paid out of money belonging to the estate which was collected from the insurance companies. The chancellor found that the indebtedness should be deducted from the value of the property, and the widow was entitled to a dower interest, or one-third of the difference between the value and the indebtedness. It is the contention of the appellant that, since the indebtedness was paid with the estate's money, one-third of that was hers, and that she is entitled to a dower of one-third of the property and not one-third of the equity or one-third of the value after paying the indebtedness.

This would be true if the estate's money had been used to pay the indebtedness and had not been accounted for by the administrator, because, if the estate's money was used, one-third of that belonged to her, and when she contributed her portion to paying the indebtedness she would, of course, be entitled to dower in the property freed from the indebtedness. But the evidence shows that, while originally the insurance money was taken to pay this indebtedness, yet all of the insurance money was accounted for in the settlement, and she gets her one-third of the insurance money, and she would not be entitled to take one-third of her insurance money and then take one-third of the property when the indebtedness had been paid out of that portion of the insurance money that did not belong to her. These also are questions of fact, and were determined by the chancellor, and, we think, correctly determined.

When the insurance money was received by the administrator, he made a deposit in one bank of $700 and in another bank of $600, and received interest on that, one-third of which interest the chancellor found belonged to the widow. It is the contention, however, of the appellant that she was entitled to one-third of the $700

and one-third of the $600 items. This is true, but one of the insurance policies was for $1,819.28 and the other one was for $878.41, the insured having borrowed a small amount on each policy. The appellant is entitled to one-third of each of these items, but she is not entitled to take one-third of each of these and then take one-third of the $1,300, when the $1,300 was itself a part of this insurance money—that is, a part of the $1,819.28 and a part of the $878.41. She could not have dower interest in these items and also in the $1,300, which was a part of these items.

The other insurance policy was for $2,000, and, according to the testimony, belonged entirely to the appellant as the widow of W. H. Lilly. It was a policy, however, taken out in the Woodmen during the lifetime of Lilly's first wife, and the appellant, although told that she was entitled to all of it, said that it was money coming from a policy issued in the lifetime of the first wife, and that she would take $400 of it and give the children $1,600, and Mr. Lilly, the guardian of the children, has that $1,600 as guardian of the minor children. There is no controversy about this. The appellant agreed to it, but it accounts for $400 that she had which she says she used in helping to pay expenses.

There is some controversy about the manner in which the $300 to which the widow was entitled was set aside to her, but it appears from the evidence that she signed a petition asking that it be set aside, and that it was. It appears, however, that a portion of it was never turned over to her, the parties in possession claiming that she has never called for it, and she can, of course, get that at any time she calls for it. It is the property she is entitled to under the statute, and that property belongs to her, and she may possess herself of it at any time.

There was some of the personal property sold, and it appears that the proceeding with reference to the sale was irregular, and some of the payments made by the administrator were not authorized by the court, but, as

to the sale of the personal property, it clearly appears that it brought all that it was worth, and it was approved by the court and the amount for which it was sold accounted for by the administrator.

We think the undisputed proof shows that, after paying the debts and expenses of the rice crop, there was a balance of $1,168.53. The widow was entitled to one-third of this, which was $389.51. Adding to this the amount found by the chancellor makes a total to which the appellant is entitled of $965.28.

We do not think that any fraud or that any intentional wrong can be charged to either party. The testimony shows that the appellant lived on the rice farm, worked and helped make the crop; that she cared for the minor children of the deceased; that one of the brothers, in December, moved the appellant and minor children of the deceased to the Carlisle property, and that she cared for them, and there was no complaint about her treatment of the children. She was willing to continue to keep them, but one of the brothers took them to other homes. During the time she kept the children the chancellor did not charge her with any rents, but from that time on he charged her with rent, and, without deciding whether that was properly chargeable to her, the evidence conclusively shows that she collected approximately as much by renting rooms as this item amounted to.

As we have already said, there are no principles of law involved, but the questions determined by the chancellor were purely questions of fact, there being no dispute about the principles of law to be applied, and the chancellor's finding, unless against the preponderance of the evidence, will be sustained. He did not find in favor of the widow for one-third of the money on hand from the rice crop, after paying the expenses and indebtedness, and the testimony is undisputed that it was the intention of the parties that she and the children should have whatever profit there might be in the rice crop.

The decree of the chancery court, because of the chancellor's failure to allow her a dower in the profits from the rice crop, will be reversed, and remanded with directions to enter a decree in appellant's favor for $965.28, with a lien on the property as provided in the original decree.

ARKANSAS POWER & LIGHT COMPANY *v.* ORR.

Opinion delivered November 12, 1928.

Raymond Roddy, W. H. Holmes, Harry E. Meek and *Robinson, House & Moses,* for appellant.

H. B. Means, D. M. Halbert and *D. D. Glover,* for appellee.

MEHAFFY, J. This is the second appeal of this case. The decision in the case when it was here before is in

175 Ark. 246, 298 S. W. 1029. It was reversed and remanded, and, on a re-trial in the Hot Spring Circuit Court, there was a verdict and judgment for $100. The appellant filed motion for new trial, which was overruled, exceptions saved, and the case is here again on appeal. The issues are stated in the case on former appeal, and it is not necessary to restate them.

The appellant insists on a reversal because it says the court erred in not admitting the testimony of witness Rube Gilliam, setting forth the dates of checks given by him to Fred Harper and Tom Moorehead, during the fall of 1925. Appellant cites numerous authorities to sustain this contention, and the principles of law and rules of evidence announced in said authorities are correct.

The testimony that appellant desired to introduce consisted of checks which the witness had given to Fred Harper and Tom Moorehead during the month of October. Fred Harper had testified in reference to the height of the river or the flood above Remmel Dam on the 16th of October, 1925, and had testified that he went to Hot Springs about every two weeks with a bunch of cattle, and that he knew it was the 16th of October, as he had looked at some checks, and the check that Rube Gilliam gave him was dated the 16th of October; that he deposited it on the 16th, and knows it was on that day he took the cattle to Hot Springs; that he could look at these checks and tell the date, but that he knew it was the 16th; that a check that Rube Gilliam gave him was dated the 16th, and he deposited it on that day, and that was the day he saw the river, and testified about the flood.

The appellant undertook to introduce some of the checks that Gilliam had given for the purpose of contradicting Fred Harper as to the date. But Gilliam did not testify that he did not give the check on the 16th of October. He testified that he had given to Mr. Harper and to Mr. Moorehead some checks; that they drove together, and that generally Mr. Harper would deliver the cattle and the next morning Mr. Tom Moorehead

would call, and he would give the checks to Mr. Moorehead; that he had all of his canceled checks in the vault at the bank, and that he has gone through same, and that he thought all of the checks for October were there; that he could not say positively that was all the checks he had given, but that he thinks it was all of them, and that he looked through the October account. The court asked Gilliam if these were all of the checks that were given to both parties, and Gilliam answered: "Well, I would not swear that. I have all of my checks in a vault and—I am supposed to have them there. But I went through them hurriedly, and that is all the checks I found in October, 1925."

It will be seen that Gilliam did not testify at any time during his examination that he did not give a check on the 16th of October. On the other hand, he stated that he would not swear that these were all of his checks given in October, but that he had looked hurriedly in the vault, and the checks he had with him were all he found. Certainly the introduction of checks of other dates would not tend to show that he did not give a check on the 16th of October, and therefore they would not be admissible to contradict Harper's testimony. The proof that a check was given on the 19th of October would be no evidence at all that one was not given on the 16th of October. And certainly, unless Gilliam could have testified that these were all the checks that he gave Harper, or that he did not give him one on the 16th of October, this testimony would be inadmissible.

It would have been proper to impeach witness Harper by proving that no check was given him by Gilliam on the 16th of October, because that would have tended to show that his statement about seeing the river and about the flood on the 16th of October was erroneous. But it would not be proper to impeach him or try to discredit him by showing that he received a check on the 19th of October when there is no evidence that he did not also receive one on the 16th of October. We think the court was correct in excluding this evidence.

It is next contended that the principles of riparian law are involved in this case, and that the owner of the dam was not an insurer. The appellant cites and quotes from numerous authorities in support of this contention. When this case was here on former appeal this question was discussed by attorneys in their briefs, and this court said:

"Instruction number one tells the jury that plaintiff may recover if it negligently raised the gates and caused the water to flow, etc. No matter what the rights of the defendant might be with reference to building the dam and gates and operating the same, if it did these things negligently, and this negligence caused the injury to the plaintiff, of course it would be liable. It is not liable because it built the dam or gates or operated the same, but it is only liable if its negligence caused the damage." *Ark. Power & Light Co.* v. *Orr,* 175 Ark. 246, 298 S. W. 1029.

The decision of the case when here before is the law of the case now. And this case was tried on the theory that the damage claimed by plaintiff was caused by the negligence of the defendant, and not because it built a dam and gates and operated them. In other words, the right to recover in this case depends wholly only whether appellant was guilty of negligence, and there is no contention that there is any absolute liability or that the appellants were insurers.

Appellant's next contention is that the evidence was insufficient to sustain the verdict. When the case was here before, this court did not pass on the sufficiency of the evidence. We there said: "And, since the case will have to be retried and the erroneous evidence eliminated or omitted, we do not pass on the question of the sufficiency of the evidence, and deem it unnecessary to set out the evidence here."

The evidence on the part of appellant was to the effect that the gates were raised, that the Ouachita River was very high, and that on the 16th of October appellant raised eleven of the gates; that the gates are about 27½

feet wide, and can be raised about 17 feet. Witness, who was at the time in the employ of the appellant, stated that on the 16th of October the highest point reached by the water was 19.6 feet. The dam is approximately 900 feet long and has an extreme height of 75 feet. The height of the gates is 57 feet from the bed of the river. The gates were originally designed for a height of 55 feet, but the water can now be raised to the height of 57 feet.

The testimony shows that these gates were raised, and that permitted the water held by the dam to rush through and overflow and injure the crops. There is no contention, of course, that it could not have been let off gradually. In fact, it is the contention of the appellant that the gates were not all raised at the same time. But it is not necessary to set out the entire evidence. We have examined it very carefully and have reached the conclusion that the evidence as to whether the crops of appellees were destroyed by the negligence of the defendant is sufficient to take the case to the jury. And it is a well established rule of this court that, if there is any substantial evidence to support the verdict of the jury, it will not be disturbed by this court. The appellant does not complain about the instructions given or refused. It is therefore conceded that the question of negligence was properly submitted to the jury, and the jury's finding on the question of fact is conclusive here.

It is the province of the jury to pass upon the conflict in and the weight of the testimony, and the fact that the testimony is conflicting and that the verdict may even appear to be contrary to the preponderance of the testimony, furnishes no ground for reversal. *Blankenship* v. *State, ante,* p. 190; *Wright* v. *State,* 177 Ark. 1039, 9 S. W. (2d) 1033; *Tyner* v. *State,* 109 Ark. 138, 158 S. W. 1087; *People's Bank* v. *Brown,* 136 Ark. 517, 203 S. W. 579; *Harris* v. *Ray,* 107 Ark. 281, 154 S. W. 499; *Gazola* v. *Savage,* 80 Ark. 249, 96 S. W. 981.

The verdict of the jury was against the appellants on the facts, and the case is therefore affirmed.

MISSOURI & NORTH ARKANSAS RAILWAY COMPANY *v.* POTTS.

Opinion delivered November 12, 1928.

[redacted]

Shouse & Rowland, for appellant.

J. M. Shinn and *Marvin Hathcoat,* for appellee.

McHANEY, J. Appellees brought this action to recover from appellant the damage sustained by them on a shipment of cattle to the National Stock Yards, East St. Louis, Ill., by reason of the alleged negligence of the appellant in failing to remove said car of cattle from Everton, Arkansas, to Seligman, Missouri, promptly, in time to make connection with the Frisco, so that said car of cattle should reach the National Stock Yards on the early morning market of Monday, the 2d day of August, 1926, it being alleged that they were not delivered at destination until about 4:30 o'clock A. M. August 3, and that, by reason of the long delay, the cattle had shrunk

in weight, had been down in the car, and were muddy and bruised to such an extent that they suffered $300 damages by reason thereof.

Appellant denied all the allegations of negligence, and says that, even though the cattle were not transported promptly from the point of origin to Seligman, Missouri, they did in fact arrive there in time to make the same Frisco connection they would have made had the train which moved them from the point of origin to Seligman reached Seligman on schedule time.

The case was submitted to the court sitting as a jury, who, in rendering judgment for the appellees for $297.78, made the following findings of fact:

"That when the plaintiffs, L. M. Graham and J. F. Potts, applied for a car on the 29th day of July, 1926, for the following Saturday, July 31, 1926, for a shipment of their cattle to the National Stock Yards at East St. Louis, Illinois, the defendant's station agent at Everton, Arkansas, understood that it was the intention of the defendant to have a car arrive at East St. Louis for the following Monday morning market; that there was an unnecessary delay in getting the shipment to Seligman, Missouri, and but for this delay the shipment should have arrived at East St. Louis several hours earlier, and said stock could have been unloaded and fed and their damage lessened; that, by reason of the unnecessary delay, the plaintiffs were damaged in the sum of $297.78, and that they should have judgment for said amount."

Appellant challenges the above findings to the effect that, when appellees applied for a car on the 29th of July, for the following Saturday, July 31, appellant's agent in Everton understood that it was the intention of appellees to have the car arrive at East St. Louis for the following Monday morning market, and says that there is no evidence in the record to support such finding. Counsel for appellant concede the well-established rule of this court, that it will not reverse upon conflicting evidence submitted either to the jury or to the court sitting as a jury. They say, however, that there is no evidence

upon which to base this finding, and that therefore it should be reversed. We disagree with appellant in this regard. We think there is substantial evidence in the record to support the finding of the court. Mr. Graham testified that they ordered the car on Thursday, July 29, for Saturday, July 31, and that on Friday they went back to Everton and asked the agent what time they had to get the stock in, and the agent told them that they should have them in the pens by nine o'clock. He was asked this question:

"Q. I will ask you if they informed you that if you would load your cattle they would put them on Monday's market at St. Louis? A. They said they would have to have them there by nine o'clock to put them on. Q. What time, when you loaded at nine, or delivered the stock to the pen, what time were they in the habit or custom of putting them into St. Louis? A. Anywhere from seven to eight Monday morning."

He further testified, in substance, that he asked the agent what time he would have to have his stock in the pens to be loaded in order to get them to the St. Louis market Monday morning, and the agent told him nine o'clock Saturday morning. This evidence is disputed by the agent, and there is other substantial evidence in the record sufficient to take the case to the jury, or the court sitting as a jury, as to whether or not the agent invited the shipment for nine o'clock A. M. July 31, 1926, in order to have the cattle reach the National Stock Yards the following Monday morning.

In the case of *C. R. I. & P. Ry. Co.* v. *Butler,* 132 Ark. 37, 200 S. W. 144, L. R. A. 1918C, 537, this court, quoting the second syllabus, said:

"Where a shipper is invited by a carrier to tender to it his stock for shipment, and the shipper does so pursuant to this invitation, the shipper may presume that the carrier has provided and will furnish the facilities needed, and if, through the lack of facilities, the shipper be compelled to load his cattle into cars prematurely, and they are compelled to stand in the cars

an unnecessarily long time before the cars are put in motion, the shipper may recover damages to compensate the loss sustained thereby."

It was therefore not a question of whether appellant's train reached Seligman on schedule time, or that they reached the same train on the Frisco they would have reached if appellant's train had arrived on schedule time at Seligman, but it is a question of the appellant's negligence in inviting the shipment at such an hour that it had no facilities to move the cattle promptly to Seligman. Appellees had the right to assume that appellant and the agent invited the shipment for nine o'clock on Saturday, in response to a query from them as to when they must be delivered in the pens to reach the St. Louis market on Monday, that they would thus be transported in time to reach the market, and, if appellant failed to do so, to the damage of appellees, they would be answerable therefor.

We find no error, and the judgment is affirmed.

HURST *v.* HILDERBRANDT.

Opinion delivered November 12, 1928.

[redacted]

Smith & Blackford, for appellant.

W. M. Ponder and *H. L. Ponder,* for appellee.

McHaney, J. On October 29, 1905, Isham J. Bagley executed and delivered to his wife, Nancy Elizabeth Bagley, a deed to a large body of land in Lawrence County, Arkansas, and certain lots in Walnut Ridge, the *habendum* clause of said deed being as follows: "To have and to hold the same, with all appurtenances thereto belonging, to her, the said Nancy Elizabeth Bagley, for and during her natural life, and in the event that I, Isham J. Bagley, shall survive her, at her death the title and possession of all of said lands shall revert and be reinvested in me, as though this conveyance had never been made. But if the said Nancy Elizabeth Bagley shall survive me, then at her death the title to said lands shall revert and be vested in my surviving children and grandchildren, the latter taking *per stirpes,* and said land shall be divided between them according to the laws of descent, inheritance and distribution of the State of Arkansas."

Isham J. Bagley died intestate October 22, 1910, and Nancy Elizabeth Bagley died March 27, 1928. Ed Bagley, son of Isham J. Bagley, died, and left surviving as his only child and heir at law Harry Bagley, who died prior to the death of Nancy Elizabeth Bagley, and left surviving him his two minor children and only heirs at law, the appellants, Harry Joseph Bagley and Bettie Ruth Bagley. Harry Bagley and his wife, Josephine Bagley, on the 10th day of November, 1924, executed and delivered to the appellee, J. F. Hilderbrandt, their warranty deed to "all my interest, as the son of and heir of Ed Bagley, deceased, who was the son of I. J. Bagley, who is also deceased, and who was my grandfather; and I further state that I am the sole and only heir at law of Ed Bagley, deceased, being an undivided one-fourth interest in the following lands, lying

in the county of Lawrence and State of Arkansas, to-wit'' (describing lands).

This conveyance was made for a consideration of $2,000 by Harry Bagley to his maternal grandfather, the appellee, J. F. Hilderbrandt. After the death of Nancy Elizabeth Bagley, suit in partition was instituted to divide the land, in which the appellants, Joseph and Bettie Ruth Bagley, appeared by their respective mothers as next friend, and complained that the deed from their father, Harry Bagley, to the appellee, J. F. Hilderbrandt, was void for the reason that Harry Bagley had only a contingent remainder in the lands of his grandfather, by virtue of the clause in the deed heretofore mentioned, and not a vested remainder, and could not therefore convey anything by his said deed. The chancery court held that Harry Bagley acquired a vested remainder interest in and to a one-fourth interest in the land described in his grandfather's deed, and that therefore his deed to the appellee, Hilderbrandt, conveyed a good title to his vested interest in remainder, which ripened into an absolute title in fee on the death of Nancy Elizabeth Bagley.

It therefore becomes necessary for us to decide only one question. Was Harry Bagley a vested remainderman or a contingent remainderman under the deed from his grandfather, Isham J. Bagley, to his grandmother, Nancy Elizabeth Bagley, after the death of said Isham J. Bagley?

The subject of vested and contingent remainders has formed the basis of prolific decisions of courts of last resort, textwriters and annotators. We will not undertake an extensive review of the cases touching on this subject, not even those of our own court. It is a fundamental rule of construction of both deeds and wills to ascertain the intention the grantor had in mind, as to the course he desired his property to take, from the language used in the instrument, and to give effect to such intention, if it may be done without doing violence to the law. As said by this court in *Booe* v. *Vinson,*

104 Ark. 439, 149 S. W. 524: "The purpose of construction of a will is to ascertain the intention of the testator from the language used, as it appears from the consideration of the entire instrument, and, when such intention is ascertained, it must prevail, if not contrary to some rule of law; the court placing itself as near as may be in the position of the testator when making the will." And it is also a rule that the law favors the early vesting of estates, and that, if a deed or a will is susceptible of a dual construction, by one of which the estate becomes vested and by the other it remains contingent, the former construction will be adopted. *Booe* v. *Vinson, supra; McCarroll* v. *Falls,* 129 Ark. 245, 195 S. W. 387.

In the last cited case the court quoted with approval from *Archer* v. *Jacobs,* 125 Iowa 467, 101 N. W. 195, the second syllabus on the subject of vested and contingent remainders as follows:

"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 effect 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." The court in the same opinion quoted from *Hawley & King* v. *James,* 5 Paige (N. Y.), 318, as follows:

"A remainder is vested in interest where the person is in being and ascertained, who will, if he lives, have an absolute and immediate right to the possession of the land upon the ceasing or failure of all the precedent estates, provided the estate limited to him by the remainder shall so long continue. In other words, where the remainderman's right to an estate in possession can-

not be defeated by third persons, or contingent events, or by the failure of a condition precedent, if he lives, and the estate limited to him by way of remainder continues till all the precedent estates are determined, his remainder is vested in interest."

R. C. L., vol. 23, page 500, § 32, makes the distinction between vested and contingent remainders in the following language:

"The fundamental distinction between the two kinds of remainders is that, in the case of vested remainder, the right to the estate is fixed and certain, though the right to possession is deferred to some future period, while, in the case of a contingent remainder, the right to the estate as well as the right to the possession of such estate is not only deferred to a future period, but is dependent on the happening of some future contingency. The broad distinction between vested and contingent remainders is this: In the first there is some person *in esse* known and ascertained, who, by the will or deed creating the estate, is to take and enjoy the estate, and whose right to such remainder no contingency can defeat. In the second, it depends upon the happening of a contingent event, whether the estate limited as a remainder shall ever take effect at all. The event may either never happen, or it may not happen until after the particular estate upon which it depended shall have been determined, so that the estate in remainder will never take effect."

It therefore becomes necessary to determine the intention of I. J. Bagley by this language appearing in the deed: "But if the said Nancy Elizabeth Bagley shall survive me, then at her death the title to said lands shall revert and be vested in my surviving children and grandchildren, the latter taking *per stirpes,* and said land shall be divided between them according to the laws of descent, inheritance and distribution of the State of Arkansas." She died surviving him. When did the title to said lands revert and vest in the grantor's surviving children and grandchildren? His own language

answers the question—"at her death." It is conceded that Nancy Elizabeth Bagley held a life estate only. At her death the title was to go to his surviving children and grandchildren. Surviving whom—him or her? Manifestly, we think, he meant that it should go to such children and grandchildren as survived her, and not those surviving him. The grandchildren, according to the language, were to take "*per stirpes.*" That is, they were to take the shares equally their immediate ancestor would have been entitled to had he not died. Therefore, giving the language used this construction, which we believe to be the intention of the grantor, the necessary result is that Harry Bagley took as a contingent remainderman, because it could not be known what children and grandchildren would survive Nancy Elizabeth Bagley until she had died. Since his interest in this land was a contingent remainder and not a vested remainder, he had no power to convey, because he had no vested interest to convey, and his deed to the appellee, Hilderbrandt, conveyed nothing.

A similar situation existed in *Eversmeyer* v. *McCollum,* 171 Ark. 117, 283 S. W. 379, where, to quote the third syllabus, it was held: "Where land was conveyed to A and her husband for their natural lives, and at her death to A's children or descendants, and, if none such be in existence at their death, to a named child of the husband by a former marriage, *held* that, during A's lifetime, her child was a contingent remainderman to whom no title passed."

We will not undertake a discussion of the other cases cited by counsel on both sides, as it would unduly extend this opinion, and, as already stated, there are so many cases on the subject of vested and contingent remainders that the writer feels that it would be a work of supererogation and an affectation of learning on his part for him to attempt to review them, or to announce any new principles on the subject.

Having reached the conclusion that Harry Bagley took only as a contingent remainderman, and that his

deed to appellee, Hildebrandt, conveyed nothing, it necessarily follows that the decree must be reversed and the cause remanded with directions to enter a decree in accordance with this opinion. It is so ordered.

BARR *v.* BARR.

Opinion delivered November 12, 1928.

Pat L. Robinson, for appellant.

Murphy & Wood, for appellee.

McHANEY, J. This is an action for divorce and alimony, brought by appellee against appellant, alleging a course of cruel treatment and general indignities which made her condition in life intolerable; that he cursed and abused her on numerous occasions, in the presence of others, thereby greatly humiliating her; that he struck her, pulled her hair, and threatened to kill her.

Upon a hearing, the chancery court entered a decree granting appellee an absolute divorce from appellant, and rendering judgment for $75 per month alimony, beginning on the 20th day of March, and payable on the 20th day of each month thereafter.

Several questions are raised on this appeal, but we find it necessary to determine only one of them, in view of the disposition we make of it, and that is, the question of the sufficiency of the corroborating evidence. Appel-

lee testified to several minor incidents in the course of their married life, which was only about eight months, tending to support her action for divorce, one of which was that, on one occasion, when her brother, Dr. Houston, and his wife, of Hot Springs, visited them in their home in Little Rock, when appellee says appellant became violently angry at her, cursed her, calling her a damn fool because she gave her brother, Dr. Houston, a drink of appellant's whiskey, kept for medical purposes. This, while denied by appellant, he stating that he only said to her that she was making a damn fool of herself, was corroborated by Dr. and Mrs. Houston, who heard what he said to her, and this is the only respect in which appellee is corroborated by her testimony of several different instances tending to show a ground for divorce. All the charges are denied by appellant, but, even though he had admitted them, this would not be corroboration within the meaning of the term. As was said by this court in *Pryor* v. *Pryor*, 151 Ark. 157, 235 S. W. 421:

"The appellee, in his testimony, flatly contradicts the testimony of the appellant that he had been afflicted for the length of time and to the extent that the testimony of appellant tended to prove. But, even if he had admitted that her testimony in this respect was entirely true, still this would not entitle her to a decree of divorce, because the law, as announced by this court in numerous cases, is that divorces are not granted on the uncorroborated testimony of the parties and their admission of the truth of the matters alleged as grounds therefor." *Shelton* v. *Shelton*, 102 Ark. 59, 143 S. W. 110; *Sisk* v. *Sisk*, 99 Ark. 94, 136 S. W. 987; *Chappell* v. *Chappell*, 83 Ark. 533, 104 S. W. 203.

As to the incident related by her in which she is corroborated by Dr. Houston and his wife, the record shows that there was a reconciliation afterwards. She thereafter continued to live with him for a period of approximately two weeks, and the testimony of both of them is to the effect that they lived happily during that time; that by appellant being that they were happier

during the last two weeks than ever before, and appellee admitting that they resumed their former conjugal relations and lived together as husband and wife. Appellee testified herself that this was the last unpleasant occurrence that happened between them, and about two weeks later she left for her brother's home in Hot Springs, without telling appellant that she was leaving him, and that he did not know that she was not going to return until some days later, when he telephoned her, asking her if she did not intend to come back, and she told him that she did not. She testified that the relations between them after the last unpleasant incident were agreeable; that they worked crossword puzzles together, and that their relations thereafter were as pleasant as usual. Under this state of the record we do not think appellee was entitled to a divorce, as the evidence on her behalf was wholly uncorroborated, except as to the one incident, and the proof conclusively shows that that was condoned. We do not discuss the evidence in detail, as it would serve no useful purpose, but we have examined it carefully, and find it as heretofore stated. This case must therefore be reversed, and the cause dismissed.

On October 1 this court made an order directing appellant to pay appellee as counsel fees $100, and the cost of printing her briefs in this court. This order was not complied with, and, upon motion of appellee to dismiss the appeal, counsel for appellant suggested that it be passed to the final submission of this case, which was done. The appellant is therefore ordered to pay into the registry of this court the above sums of money within ten days from this date, and all the costs that have accrued in both the lower court and this court.

GRADY DRAINAGE DISTRICT *v.* FREE.

Opinion delivered November 19, 1928.

A. J. Johnson, for appellant.

Brockman & Reid, for appellee.

HART, C. J., (after stating the facts). Grady Drainage District contains land both in Jefferson County and in Lincoln County, Arkansas. It was organized under §§ 3607-3655 of Crawford & Moses' Digest.

Section 3607 contains a clause that, if land in more than one county is embraced in a proposed drainage district, the application shall be made to the circuit court of either county, and all proceedings shall be had in such county. Hence the district was properly organized by the circuit court of Jefferson County.

Section 3607 was amended by § 1 of act 353 of the Acts of 1921. See General Acts of 1921, p. 388. The amendment provides that if lands in more than one county are embraced in the district, the application shall be addressed to the circuit court of the county in which the greater portion of the land lies, and all proceedings shall be had in such circuit court.

In *Indian Bayou Drainage District* v. *Dickie,* 177 Ark. 728, 7 S. W. (2d) 794, it was held that the commis-

sioners of a drainage district are empowered to preserve the district improvement without a petition from the landowners, if the necessary funds are available for that purpose. It was further held that, if it is proposed to do additional work, that is, work not contemplated by the original plans, it would be necessary to proceed by a petition of the landowners under act 203 of the Acts of 1927. See Acts of 1927, p. 680. Under § 3 of that act the commissioners are empowered to file plans for additional work when a petition has been filed with the county court, signed by a majority in numbers, acreage and value of the landowners within the district, praying that the work as provided in the plans shall proceed. Hence it is sought to uphold the action of the circuit court in sustaining a demurrer to the petition because it was not filed in the county court as directed by the act of 1927, under which the commissioners were proceeding to act.

We do not agree with counsel in this contention. The act of 1927 in question was passed in aid of drainage districts established under §§ 3607-3655 of Crawford & Moses' Digest. Under the original act the commissioners of drainage districts had no power to construct lateral ditches or to enlarge the original ditches unless they had funds for that purpose on hand. The object of the amendment was to confer upon the commissioners these additional powers.

The settled rule to be followed in the interpretation of an amendment is that the Legislature must be presumed to have had in mind existing statutes on the subject, and the courts will review and interpret the words used in the amending statute as they were used and interpreted in the statute existing at the time of the amendment. *McIntosh* v. *Little Rock,* 159 Ark. 607, 252 S. W. 605, and *American Woodenware Mfg. Co.* v. *Schorling,* 96 Ohio St. 305, 117 N. E. 366, Ann. Cas. 1918D, p. 318.

Now, § 3607 of the Digest contains a clause which says that whenever the words "county court" or

"county judge" are used in the act, they shall be construed to mean "circuit court" or "circuit judge," in cases where the district contains lands in more than one county. It will be presumed that the Legislature had this legal definition of the words "county court" in mind when it passed the act of 1927 in aid of drainage districts. It would be just as necessary to enlarge and add laterals to drainage districts situated in more than one county as it would be to perform such work where the drainage district was situated wholly within one county. Hence it must be presumed that the Legislature had in mind that, when a drainage district was situated in more than one county, the words "county court," as used in the amending act, should be given the meaning of "circuit court" as prescribed by § 3607 of the Digest.

In this view of the matter, the circuit court erred in holding that the proceedings should be had in the county court, or in the Jefferson Circuit Court, where the district was originally organized.

Section 3607 of the Digest was amended by the Acts of 1921, above referred to, so that, if lands in a drainage district are in more than one county, the application should be addressed to the circuit court in which the larger portion of the lands lie, and all proceedings shall be had in the same circuit court. Now, the matter in question was a proceeding within the contemplation of that amendment. The record shows that the larger body of lands in the district was situated in Lincoln County.

Hence the Lincoln Circuit Court had jurisdiction of the proceedings, and the court erred in not so holding; and the judgment will be reversed, and the cause will be remanded for further proceedings in accordance with law and not inconsistent with this opinion.

WATKINS *v.* MOORE.

Opinion delivered November 19, 1928.

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Brundidge & Neelly, for appellant.

J. R. Linder and *Snodgress & Snodgress,* for appellee.

HART, C. J., (after stating the facts). It is well settled in this State that, when a person holds himself out, by word or deed, to another as a partner, and thereby induces him to extend credit to the partnership on the faith of such representation, he cannot shield himself from liability under the partnership. When a

person holds himself out as a member of a partnership, any one dealing with the firm on the faith of such representation is entitled to act on the presumption that the relation continues until notice of some kind is given of its discontinuance. *Brugman* v. *McGuire*, 32 Ark. 733; *Herman Kahn Co.* v. *Bowden*, 80 Ark. 23, 96 S. W. 126, 10 Ann. Cas. 132; and *Gerhner* v. *Scott-Mayer Commission Co.*, 93 Ark. 301, 124 S. W. 772.

We think that a preponderance of the evidence shows that M. E. Moore held himself out to T. A. Watkins as a partner with his son in the purchase and sale of fertilizer from Watkins and his brother. The Moores were in business at Beebe, and the Watkins were in business at Searcy. It is true that the testimony of the parties to the contract is in direct and irreconcilable conflict, but we believe that the attendant circumstances turn the scale in favor of the plaintiffs. The record shows that very little of the fertilizer was sold for cash. Notes to the total amount of $4,000 were given by purchasers of the fertilizer, and these notes were indorsed by Guy Moore, in the name of M. E. Moore & Son, to the plaintiffs. The notes were either made payable to M. E. Moore & Son or to Moore & Son. It is true that M. E. Moore denies that he knew that this was done until in the fall, when an attempt was made to collect the notes. Notwithstanding his testimony on this point, the record shows that he signed one of these notes himself, payable to M. E. Moore & Son, or Moore & Son. M. E. Moore only states in a general way that he did not know these notes were made payable to Moore & Son. He does not state specifically that he did not read over the note that he gave for fertilizer. It is true that Guy Moore says that he presumed his father signed the note without reading it, but his father makes no such statement. If M. E. Moore read the note, he was bound to know that it was payable to M. E. Moore & Son, or to Moore & Son.

Again, the record shows that in the fall M. E. Moore and Guy Moore brought suit on one of these notes and

recovered judgment in the circuit court. It is true that M. E. Moore said that this was done to accommodate the parties, but this could have been done as effectually by disclaiming any right to the proceeds of the note. During the whole of the season he was considered a partner in the business, and was so treated by the plaintiffs. The partnership was organized and conducted as a trading business, and Guy Moore had the right to indorse the notes to the plaintiffs in payment of the fertilizer which the firm had purchased from the plaintiffs. The law of partnership is a branch of the law of agency. One partner acts for himself and as the implied agent of the other within the scope of the partnership business. *Stephens* v. *Neely,* 161 Ark. 114, 255 S. W. 562, 45 A. L. R. 1236; hence a member of the partnership is authorized to settle and adjust claims against the partnership. *Mortimore* v. *Atkins,* 98 Ark. 183, 135 S. W. 865.

Guy Moore was acting within the scope of the partnership business when he indorsed the notes given by the purchasers of fertilizer to the plaintiffs in payment of the debts of the firm. By indorsing the notes in the firm name in payment of a firm debt he bound all the members of the partnership by his indorsement; and, as we have already seen, M. E. Moore became liable for the partnership debts by holding himself out as a member of the firm to T. A. Watkins when the arrangement was made for the purchase of the fertilizer from the White County Supply Company by Moore & Son.

The decree is reversed, and the cause is remanded with directions to the chancery court to render judgment in favor of the plaintiffs against M. E. Moore jointly with Guy Moore as members of the partnership of Moore & Son.

TEMPLE *v.* HAMILTON.

Opinion delivered November 19, 1928.

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Claude V. Holloway, for appellant.

Morris & Barron, for appellee.

HART, C. J., (after stating the facts). Counsel for the defendants seek to defeat any recovery by the plaintiff on the ground of usury. There is no contention between the parties that the plaintiff did not advance to the defendants the sum of $7,520.67 for the purpose of making a crop on the lands rented from the plaintiff by the defendants, and that this amount is shown by an itemized statement in the record. The renewal note of $2,860.98, which was dated February 28, 1927, and secured by the crop and mule mortgage executed on the same date, was intended to represent the balance of the indebtedness due by the defendants to the plaintiff under the first mortgage. It appears that the amount of the note was arrived at by charging ten per cent. per annum interest on all the advances made by the plaintiff to the defendants during the fall of 1925 and the whole of the year of 1926. According to the testimony of the defendants, the transaction on this account was usurious. According to the testimony of all the parties, there was no agreement between them as to

what interest was to be charged, and the plaintiff testified that he accepted the sum of $2,860.98 to be the balance due because one of the defendants stated to him that was the amount due under their contract. The plaintiff testified that he was sick at the time, and that Ben Temple, one of the defendants, went over the account of the defendants and added up the different items on an adding machine, and told him that $2,860.98 was the amount due under the first mortgage. While this is denied by the defendant Temple, we think the chancellor was justified in finding for the plaintiff on this question.

In the first place, the burden of proof is upon the party who pleads usury to show that the transaction was usurious. *Smith* v. *Mack,* 105 Ark. 653, 151 S. W. 431; and *Cammack* v. *Runyan Creamery,* 175 Ark. 601, 299 S. W. 1023. In the second place, it is the settled law of this State that the charge of an excessive amount of interest through mistake of fact on the part of the lender does not render the contract usurious. *Garvin* v. *Linton,* 62 Ark. 370, 35 S. W. 430, 37 S. W. 569; *Tompkins* v. *Vaught,* 138 Ark. 262, 211 S. W. 361; and *Hinton* v. *Brown,* 174 Ark. 1025, 298 S. W. 198.

The substance of the whole transaction was that the plaintiff rented to the defendants about 500 acres of land and agreed to supply them to enable them to make a crop. The supplies were duly furnished, and an itemized account of the same was rendered. None of the items of the account are disputed. It was the intention of the parties that the defendants should give their note to the plaintiff for the balance due after the crop season of 1926. The amount of this note was to be secured by a mortgage on the same mules and on the crop to be grown by the defendants on the plaintiff's land during the year 1927. The amount of the balance due, according to the testimony of the plaintiff, was furnished by one of the defendants, and there was no intention whatever to charge or receive an illegal rate of interest. It is true that, according to the testimony

of the defendants, more than ten per cent. was charged, but the chancellor was justified in finding, under the circumstances, that this was due to a mistake of fact. Hence we are of the opinion that the chancellor was right in not sustaining the complaint of the defendants of usury.

The chancellor was wrong, however, in the amount which he found to be due. As we have already seen, the substance of the whole transaction was that the plaintiff rented to the defendants 500 acres of land and agreed to make certain advances to them to enable them to make a crop. Advances in the sum of $7,520.67 were made during the fall of 1925 and during the year of 1926. The plaintiff appears to have charged ten per cent. interest on these supplies. This he had no right to do. An agreement to pay interest on an account at a rate exceeding six per cent. will not be enforced as to such excess, unless the agreement be in writing. *Johnson* v. *Hull*, 57 Ark. 550, 22 S. W. 176. Hence in no event could the plaintiff charge ten per cent. interest on the advances made by him.

In the first mortgage, which was executed on the 4th day of January, 1926, there is recited an indebtedness of $3,500, evidenced by a promissory note. Although the mortgage on its face was for the sum of $3,500, evidenced by a promissory note of that date, parol evidence was admissible to show that it was really intended to secure advances already made and future advances to be made from time to time. Parol evidence is always admissible to show the true character of a mortgage, and for what consideration it was given. Jones on Mortgages, vol. 1, 8th ed. § 451 (367a); *McKinster* v. *Babcock*, 26 N. Y. 378; and *Louisville Banking Co.* v. *Leonard*, 90 Ky. 106, 13 S. W. 520.

As we have already seen, there was no agreement, in writing or otherwise, that the plaintiff should charge interest on the supplies furnished or the advances made by him to the defendants. Hence he was not entitled to charge any interest on such advances until the end

of the year 1926. The parties had a settlement at that time, and on February 28, 1927, the defendants gave to the plaintiff a new mortgage for what was believed to be the balance due on the old mortgage and to secure future advances. While a mistake was made in the amount then due, the plaintiff will be entitled to charge interest on the amount actually due at the rate of ten per cent. per annum from the date the note was given, because the note recites that ten per cent. interest thereafter was to be charged from the date of the note until its payment. On the advances to be made during the year 1927 no interest should be charged until the end of the year, because the account was not due until that time. No interest should be charged on the mule note of $1,200 at all, because the plaintiff agreed to take the mules back and charge no interest. The fact that the mules were agreed to be returned to him was a sufficient consideration for this new agreement, and he should not have charged any interest at all on the mule note.

From what we have said it is evident that the amount found by the chancellor was greater than that due by the defendants to the plaintiff. Because the chancery court erred in finding the amount due by the defendants to the plaintiff, the decree will be reversed, and the cause will be remanded with directions to the chancellor to enter a decree in favor of the plaintiff against the defendants for the amount actually found due in accordance with the directions of this opinion and for further proceedings in accordance with the principles of equity, and not inconsistent with this opinion. It is so ordered.

STATE USE CRAWFORDSVILLE SPECIAL SCHOOL DISTRICT *v.* HUXTABLE.

Opinion delivered November 19, 1928.

[redacted]

Charles D. Frierson, for appellant.

S. V. Neely and *Rose, Hemingway, Cantrell & Loughborough, W. B. Scott* and *A. B. Shafer,* for appellee.

HART, C. J., (after stating the facts). In the first place, it is contended by counsel for the Crittenden County Bank and the Bank of Crittenden County that there was no liability on their part. The Bank of Crittenden County was organized for the purpose of purchasing the assets and assuming the liabilities of the Crittenden County Bank, which had become insolvent. The contract for the purchase of the assets and the assumption of the liabilities of the Crittenden County Bank was made on February 5, 1927. It is sought to hold both of these banks liable upon the theory that the Crittenden County Bank had purchased the assets and assumed the liabilities of the Crittenden County Bank & Trust Company. Of course, if there was no liability

on the part of the Crittenden County Bank, there could be none on the part of the Bank of Crittenden County.

Now, it is sought to hold the Crittenden County Bank liable under its contract to purchase the assets and assume the liabilities of the Crittenden County Bank & Trust Company, which was approved by the chancery court on the 3d day of February, 1926. The Crittenden County Bank & Trust Company was organized as a trust company, and, under subdivision 7 of § 747 of Crawford & Moses' Digest, it had the power to sign the bond of Frank Huxtable as county treasurer of Crittenden County. It did sign his bond as one of his sureties, and, on that account, became liable for the faithful discharge of the duties of his office. On December 17, 1923, the Crittenden County Bank & Trust Company became insolvent, and its affairs were wound up by the State Bank Commissioner under the statute. At this time no liability had accrued against any one on Huxtable's bond. The liablity of Frank B. Huxtable and his bondsmen for the $5,306.97, belonging to the Crawfordsville Special School District, did not accrue until nearly a year afterwards. This money was lost because of the failure of the Bank of Commerce of Earle, in which the money was deposited. Prior to the failure of the Bank of Commerce, the Crittenden County Bank was organized for the purpose of purchasing the assets of the Crittenden County Bank & Trust Company and assuming its liabilities. The contract of purchase and sale was approved by the chancery court on February 3, 1926; and it is contended by counsel for the appellants that the liability of Frank B. Huxtable and the sureties on his bond as county treasurer included the amount belonging to the Crawfordsville Special School District, which was lost by the failure of the Bank of Commerce.

We cannot agree with counsel in this contention. It is true that the Crittenden County Bank & Trust Company had the power to sign as surety the bond of Frank B. Huxtable as county treasurer of Crittenden County. Subdivision 7 of § 747, Crawford & Moses'

Digest. This power, however, was taken away by the Legislature of 1923. Acts of 1923, p. 515. Section 10 of that act expressly repeals par. 7 of § 747 of the Digest. Besides, corporations organized to do a general banking business never had the power to sign the bond of a public officer as surety. At the time the affairs of the Crittenden County Bank & Trust Company were placed in the hands of the Bank Commissioner, and sold by him under the order of the chancery court, neither a corporation organized to do business as a trust company nor that organized to do a general banking business had the power to sign the bond of a public officer as surety. Therefore it could not be said that, under the contract in question, the Crittenden County Bank should be held to have taken the place of the Crittenden County Bank & Trust Company as one of the sureties on the bond of Frank B. Huxtable. No liability had accrued on his bond at that time.

The Bank of Commerce did not fail until nearly a year afterwards. The money involved in this suit was lost by its failure. Hence there was no existing liability on the bond of Frank B. Huxtable at the time the Crittenden County Bank purchased the assets and assumed the liabilities of the Crittenden County Bank & Trust Company.

We are of the opinion that the terms of contract of purchase and sale of the assets of the Crittenden County Bank & Trust Company only included existing liabilities of the latter, and that no attempt was made to include a default on the bond of the treasurer which might accrue in the future.

But it is contended that the liability of the Crittenden County Bank & Trust Company, as surety on the bond of Frank B. Huxtable, was a continuing one, and that it continued throughout his term of office, although the Crittenden County Bank & Trust Company became insolvent and its affairs were placed in the hands of the State Bank Commissioner, to be wound up by him pursuant to statute. We do not think so. When

the affairs of the Crittenden County Bank & Trust Company were wound up and its assets disposed of and distributed pursuant to statute, its existence came to an end, and it could not in any sense be said to continue liable on the bond of the county treasurer. When its affairs had been wound up and its assets had been distributed among its creditors as provided by statute, it no longer had any powers whatever, and could in no sense be said to continue liable as one of the sureties on the bond of the county treasurer.

The police power of the State extends to the regulation of banking business, and even to its prohibition, except on such conditions as the State may prescribe. *Noble State Bank* v. *Haskell,* 219 U. S. 104, 31 S. Ct. 86, 32 L. R. A. (N. S.) 1062, Ann. Cas. 1912A, 487. The business of banking is of a public nature, and therefore is subject to statutory regulation for the protection of the public. The power to regulate the business necessarily carries with it the power to provide adequate machinery for winding up its affairs when insolvent. If it should be said that the liability of a trust company as a surety on the bond of a public officer must necessarily continue during the life of the bond, regardless of the insolvency of the bank and trust company, then a statute providing for the winding up of the affairs of insolvent banks and trust companies by a State Bank Commissioner or other public agency would be seriously impaired, and of but little advantage to the public or to those dealing with such bank or trust company. The power to wind up and settle its affairs must necessarily conclude its future liabilities and have the effect of putting an end to its existence for all purposes except those held open by the regulating statute itself.

We have already seen that, by the terms of the contract, the Crittenden County Bank only assumed the existing liabilities of the Crittenden County Bank & Trust Company. When the affairs of the Crittenden County Bank & Trust Company were wound up pursuant to statute, its liability as one of the sureties on the

bond of the county treasurer ended. Therefore we are of the opinion that there is no liability on the part of the Crittenden County Bank or on the part of the Bank of Crittenden County, which purchased the assets and assumed the liabilities of the former.

The chancellor held that the individual sureties on the bond of the treasurer were not liable because the county court had given the treasurer credit for the amount lost by him on account of the failure of the Bank of Commerce at Earle, in Crittenden County, and no appeal has been taken. It appears from the record that on June 30, 1925, a day of the April term, 1925, of the county court of Crittenden County, F. B. Huxtable, as treasurer of Crittenden County, filed his report as such county treasurer for the quarter ending December 31, 1924. Among other items for which he asked credit is the following: "Lost in Bank of Commerce, $5,306.97." The county court approved and confirmed his settlement, thereby giving him credit for the sum of $5,306.97, belonging to Crawfordsville Special School District, which had been lost by the failure of the said Bank of Commerce. No appeal was taken from the judgment of the county court in the premises. Hence it is claimed that the matter is *res judicata,* and that, inasmuch as the county court has never adjudged that any liability existed, the present suit cannot be maintained under the authority of *Graham* v. *State,* 100 Ark. 571, 140 S. W. 735. In that case the court held that, before a suit can be brought upon the bond of a county treasurer, there must be a settlement made with him by the county court, and the amount due by him determined, and an order made to pay over the amount found to be due. The court said that the judgment fixing the liability and containing an order to pay over was a condition precedent to the bringing of a suit against the treasurer and the sureties on his bond.

Now, under § 10165 of Crawford & Moses' Digest, the county court was given the power on its own motion to reconsider and adjust the settlement of any county

officer at any time within two years from the date of settlement. In *Sims* v. *Craig,* 171 Ark. 492, in construing this section of the statute, the court said that unintentional errors and mistakes in accounting, resulting in a loss to the county, would be a legal fraud upon the county, and might be corrected by the county court itself within the two years. The court also held that the chancery court has the power to surcharge and correct such settlement for fraud at any time within five years.

Was the action of the county court allowing the treasurer credit for the $5,306.97 belonging to Crawfordsville Special School District, lost by him on account of the failure of the Bank of Commerce of Earle in which it was deposited, a fraud? We think so. The general rule with respect to the liability of public officers and their sureties for the loss of public moneys is that, where the statute, in express terms, imposes the duty to pay over public funds received and held as such, and no condition limiting that obligation is in the statute, the obligation thus imposed upon and assumed by the officer is absolute, and the plea that the money has been lost without his fault does not constitute a defense to an action for its recovery. *United States* v. *Prescott,* 3 How. (U. S.) 578; *Smythe* v. *United States,* 188 U. S. 156, 23 S. W 279; *Board of Education* v. *Jewell,* 41 Minn. 427, 46 N. W. 914, 20 A. S. R. 586; and 33 R. C. L., par. 136, p. 468.

In *Mecklenburg County* v. *Beales,* 111 Va. 691, 69 S. E. 1032, 36 L. R. A. (N. S.) 285, the Virginia Supreme Court of Appeals held that a county treasurer is liable for public funds lost through bank failure, although he believes the bank to be sound, and it is generally so regarded, and in depositing the funds he merely follows a long-prevailing custom, and acts with knowledge of the supervisors, where the statutes of the State manifest an intention to guard with the utmost care the public funds from loss, and to hold the county treasurer handling them to a very strict accountability for their safekeeping. Many decisions are cited in the opinion in support of the

rule, and many more are cited in a case-note to 36 L. R. A. (N. S.) 285.

In *Cameron* v. *Hicks,* 65 W. Va. 484, 64 S. E. 832, 17 Ann. Cas. 926, the West Virginia Court of Appeals said:

"By the great weight of authority the custodian of public money is not a bailee bound only to the exercise of a high degree of care, prudence and diligence for its safety, and excusable for the loss thereof by fire, robbery, theft or bank failure, when such loss is not in any sense due to negligence or misconduct on his part, but a debtor and insurer to the extent of the amount received, excusable for no losses except those resulting from acts of God or the public enemy."

Numerous decisions from the Supreme Court of the United States and from the courts of last resort of the various states are cited in a case-note to 17 Ann. Cas. at p. 929, to the effect that the reasons on which the proposition rests are to be found in the unqualified terms of the bond and in considerations of public policy. Among the cases cited are the following: *State* v. *Croft,* 24 Ark. 550; *State* v. *Newton,* 33 Ark. 276; and *State* v. *Wood,* 51 Ark. 205, 10 S. W. 624.

In this State the condition of the treasurer's bond is that he will faithfully discharge the duties of his office, and under § 2832 of Crawford & Moses Digest he and the sureties on his official bond are liable for all funds deposited by him in a bank when such bank, on demand, shall fail to pay to the person entitled to receive the same. Demand was made for the funds in the case at bar, and there was a failure to pay the same to the persons entitled to receive the same. Under the authorities above cited, the county court was wholly without power to allow the county treasurer credit for the funds in question, and the action of the county court in allowing the same constituted a legal fraud which a court of chancery had the authority to set aside in the present suit. *Fuller* v. *State, use of Craighead County,* 112 Ark. 91, 164 S. W. 770; and *Sims* v. *Craig, supra,* and cases cited.

This principle was sustained in *State* v. *Croft,* 24 Ark. 550. In that case the court held that the declaration, in a suit upon a county treasurer's bond, averring that a specified sum, as appeared by the books, remained in the treasurer's hands; that he had been summoned by the county court to settle his accounts, but had failed to do so; that the court struck the balance due by him, and that he is justly indebted to the county as treasurer in such sum, which he had neglected and refused to pay, were sufficient to charge the sureties in the bond, without the averment of a formal judgment rendered by the county court.

In the case at bar, the county treasurer admitted that he was indebted to Crawfordsville Special School District in the sum of $5,306.97, which was due, and which he had lost by the failure of a bank in which he had deposited it. This substantially amounts to an averment that the county court had settled and determined the amount due from the treasurer to said school district as a part of its school fund, and that such adjustment and settlement are shown by the records of that court. In short, the settled rule is that public policy requires that every depository of public money should be held to strict accountability. The obligation to keep safely the public money is absolute, without any condition, express or implied. Nothing but the payment of it, when required, can discharge the bond, unless by statutory authority. *Newton County* v. *Green,* 104 Ark. 270, 1409 S. W. 73, Ann. Cas. 1914C, 491; *State* v. *Davis, ante,* p. 153, 10 S. W. (2d) 513; *Pearson* v. *State,* 56 Ark. 138, 19 S. W. 499, 35 A. S. R. 91.

Therefore, in view of the situation of the parties as shown by the record, the order of the county court procured by the treasurer giving him credit in his quarterly settlement is a legal fraud against which equity will relieve; and we hold that Crawfordsville Special School District was entitled to recover the sum sued for from the county treasurer and his individual bondsmen.

UNION SAWMILL COMPANY *v.* ROWLAND.

Opinion delivered November 19, 1928.

[redacted]

Gaughan & Sifford, for appellant.

Patterson & Rector, for appellee.

SMITH, J. On September 30, 1916, W. G. Grace executed to J. A. Rowland a deed conveying the oil, gas and minerals in and under a certain forty-acre tract of land, together with other lands, in Union County. This conveyance was duly recorded. On June 16, 1919, Grace conveyed this and other land, without reservation or exception, to the Union Sawmill Company, hereinafter referred to as the company, and thereafter all taxes were paid on the land by the company. Rowland did not at any time assess the mineral rights or pay taxes thereon. On March 3, 1920, a decree was rendered by the chancery court of Union County confirming the title of the company. This decree deraigns the title of Grace to the land which he conveyed to the company, and professes to quiet and confirm it. Thereafter the company received information that Rowland was claiming title to

the oil, gas and minerals in and under the land in question, and this suit was brought by it to quiet its title to the land, including the oil, gas and minerals, against Rowland.

The complaint praying that relief exhibited the confirmation decree, and alleged that Rowland's interest in the land was unknown at the time the confirmation decree was rendered.

An answer was filed by Rowland, alleging the prior conveyance to him by Grace of the oil, gas and minerals, by a deed which was duly of record when the deed from Grace to the company was executed. It was alleged that, as the deed to Rowland was in the company's chain of title, the company was charged with knowledge thereof, yet Rowland, who was a resident of Union County, was not made a party to the proceeding except by the publication of the confirmation notice. The answer alleged therefore that the decree was void as to the defendant Rowland.

A demurrer to this answer was overruled, and, as the plaintiff company refused to plead further, its complaint was dismissed, and this appeal is from that decree.

Section 8363, C. & M. Digest, provides that the owner praying confirmation of his title shall file in the office of the clerk of the chancery court a petition, describing the land and stating facts which show a *prima facie* title in the petitioner, and that, "if the petitioner has knowledge of any other person who has or claims to have interest in such lands, the petitioner shall so state, and such person or persons shall be summoned as defendants in the case."

The pleadings in the case do not allege that the company had any knowledge of Rowland's title, except the constructive notice arising out of the fact that Rowland's deed was in its chain of title and was duly recorded. The question presented for decision is therefore whether the plaintiff company had such knowledge of Rowland's title as required it to make him a party to the proceeding by summoning him as a defendant.

The court below held that it had, and we concur in that holding.

It must be remembered that the purpose of the confirmation statute is to quiet titles, and for one to be entitled to invoke the benefit of the statute he must make a showing of a *prima facie* title in himself, and to do so necessarily involves some investigation of the title of record. It is a well-recognized principle of the law of conveyancing that one is charged with notice of all conveyances appearing in the line of his title, and the deed to Rowland was from the same grantor who conveyed to the company, and Rowland's deed was of record when the conveyance to the company was made.

The statute (§ 8363, C. & M. Digest) provides that if the petitioner has knowledge of an adverse claimant he shall cause such person to be summoned as a defendant. We think the word "knowledge," as here employed, was used in the sense of notice, so that if a petitioner has knowledge, or notice from which knowledge will be imputed, of an adverse claimant, that claimant must be made a party, failing which he is not bound.

The case of *Fulcher* v. *Dierks Lbr. & Coal Co.*, 164 Ark. 261, 261 S. W. 645, involved the question of constructive notice of an outstanding easement, and it was there said that a purchaser had to take notice of all prior recorded instruments in the line of his purchased title, and that one could not claim to be an innocent purchaser as against a recorded instrument appearing in the chain of his title.

So here the recorded mineral deed to Rowland was in the company's chain of title, and the company could not therefore claim to be an innocent purchaser as against it, as notice thereof was imputed to it, and it should therefore have made Rowland a defendant, and, as this was not done, it was correctly held by the court below that Rowland was not bound, and that decree is affirmed.

HOLDEN *v.* CARMEAN.

Opinion delivered November 19, 1928.

Dillon & Robinson and *S. S. Jefferies,* for appellant.

S. L. White and *Snodgress & Snodgress,* for appellee.

SMITH, J. Appellee Rogoski owns a portion of the lot forming the southeast corner of Markham and Pulaski Streets, in the city of Little Rock, and appellant owns the remainder. Some years ago the city opened up Pulaski Street so that it ran at a right angle into Markham Street, and in so doing it became necessary to excavate Pulaski Street to lower it to the grade of Markham. *Little Rock* v. *Holden,* 124 Ark. 599, 186 S. W. 293. The case cited involved the identical property here in litigation.

The excavation of Pulaski Street left the lot owned by Rogoski and appellant about ten feet above the grade line of Pulaski Street. Rogoski, desiring to improve his

portion of the lot, lowered it to the grade line of Pulaski Street, and in so doing appellant's part of the lot was left about ten feet higher than that of Rogoski's part. It is said that this condition itself damaged appellant's property, and that she should have damages on that account. Damages were also claimed to compensate the injury alleged to have been inflicted upon appellant's portion of the lot by the manner in which the excavation was done, and suit was brought against both Rogoski and the independent contractor who did the work.

The trial court held that the mere excavation of the Rogoski part of the lot conferred upon appellant no cause of action, and we concur in that view. Rogoski had the right to excavate his property to the grade line of the streets, and if appellant was injured thereby it was, so far as Rogoski was concerned, *damnum absque injuria.* Appellant has had her day in court when she sued the city for damages resulting from changing the grade line of Pulaski Street. *Little Rock* v. *Holden, supra.*

It does not follow, however, that, because Rogoski had the right to excavate his lot to the grade line of the street, he could do this work or have it done in a negligent manner. The lot was composed of rock, which had to be broken up before it could be removed, and dynamite was employed for that purpose.

Appellant requested an instruction reading as follows:

"You are instructed that dynamite is a highly dangerous article or instrumentality, and any one using it in a crowded city for blasting is required to use more than ordinary care. The one so using it is required to use the utmost care to prevent injury to property of others. If you find from the evidence that defendant failed to use the utmost care in the use of the dynamite in this case, then you must return a verdict for the plaintiff."

The court refused this instruction, and gave one which imposed the duty only to exercise ordinary care.

There was a verdict and judgment in favor of Rogoski and his contractor who did the work, and who were jointly sued, and this appeal is from that judgment.

We think the instruction set out above should have been given. In the case of *Rafferty* v. *Davis,* 214 Pa. 244, 103 Atl. Rep. 951, the Supreme Court of Pennsylvania said:

"We have several times said that extreme care must be observed in the use of so dangerous a substance as dynamite. In *Sowers* v. *McManus*, 214 Pa. 244, 245, 63 Atl. 601, the present Chief Justice said that the general rule in cases of the explosion of dynamite, where third parties having no relation to the person having it in possession are injured, is that the highest degree of care must be exercised" (Citing cases).

Cases cited in a note to 11 R. C. L., page 657, chapter "Explosions and Explosives," and 25 C. J., page 195, chapter "Explosives," support the statement of the law approved by the Supreme Court of Pennsylvania and quoted above.

The instructions of the court did not limit plaintiff's recovery to injury occasioned by substances cast upon the lot by the explosives, but allowed a recovery, if the defendants were liable at all, for the damage caused by the concussion of the air or of the earth, and this was correct. *Fitzsimmons & Connell Co.* v. *Braun & Fitts,* 199 Ill. 390, 65 N. E. 249, 59 L. R. A. 421.

The court charged the jury when and under what circumstances Rogoski would be liable for the negligence of the independent contractor employed by him to excavate the lot. The instructions on this subject were not objected to by either side, and appear to conform to the law as declared in the recent case of *Stout Lbr. Co.* v. *Reynolds,* 175 Ark. 988, 1 S. W. (2d) 77.

No error appears in the record, except the failure of the court to charge that the highest degree of care should have been employed in the use of the dynamite, but the judgment must be reversed for this error, and it is so ordered.

GLOBE & RUTGERS FIRE INSURANCE COMPANY *v.* BATTON.

Opinion delivered November 19, 1928.

[redacted]

McMillen & Scott, for appellant.

Shaver, Shaver & Williams, for appellee.

SMITH, J. The appellant insurance company, hereinafter referred to as the company, issued a policy of fire insurance to appellee on his residence in the sum of $400, and on October 28, 1927, the building was totally destroyed by fire. At the request of the company's local agent, appellee furnished an estimate of his loss in the sum of $1,363.89, and was then advised by the local agent that no other proof of loss would be required.

A few days after the fire an adjuster came to see appellee about his loss, but the parties did not meet, and on November 26, 1927, the adjuster wrote the local agent that, in his opinion, there was no liability on the part of the company, for the alleged reason that appellee had made no effort to extinguish the fire, but, as a matter of compromise, $300 was offered. This offer was declined by appellee. The letter containing this offer was sent by the adjuster to the company's local agent, who sent it to appellee, and after receiving this letter appellee called on the local agent, who advised him to settle, as otherwise he would have the expense

of a lawsuit, with an attorney's fee, and appellee thereupon offered to take $375 in settlement of his claim, provided same was paid at once. A few hours later appellee consulted an attorney, who informed him that, if a recovery was had against the company for the full amount of the policy, judgment would be rendered in his favor for a penalty of twelve per cent. as well as an attorney's fee. Appellee went, immediately after receiving this information, to the local agent and withdrew his offer of compromise, and announced that he would demand the full face value of the policy, but he was advised by the agent that he had already written a letter submitting the offer.

Appellee did nothing until December 10, 1927, except to call on the local agent several times to ascertain what the company had done or would do about the policy, and on the date last mentioned appellee was informed by the local agent that the company had done nothing and was not going to pay anything. The testimony of the local agent varied slightly, but he admitted that, after reading to appellee the letter from the adjuster, he stated, "I said it looked like from the report and what the adjuster said that they (the company) would not do anything."

We think the court was warranted in finding (the case having been tried before the court without a jury) that the company had denied liability, and, this being true, appellee was not required to wait longer to bring suit on the policy, and he, in fact, brought this suit on the date on which he was advised that the company would not pay him for his loss. *Fire Assn. of Philadelphia* v. *Bonds,* 171 Ark. 1066, 287 S. W. 587.

After the suit had been brought, the company requested appellee to furnish additional proof of loss, and this request was complied with on December 24, 1927, which date was still within sixty days of the date of the fire. In this proof of loss appellee recited a denial of liability by the company and the consequent

institution of the suit, and demand was there made for a reasonable attorney's fee to compensate the attorney appellee had been required to employ, and the twelve per cent. penalty.

The company filed an answer December 31, 1927, in which it admitted liability for the full amount of the policy, but denied liability for the attorney's fee or statutory penalty.

The court rendered judgment for the face of the policy, with an attorney's fee of $100 and the statutory penalty, and this appeal is from that judgment.

The policy sued on contained the provision that the loss insured against should be payable sixty days after proof of loss, and it is therefore insisted that, inasmuch as the company answered within sixty days after proof of loss had been furnished, admitting liability for the face of the policy, the attorney's fee and penalty should not have been allowed. It is also insisted that, by complying with the company's request for proof of loss after the institution of the suit, appellee waived any right he may have had to claim the penalty and attorney's fee.

As we have said, the court was warranted in finding that within sixty days of the fire the company denied liability, and, this being true, the insured was not required to wait further before instituting suit, but he had the right to sue at once. *Fire Assn. of Philadelphia* v. *Bonds, supra; Old Am. Ins. Co.* v. *Wexman,* 160 Ark. 571, 255 S. W. 6. In the exercise of this right, appellee employed counsel, who brought this suit, and, as there was a recovery of the sum demanded, the court did not err in allowing an attorney's fee.

We do not think appellee waived any right which had accrued to him by furnishing proof of loss after the institution of the suit. On the contrary, he expressly reserved this right, and called attention to the fact that, through the company's denial of liability, he had been

compelled to incur the expense of employing an attorney, and a fee would be demanded on that account.

The fee allowed does not appear to be unreasonable, and the penalty is fixed by the statute. The judgment is therefore affirmed.

THOMAS *v.* STATE.

Opinion delivered November 19, 1928.

Cochran & Arnett, for appellant.

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

HUMPHREYS, J. Appellant was indicted, tried and convicted in the circuit court of Logan County, Northern District, for carnally knowing Lucy Wooten, who was under sixteen years of age at the time of the alleged offense, and was adjudged to serve a term of one year in the State Penitentiary as a punishment therefor, from which is this appeal.

The only error assigned by appellant for a reversal of the judgment was the exclusion by the court of testimony offered by him tending to show that the pregnancy of the prosecuting witness was the result of sexual intercourse with either Ted Kennedy or Everett Miller. The rule with reference to the admission of this character of evidence was restated in the case of *Rowe* v. *State,* 155 Ark. 142, 244 S. W. 463, as follows:

"The chastity of the prosecutrix is not in issue in prosecutions under the carnal abuse statute; and, while

the prosecutrix may be asked, on her cross-examination, about other illicit intercourse, this is only for the purpose of impeaching her as a witness—a circumstance to be considered by the jury in passing upon the credibility of the witness. But, as the matter is collateral to the main issue, her answers, whether true or false, conclude the inquiry. So also the defense may not show acts of sexual intercourse between the prosecuting witness and other persons, as the '*et tu*' defense does not obtain, as was said in the case of *Plunkett* v. *State,* 72 Ark. 409, 82 S. W. 845. If, however, the State elects to attempt to corroborate the prosecuting witness by showing that a child was begotten by the illicit intercourse charged in the indictment, then defendant may show acts of sexual intercourse with other persons about the time conception took place for the purpose of rebutting this testimony. The State made that effort here, and the defendant should therefore have been allowed to rebut the testimony by showing that some other person was the father of the child."

The Attorney General frankly admits that, under the rule quoted, if the State had elicited any testimony whatever from the State witnesses as to the paternity of the unborn child tending to show that appellant was the author of her condition, then the testimony should have been admitted. After the prosecuting witness had denied, on cross-examination, illicit relationships with Ted Kennedy, Everett Miller or any other person at any time or place, the court asked her if she was pregnant, and she said that she was. According to her testimony, she had conceived the child in November or December, and she testified the following August, so her condition must have been apparent to the jury. The necessary inference from her testimony and her appearance was that appellant was the father of her unborn child. The production of this testimony by the State brought the case within the rule announced, and the court therefore committed reversible error in excluding the testimony offered, which

tended to show illicit relations with other men about the time the conception took place.

On account of the error indicated, the judgment is reversed, and the cause is remanded for a new trial.

MERCER *v.* MOTOR WHEEL CORPORATION.

Opinion delivered November 19, 1928.

J. S. McKnight, for appellant.

E. L. Westbrooke and *E. L. Westbrooke, Jr.,* for appellee.

HUMPHREYS, J. This is an appeal from a judgment of the circuit court of Calhoun County dismissing appellants' suit against appellee to recover $87.50 for timber which it was alleged they delivered to it. The suit was commenced before J. B. Brumley, a justice of the peace of Jefferson County, and service was obtained on appellee in the manner provided by §§ 1826 and 1829 of Crawford & Moses' Digest for serving process upon foreign corporations doing business in the State of Arkansas.

In response to the service, appellee appeared by its agent and attorney, on October 26, 1926, and announced ready for trial. The cause was submitted by agreement to the justice of the peace, a jury being waived,

which resulted in a judgment against appellee, and an appeal was duly prosecuted to the circuit court. On January 10, 1927, the circuit court continued the case, on motion of appellee, until the July term of said court, at which time a motion was filed by appellee and sustained by the court, to dismiss the suit upon the ground that §§ 1826 and 1829 of Crawford & Moses' Digest, upon which service was obtained, were void. The sections of the statute referred to were declared void by the Supreme Court of the United States in the case of *Power Manufacturing Co.* v. *Saunders,* 274 U. S. 490, 47 S. Ct. 678.

Appellants contend that the trial court erred in dismissing their complaint, notwithstanding the invalidity of the statute, because appellee answered and went to trial in the justice of the peace court without raising any question as to the jurisdiction of its person, in appealing the case to the circuit court, and in obtaining a continuance of the cause to a subsequent term in said court.

This court is committed to the doctrine, by a long line of decisions, that taking any substantive step by defendant in an action brought against him in the courts operates as a general appearance, and waives the manner of process or any defects therein. *Hawkins* v. *Taylor,* 56 Ark. 45, 19 S. W. 105, 35 A. S. R. 82; *Carden* v. *Bailey,* 87 Ark. 230, 112 S. W. 743; *Dodson* v. *Butler,* 95 Ark. 617, 130 S. W. 581; *German Investment Co.* v. *Westbrook,* 101 Ark. 124, 141 S. W. 510; *Linn-McCabe Co.* v. *Williams,* 116 Ark. 307, 172 S. W. 895; *Bixley* v. *Taylor,* 122 Ark. 278, 183 S. W. 200.

Appellee argues that taking substantive steps by a defendant in a suit, or by participation in the trial thereof, only waives irregularities in a process which might be amended, and does not waive defects which vitiate or void the process *in toto.* Appellee's argument and the two early cases, one a Georgia and the other a Missouri case, cited in support of its position, are out of line with the Arkansas cases cited above.

According to the Arkansas cases, a defendant against whom a suit has been filed, whether served at all, enters his appearance generally and for all purposes by taking substantive steps therein, such as answering, obtaining a continuance, or appealing from a judgment against it from a lower to a higher court. Certainly no sound distinction can be drawn between a void process and no process at all. If a defendant may waive service entirely by participating in the trial, it logically follows that void service may be waived in the same manner.

The trial court erred in dismissing appellants' complaint on account of the void service, after appellee participated in the trial. The judgment is therefore reversed, and the cause is remanded for a new trial.

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

Opinion delivered November 19, 1928.

Thos. S. Buzbee, Geo. B. Pugh and *H. T. Harrison,* for appellant.

Elmo CarlLee, for appellee.

KIRBY, J. This appeal is prosecuted from a judgment for damages caused by the alleged negligent killing of appellee's intestate by striking her with one of its engines, in the operation of its train.

The complaint alleged that on the 17th day of June, 1924, Beulah Campbell was run over and killed by defendant's passenger train going south, at about 2:45 in the afternoon, while she was walking on the railroad track, at a point about one-eighth of a mile south from Tupelo Station; that her death was the result of the negligence of the defendant's servants engaged in the operation of the train, in failing to keep a proper lookout and give warning of the approach of the train, and in failing to stop the train after discovering the presence of plaintiff's intestate upon the track; that, on account of the defendant's negligence causing the injury, his intestate suffered great pain of body and anguish of mind, for which he was entitled to recover damages for the benefit of her estate.

The answer denied all the material allegations of the complaint as to negligence and damage resulting, and pleaded the contributory negligence of decedent.

The jury returned a verdict in favor of the administrator in the sum of $2,000.

It appears from the testimony that Mrs. Beulah Campbell was killed by defendant's passenger train while she was walking north along the railroad track in the direction of Tupelo. Shortly after the train left the station, the engineer saw her on the track approximately a half mile away, and, as the train proceeded, the whistle was blown, and the engineer said she stepped off the track into the clear, and remained standing there until the train reached a point about 90 feet from where she was standing, when she stepped back upon the track. The engineer immediately reversed the engine, applied the brakes, and did everything possible to stop the train. He said she walked on toward the engine, and, when it was 15 or 20 feet from her, looked up, saw it, and turned and started the other way. The engine struck her, knocked her down, and passed over her nearly one-half its length. The train was stopped about one-half an engine's length from where she was struck. She was lying under the fire-box of the engine. The fireman

jumped off, signaled the engineer, and he backed the train a few feet, got out of the cab, and went to where she was lying on the track, and said she was dead at that time. He stated that she was killed instantly.

Two of the four boys riding in an auto along the road, which was parallel to the right-of-way and about 40 to 60 feet from it, and who were going in the same direction as the train, saw the accident. One said the car was opposite the engine, and the other that the engine was about 60 yards ahead of them. They both stated they saw the woman when they reached a point near the Cotton Belt skidway, one of them estimating the distance from her to the engine at about 60 yards and the other at about 200 yards. Both stated that she did not step off the track after they saw her, nor did she turn around and start back the other way before the engine struck her; that it struck her below the knees, pushed her over backwards, and rolled her up under the engine. They went immediately to the place, and the engine had backed off the body, and she was dead when they arrived. The body had a cut across the front reaching to the cavity, and the engineer said it was burst open. No witness testified that there was any motion or indication of life when they saw the deceased after she was struck by the engine. She was a large woman, about 62 years old, weighed about 200 pounds, and, when she left home, had an old-fashioned sun-bonnet on, with long headpiece and long tails. Her vision was poor, and she was also hard of hearing.

Appellant insists that the court erred in not directing a verdict in its favor, and that the testimony is insufficient to support the judgment for damages. The testimony was conflicting. The engineer saw the deceased on the track for a half mile after he left the station, and said that she got off the track and in the clear after he blew the whistle, and stood there, giving no indication that she would return to the track; that, upon her unexpectedly doing so when the engine was about 90 feet from her, he immediately reversed the

engine, put on the emergency brakes, and did everything possible to stop the train, and he succeeded in stopping it within a few feet after it struck the deceased; but the other witnesses saw her approaching, one at 200 yards distance and the other at 60 yards, and said that she did not leave the track afterwards, nor did she turn around and start back down the track immediately before she was struck, contradicting the testimony of the engineer in both these particulars. The jury was warranted in finding that the appellant was negligent either in failing to keep a proper lookout or in the exercise of ordinary care to keep from injuring the deceased after her perilous position was discovered.

The question of the excessiveness of the verdict is a more serious one. No witness testified to any movement of the body or expression from the deceased indicating any conscious physical pain or suffering after she was struck and knocked down and the engine backed off her body, and, although the engineer testified she was killed instantly, he also said he did not see the body until after he stopped the engine and had backed it off the body on signal from the fireman. The train was moving slowly, however, almost stopped, when the engine struck her and rolled the body up, bursting it, and the jury might have found that there was conscious pain and suffering resulting from the injury of more than a short interval, a mere incident to the death. But the time for which she could have endured pain and suffering was very short in any event, not longer than from when she was struck, the very few minutes, until the train stopped and was backed off.

Each case necessarily must be determined to a certain extent upon its own peculiar facts, and we have reached the conclusion that there was no testimony in this case sufficient to warrant a recovery of more than $250 damages. *St. L. I. M. & S. Ry. Co.* v. *Dawson,* 68 Ark. 1, 56 S. W. 46; *Hughey* v. *Lemmox,* 142 Ark. 593, 219 S. W. 323.

If the appellee will enter a remittitur reducing the judgment to the sum of $250, with interest from the date of its rendition, it will be affirmed; otherwise it will be reversed, and the cause remanded for a new trial. It is so ordered.

MENZIES HARDWOOD COMPANY, INC., *v.* THOMPSON.

Opinion delivered November 19, 1928.

Culbert L. Pearce, for appellant.

C. E. Yingling, for appellee.

KIRBY, J. Appellees, J. T. Thompson and M. E. Chumley, each brought suit in the justice court against defendant, J. T. Miller, to collect certain amounts alleged to be balances due each of them for work and labor performed in the manufacture of lumber, and to enforce a laborer's lien for the collection thereof. The other appellees intervened in the suit for the collection of amounts alleged to be due each of them for work and labor performed in the manufacture of the lumber. Appellant intervened, alleging that, prior to the time the complaint and interventions were filed, it had purchased from the defendant 7,000 feet of oak lumber of the value of $322, which was purchased and delivered to it before the suits and interventions were filed. Claimed to be an innocent purchaser for value, without notice of the claims and liens, and further alleged that no attachments were levied upon the property which was in its pos-

session until after judgment was rendered for plaintiffs and the other interveners in the suit, of which it had no notice, either actual or constructive.

H. L. Stemple also filed an intervention, alleging that he had purchased from the defendant Miller, in good faith and for value, 10,000 feet of oak lumber of the value of $449. In other respects his intervention contained the same allegations as the intervention of the appellant. These two interveners gave a forthcoming bond for $500 jointly.

The plaintiffs and five of the other interveners replied to the intervention of appellant, denying the allegations thereof.

Upon the trial, judgment was rendered against the defendant Miller, the interventions of appellant company and Stemple were dismissed, and judgment rendered against them and their surety in various amounts, in favor of the plaintiffs and interveners, aggregating $351.02. Appellant company and Stemple appealed to the circuit court, where the cause was heard by the court without a jury, and judgments rendered in favor of the plaintiffs and interveners each against the defendant Miller for certain specified amounts, upon which a credit of $45 was allowed for the sale of materials by the constable, not claimed by interveners, and also against appellant company and Stemple, intervener, and the surety on their forthcoming bond, for the amount of said judgments, less the credit of $45, and this appeal is prosecuted from that judgment.

The testimony shows that defendant Miller operated a small mill at Bald Knob from the latter part of June, 1927, to the middle of September, manufacturing oak, gum and hickory timber into pick, hammer and sledgehammer handles, lumber, cooking and stovewood. Appellant company, by written contract, agreed to and did advance money to him to take care of his payroll, and was to receive the entire output of manufactured oak at prevailing prices, to apply on the account for money advanced, and to pay the balance due thereon in cash.

The gum and hickory was sold to other parties, and appellant company only advanced $1,100 on the payrolls, and only received, prior to the filing of these suits, two small carloads of oak to apply on its indebtedness. Stemple, who was representing appellant company, had advanced $350 for the purchase of timber which was used in the manufacture of the materials attached. It appeared that some of the interveners and plaintiffs had worked for the defendant Miller from the time he began operations, and had been paid a portion of the amounts due for the labor in the manufacture of the lumber on each payday, there remaining due to each of them the amounts claimed and as found by the court, and for which judgment was rendered, except that J T. Thompson only claimed in his complaint $31.50, for which he alleged he was entitled to a lien. He admitted that he had done some work not on the material attached, but was given a judgment for $46.50 instead of the amount claimed. The claimants each testified that the work and labor done had been performed in the manufacture of the oak lumber attached.

It is insisted that the testimony was insufficient to warrant the judgment fixing the lien against the manufactured lumber for the amounts claimed by each of the laborers and also to identify the materials upon which the labor had been actually performed and for which they had not been paid. It is true the testimony shows that hickory, gum and oak timber was manufactured, and that the laborers were employed in its manufacture, and the amount of hickory and gum manufactured was not definitely shown, appellants insisting that at least one-half of the labor was performed in the manufacture of the gum and hickory timber, but each of the claimants testified that the amount claimed was due for labor performed in the manufacture of the oak lumber attached herein and for which appellants had given the forthcoming bond.

The law gives a lien to the laborers who perform work under a contract, either written or verbal, on the products of his labor, for the work done, subject to prior

liens (§§ 6848-64, C. & M. Digest), and the evidence herein tends to establish the liens as claimed. The claimants were entitled to liens upon the production of their labors, the oak lumber and manufactured products. *Russell* v. *Painter,* 50 Ark. 244, 7 S. W. 35; *Klondike Lumber Co.* v. *Williams,* 71 Ark. 334, 75 S. W. 854; *Valley Pine Lumber Co.* v. *Hodgins,* 80 Ark. 516, 97 S. W. 682.

It is insisted, however, that the claimants did not have liens for the full amounts claimed for work done on the oak lumber and manufactured products, since gum and hickory timber had also been manufactured along with the oak. It is true the testimony does not disclose exactly the amount or value of work done in the manufacture of the gum and hickory timber, but, as already said, the claimants, except J. T. Thompson, testified that they had done work to the value of the amounts of their claims in the production of the oak lumber and manufactured products, and this is sufficient to support the judgments. *Bennett* v. *Snyder,* 147 Ark. 206, 227 S. W. 402; *Thomas* v. *Thomas,* 150 Ark. 43, 233 S. W. 808; *International Harvester Co.* v. *Layton,* 148 Ark. 156, 229 S. W. 22.

As to appellee Thompson, such is not the case, since, according to his own statement, he was not entitled to the amount allowed by the court, but only to a lien for $26.50, $5 less than the amount of his claim, for the two days' work which he stated was not done in the manufacture of the lumber attached.

The judgment will be modified accordingly, and, as modified, affirmed. It is so ordered. Costs of the appeal to be taxed against appellants.

FRATERNAL AID UNION *v.* ALLEN.

Opinion delivered November 19, 1928.

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Calvin T. Cotham, George R. Allen and *A. W. Fulton,* for appellant.

Murphy & Wood, for appellee.

KIRBY, J., (after stating the facts). It is urged that the court erred in directing a verdict against appellant. The defense was on two grounds, misrepresentation of insured's physical condition in answer to question 14 of the application in not stating that he had been treated for bronchial pneumonia about a year before his death, and because the insured was not in sound mental and bodily health when the policy was delivered.

Appellee, the mother of the insured and beneficiary in the policy, testified, and her testimony was not contradicted, that Smith, the soliciting agent, who did not testify, came out to her home and asked her consent to her minor son, Luther Homer Allen, becoming a member of the lodge and taking out a benefit certificate, which she agreed he might do if he thought he could pay the dues or premiums, and, the boy thinking he could, the agent filled out a blank application, which he had with him. She and the boy answered all questions fully and

truthfully, telling the soliciting agent that Dr. Hamilton had treated Luther in the summer before for malaria—the doctor said he was treating him for that; that Dr. Sanders had made one visit, and prescribed for Luther, but did not say for what he was treating him; and told the agent that he could telephone to Drs. Hamilton and Sanders and ascertain what his trouble was, but that Smith said that made no difference; that they would have a physician to examine the boy and find out what his present condition was. That Luther signed the application as made out by Smith, without reading it, and did not go then to the medical examiner with Smith, because of not having the time. Dr. Freeman was not present when the application was made out, and no claim is made that any false statements or answers were made to him.

Both Drs. Hamilton and Sanders, witnesses for appellant, testified that Luther did not have and was not treated for bronchial pneumonia by either of them at any time before his last illness. It did appear in the death certificate, as made out by Dr. Sanders, that, "about a year before his death, the boy had had bronchial pneumonia," but the doctor stated that this was only an inference on his part, and should not have been put in the death certificate. Dr. Hamilton made only one visit to the boy, and gave him a prescription for malaria, and he was back at work in four or five days; and Dr. Sanders called once only, and thought he gave a prescription, but was not sure, and the boy was up and back at work in three or four days.

It is argued that there was collusion between the insured and the soliciting agent, but the evidence is undisputed that there was none. Neither the insured nor the beneficiary sought the insurance, which would not have been effected had not the soliciting agent come out to the home of appellee and procured the application. According to the undisputed testimony, the soliciting agent was fully and truthfully informed of the diseases that had been suffered by the insured in his answer to question 14 of the application, and the names of the physi-

cians given, as well as the disease for which he had been treated, with the suggestion that he could call up the physicians and ascertain what the trouble was. This information would have become the knowledge of the company, by which it would have been bound, even in spite of a provision in the policy to the contrary, the agent who solicited the business being charged with the duty of asking the applicant questions concerning his physical condition. *So. Ins. Co.* v. *Floyd,* 174 Ark. 373, 295 S. W. 715; *Mass. Bonding & Ins. Co.* v. *Chapman,* 176 Ark. 349, 3 S. W. (2d) 18; *Springfield Mutual Assn.* v. *Atnip,* 169 Ark. 968, 279 S. W. 15; *United Assurance Assn.* v. *Frederick,* 130 Ark. 12, 195 S. W. 691; *American National Ins. Co.* v. *Hale,* 172 Ark. 958, 291 S. W. 82; and *Old Colony Life Ins. Co.* v. *Julian,* 175 Ark. 359, 299 S. W. 266.

Then, too, according to the undisputed testimony from witnesses introduced by appellant, the physicians who had treated the insured during the summer before his application for membership in the Union was made, he did not have and was not treated for bronchial pneumonia, and there could have been no falsity of such a warranty, if one had been made. There is no intimation in the whole record that deceased had suffered from bronchial pneumonia before making his application for membership, except Dr. Sanders' statement in the death certificate, giving bronchial pneumonia, suffered the year before, as a contributing cause. This physician had treated him during the illness, and testified he did not have bronchial pneumonia then, that he only inferred it from the history of the case, in making out the death certificate, and that he should not have put that statement in the certificate.

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

FORT SMITH *v.* NORRIS.

Opinion delivered November 19, 1928.

[redacted]

Daily & Woods and *Pryor, Miles & Pryor,* for appellant.

Webb Covington, for appellee.

MEHAFFY, J. The appellee, Tom B. Norris, brought suit in the Sebastian Chancery Court, Fort Smith District, against the city of Fort Smith and its officials, to enjoin them from interfering with his erecting a filling station on a triangular tract of ground in the city of Fort Smith.

Appellee alleged that he had secured a permit from the city to erect a filling station, and that the city had subsequently revoked said permit, without authority, and the city and its officials were trying to carry into effect this illegal cancellation by threats of arrest and interference with the building of said station. The appellee asked that the city and its officials be enjoined from interfering with plaintiff in the erection of said filling station.

Appellee also alleged that he had leased the land where he was building the filling station from the owner, and that he did not agree and did not take the lease until he procured from the city and its officials a permit to construct the filling station. That he complied with the law in applying for the permit, and it was issued to him, and he thereupon entered into a lease contract for a period of five years, at a rental value of $50 per month, and bound himself for the payment of the rental of $3,000; that, after he had entered into the lease contract and begun work on the land, the city canceled the permit, without authority.

The city and its officials denied all the material allegations in the complaint, and alleged that Norris had never applied to the city for a permit on the property described, and had never published legal notice that he intended to apply for such permit.

On the same day that appellee filed suit, E. F. Creekmore, Sophronia Alexander and others filed suit in the same court against appellee, Tom B. Norris, in which they alleged that he was about to erect a filling station, as described in his complaint, and that the ground where he was about to erect the filling station was a distinctive residential neighborhood, and that the erection of a filling station thereon would constitute a nuisance. They asked that Norris and his associates be enjoined from erecting the station.

Appellee, Norris, filed answer to the complaint of Creekmore and others, denying the allegations in their complaint. The two cases were consolidated and tried together, and the chancellor entered a decree enjoining the city and its officials from interfering with the building of said filling station, and dismissed the complaint of Creekmore and others for want of equity. The city and its officials and the plaintiffs in the other case have appealed to this court.

Norris, the appellee, introduced a lease, dated the 4th day of October, 1927, from A. T. Couch to Tom Norris, describing the property on which it was intended to erect

the filling station. It was for a term of five years, beginning October 10, 1927, and having a rental value of $50 per month, payable in advance. Appellee then introduced in evidence the following building permit:

"Fort Smith, Ark., October 5, 1927. Tom B. Norris is hereby granted permission to erect a frame filling station building 16'x9', with a shed 16'x21', as per code requirements. Part of southeast quarter of southwest quarter, section 15-8-32, on lot....., block....., ... Addition to the city of Fort Smith, to cost about $650, same to be used as a filling station. Said application is in accordance with the requirements of ordinance No. 1338 of the ordinances of Fort Smith, Arkansas.

"Cost of permit.....$1.00
"Inspection fee 1.50

"Total $2.50

"C. A. Williams,
"Building Inspector."

Norris conferred with some property owners before he leased the property, and they did not object to the erection and operation of the filling station.

Earl Henderson, city clerk, testified that the record did not show any permit to Norris, but showed the issuing of a permit to Kendall, and the clerk also testified that the publication of notice was by J. C. Kendall, and the notice was introduced in evidence.

Norris was recalled, and testified that he made the application in the name of his partner, Mr. Kendall.

There was proof introduced showing that the value of the property was approximately $3,500, and showing that the permit to Kendall had been canceled.

A number of witnesses testified about the noise and inconvenience of a filling station at the place and as to whether it would or would not decrease the value of the property. The city of Fort Smith has no zoning district, but it has ordinances which require any one that wants to build a filling station to advertise, etc. The first section of the ordinance makes it unlawful to build or main-

tain a filling station in the city without obtaining permission, and requires an applicant for permission to give ten days' notice by publication in the daily papers, for three consecutive days, of the intention to apply for such permission. The notice must state the place or location of the proposed filling station and the time when application will be made. If there is any remonstrance, a date is fixed for hearing, and a hearing is had upon the application and remonstrance.

The ordinance provides that the term, "filling station," shall include any place where gasoline or oil is sold for use in automobiles or trucks, and it provides for punishment for violation of the ordinance. The particular part of the ordinance involved here is that, if the commission shall decide that the erection of such filing station will endanger the public peace or safety of the residents of such community, or constitute a nuisance, or create an additional fire hazard, the commission shall take these facts into consideration in passing upon the application. And, if the commission determines that the filling station would not be in the interest of the welfare of the community affected, then said commission shall deny said permission.

In this case it is not contended that the filling station would endanger the public peace or safety of the residents or create additional fire hazard. The appellant contends for a reversal on the ground that the erection and operation of the filling station at the place proposed would interfere with the peace, comfort and repose of the plaintiffs in the suit against Norris. They cite and rely on *Huddleston* v. *Burnett,* 172 Ark. 216, 287 S. W. 1013. In that case the court said:

"The testimony introduced was directed to the sole issue presented by the pleadings, of whether the operation of a filling station and garage in that particular locality would constitute a nuisance that would result in irreparable damage to appellee. The trial court found that it would, and permanently enjoined the construction thereof, so the correctness of the finding and decree is

before us for trial *de novo*. The construction and operation of a filling station and public garage is a lawful business, and not a nuisance *per se*, but one cannot prosecute a lawful business in the neighborhood of a dwelling-house if the noise therefrom would render the enjoyment of it materially uncomfortable."

The court also said in that case:

"A decided preponderance of the testimony adduced in the case was to the effect that the operation of a filling station and public garage upon the lot purchased by appellants for that purpose would produce a disturbing noise in the neighborhood, and particularly interrupt the peace and quietude of appellee's home. The witnesses testified that a great many people on the much-traveled highway would stop and honk their horns for gas, and create much noise in stopping and starting their automobiles, testing their motors, etc. It strikes us that the creation of incessant noises of this character, in a strictly residential section, would constitute an intolerable nuisance in the neighborhood."

In the case above referred to the filling station was to be built not only in the residence section of the town of Atkins, but the lot upon which it was to be built adjoined appellee's home on the east and Mrs. T. J. Robinson's home on the west. Testimony also showed that thousands of automobiles and trucks passed upon the highway daily, and, in the tourist season of the year, passed both day and night. Appellee's home was not only in a residence section, but located five or six blocks away from the business district.

Leigh Kelley testified that Mrs. Sophronia Alexander was his mother-in-law, and he acted as her agent in purchasing the property where she resides, and which, it is contended, the erection of the filling station would damage. This filling station is to be erected across the lot, not directly, but at a slight angle, about 100 feet from her property. The Hays property is also across the road from where the filling station is to be erected. There are no other business houses in the immediate vicinity.

Kelley testified that around filling stations there is always trouble about traffic, about turning in, or a car going in and out. There is a certain amount of noise where the cars turn in and blow their horns for gas and oil, and a considerable amount of noise caused by minor adjustments to the motor, or starting a motor. He also testified that at nights automobiles turn into the filling station and throw their lights through the windows.

It will be remembered that the case referred to by appellants was a complaint about the erection of a filling station and a public garage, and a decided preponderance of the testimony showed in that case that the operation of the filling station and garage would produce a disturbing noise in the neighborhood; that a great many people on the much traveled highway would stop, honk their horns, and create much noise in stopping and starting and in testing their motors, etc.

In the instant case the preponderance of the evidence shows the contrary. One of the chief complaints in the instant case is that it would throw the lights of the automobiles in at the windows, but this testimony is conflicting, and the witness Kelley himself says that it is true that the Henderson house and Mrs. Black's house are on a terrace, but cars coming west on Free Ferry Road are higher up in the air. It might be possible for those cars to turn to the left and sweep those two houses with their lights.

Witness lives about three-eighths mile from this place where the filling station is to be erected. He says he thinks it will affect him, but he does not tell how. He admits that it will not reduce the value of his home at the present time, but may be a serious detriment later on.

Mr. T. J. Hays testified that the building of the station would not decrease the value of the property.

The next case referred to by appellants and relied on as authority for reversal is *Chaplain Refining Co.* v. *Dougan,* Okla., 270 Pac. 559. In that case the trial court found that the appellee's property was in an exclusively residential district, and that the appellant was threaten-

ing to erect and had begun the construction of a public drive-in filling station near the residence of the property of the plaintiffs, and within 20 feet of the residence of Dougan; that it was the intention to operate it from 7 A.M. to 9:30 or 10 P.M. each day in the week, including Sundays, and that the automobiles and other motor-driven vehicles using gas and oil, getting water and air, would be continuously going in and out from early morning until late at night, stopping and starting, and that loud and unusual noises made by the cars and motor-driven vehicles and the reflection of lights from cars would constitute and be a continuous physical discomfort and mental and physical annoyance to the plaintiffs. And the Supreme Court of Oklahoma held that, upon examination of the record, it showed that the findings of the trial court were not clearly against the weight of evidence, and therefore, before they would be justified in reversing the judgment, they would have to say that the proposed filling station within 20 feet of the residence of one plaintiff and 100 feet from the other would not constitute such a nuisance as the court of equity would enjoin. And the court further found in that case that "it clearly appears to us that the installation and operation of a drive-in filling station would interfere with the peace, comfort and quiet of plaintiffs, whose property is located within a strict residential district of Enid," and that they should be protected against the annoyance and disturbance which would be caused by the said nuisances.

In the instant case the preponderance of the evidence fails to show that the filing station, where it is proposed to be erected, would constitute a nuisance.

There is no dispute about the law. In the instant case, however, it is a question of fact, and we cannot say that the findings of the chancellor were against the preponderance of the evidence. In fact, we think that a preponderance of the evidence sustains the chancellor's findings. Unless the findings of a chancellor are against the preponderance of the evidence, this court will not reverse. The law as to nuisance and what will constitute a nui-

sance and justify a court of equity in enjoining it are well settled by the decisions of this court, but we deem it unnecessary to refer to those decisions or comment upon them, because, as we have already said, the decision of this case depends upon the evidence.

If the filling station, because of the manner of its operation, should at any time become a nuisance, it could be abated.

The chancellor's findings, being sustained by the evidence, must be affirmed.

YAFFE *v.* FORT SMITH.

Opinion delivered November 19, 1928.

[redacted]

Hill, Fitzhugh & Brizzolara, for appellant.

Roy Gean, for appellee.

MEHAFFY, J. The appellant, who was defendant below, had been operating a junk yard on the south side of the city of Fort Smith, near the yards of the Fort Smith & Western Railway Company, for a number of years. The scrap iron in which the defendant dealt was stored in three places; that is, three different piles. Appellant says that one pile is ordinary junk, another made up largely of automobile parts, and the third consisting of I-beams and structural iron, which was retailed by him for use in buildings. The three piles are within a block of each other. There are no residences near the junk yard, and the business enterprises near there were put there after the defendant established his junk yard.

The plaintiffs below were the city of Fort Smith, members of the board of health, and C. N. Geren, Allen Henderson, Tom Drake, L. S. O'Neal, Leon Williams and Mechanics' Lumber Company. All had business property in the vicinity of the junk yards. They alleged that the junk yards were a public and private nuisance; that appellant unlawfully, knowingly and willfully kept stored on the property used as a junk yard a large pile of old automobiles and parts, irons, steel, castings, rubber, bones of animals, tin cans, buckets, containers, glass jugs and jars, rags, boilers, pipes, sheet iron, and all kinds of old junk of almost every conceivable kind, character and description, all of which is piled in and on the streets and sidewalks, and piled under sheds and on vacant property, several feet high, much of which protrudes out on the sidewalks. That appellant burned rubber, which created offensive odors, and that there were many old containers that held water and created breeding places for mosquitoes; that it created an unhealthy, unsightly and dangerous condition, and that the plaintiffs suffered great and irreparable and continuing damage; that appellant had often been requested and demanded to abate the

nuisance, but he refused to do so. It is also alleged that the maintaining of the junk yard in the manner it was maintained impedes and prevents the development of that section of the city.

The plaintiffs below owned valuable property in the vicinity of the junk yard, and they alleged that rats accumulated and inhabitated in said junk yard, and that the accumulation of said junk at the yard constituted a serious menace to the public health, welfare and safety. They also alleged that there were offensive odors and fumes, and asked that appellant be permanently enjoined and that he be required to abate such public and private nuisance.

The defendant filed a demurrer on the ground that the plaintiff had no legal capacity to sue, and also on the ground that the complaint did not state facts sufficient to constitute a cause of action. The court overruled the demurrer.

The appellant then filed a motion to strike or dismiss as to the board of health and city of Fort Smith. Both parties agree that this motion was granted by the chancellor orally, but the record does not show this. The parties, however, would have the right to amend the record by agreement.

The answer admitted that appellant was maintaining a junk yard within two or three blocks of Garrison Avenue, but he denied all the other material allegations in plaintiff's complaint. He alleged that he was doing a lawful business, and that, under the Constitution of the State of Arkansas and of the United States of America, he is entitled to conduct said junk yard; that it was not conducted in such way as to constitute a nuisance; that he had conducted a junk yard at that place for a long period of years and prior to the time of the erection of buildings by other property owners.

The court, after hearing the testimony, appointed a special commission, with instructions to go in a body to the junk yard and determine upon the basis of a decree, and to report whether it could be abated without its bodily

removal. This commission reported, recommending a perpetual injunction. This commission was appointed by the court without the knowledge or consent of either party.

The appellant then filed a motion to strike from the files the report of the special commissioners. This motion was overruled, and appellant excepted.

The court rendered a decree against appellant, holding that the junk business was a nuisance, and enjoining appellant and his employees, as prayed for in the complaint, requiring appellant, before the first of July, 1928, to erect a substantial cover over the junk piles, preventing the rain from becoming stagnant so as to prevent the breeding of mosquitoes. The decree also prevented the appellant from placing upon the premises any material except solid iron. This appeal is prosecuted to reverse said decree.

Allen Henderson, one of the plaintiffs, testified, identifying photographs, and stating that he had been in that locality for several years, and at various times had noticed rotten bones. Had also noticed cans that contained water. This witness also said that the defendant burned stuff at his junk pile every few days; burns rubber and other things that are offensive; that he had seen rats there, but did not know where they came from. Some of the junk extended out into the street. Old cars were parked around the place, and they were broken up with sledge-hammers. There were quite a lot of old oil cans with water standing in them.

On cross-examination this witness said that one of the junk piles was back of the O'Neal and Drake property, and on this property there were kept horses and mules.

Dr. Johnson, health officer of the city, testified that he made an investigation in August, 1927; saw a number of cars being dismantled on the sidewalk, and asked appellant to correct conditions. On a second trip there some of the conditions had been corrected and some had not. Appellant had put oil around in several places. At

one place there was a half car-load of automobile tires, and some cans that contained water. Also found some tubs containing fruit jars and fenders that contained water. Across the street he found probably half a car-load of vessels that Mr. Yaffe said he bought at Camp Pike. They were pitchers, pans and like receptacles. Some of them contained water. After witness notified appellant, he removed the bones and the vessels he had bought at Camp Pike.

This witness, on cross-examination, testified that these vessels had not been there for about five months. Witness testified that the bones were removed as soon as he notified the appellant. On his second visit there the vessels that contained water had been removed. It takes mosquitoes from 9 to 18 days to breed.

Dr. Charles S. Holt testified that he was president of the board of health. He testified about the junk that was on the yards, and in this respect his testimony was substantially the same as that of Dr. Johnson. He also testified that anything that contains water may affect the health of the people. The junk was piled 15 or 20 feet high. This witness had told appellant that he would have to put a roof over his junk yards. Any place that would catch water would breed mosquitoes.

C. N. Geren, one of the plaintiffs, testified about the junk piles being unsanitary, and the wrecking of automobiles in the street, and that the junk was 15 or 20 feet high, but that he had never made any inspection of the junk piles; simply noticed them. Appellant will buy an old car and dismantle it. That they had the stuff on the streets. This witness owned cows and stock in the barn which was near this place.

L. S. O'Neal testified that the appellant had barrels standing near the building, and that he burns rubber and stuff, and you could smell it at times. That there were a lot of barrels and parts of automobiles about the place, and that it injured his property; that is, he could not rent it successfully. The barrels he saw were upside down, and he did not see any water in them.

Leon Williams, one of the plaintiffs, testified as to the junk and places holding water. That he was in the stock business. His barns are across the street from the junk pile, and he handled horses, cows and mules; kept an average of about 25 head. Also kept goats, chickens and other animals. The junk yard was there before he put his stable there.

M. J. Miller, one of the plaintiffs, testified substantially the same as the other witnesses about the junk pile, but he did not notice any green bones, and saw water only in a few places. Found some containers with water in them.

J. S. Hill, president of the Mechanics' Lumber Company, testified about the junk pile; about there being metal, wooden barrels, fruit jars and bottles that have water in them at times, and that the mosquitoes are bad at his place at night. Saw some green bones there last summer, and they had a bad odor.

Dr. James A. Foltz, a witness for defendant, testified about examining the junk yard, and that he found nothing unsanitary about it. That it was unsightly, and there were bars or iron pipes and every sort of thing. That he was interested in the water containers open where mosquitoes could breed.

Dr. James A. Foltz, Dr. E. H. Stevenson and Dr. St. Cloud Cooper all testified, in substance, that they found nothing unsanitary about the junk yard.

C. T. O'Neill, general manager of the Fort Smith & Western Railroad Company, said, in substance, that he was familiar with the place, and had never seen any stagnant water, either upon the ground or in vessels; no disagreeable odor, only the smell of oil. Never saw or smelled any green bones. The railroad company leases this property to appellant. He also said there were no residences in the immediate vicinity.

Louis Barry, superintendent of the Fort Smith & Western Railway Company, testified that he was familiar with the junk yard; saw it frequently; had never seen any mosquitoes about there, and had never detected any

disagreeable odor. Sees a fire there frequently, but never noticed any bad odor.

D. M. Boles also testified substantially the same as other witnesses as to the condition of the junk yard.

W. E. Mueller testified that he was around the junk pile frequently, once or twice a week, and had never seen any water there. There is plenty of oil on everything. Sometimes he smells pieces of burning rubber and other articles, but there are other people in the vicinity who also burn trash and rubber—the Morris Elevator Company being one.

W. T. Oglesby, who was in the feed business, testified that he passed the junk yard frequently. Never saw any stagnant water about the place and never detected any disagreeable odors. Never smelled any bones; had seen trash burning, but had never detected any bad odors.

S. B. Bradley, the bookkeeper for the appellant, also testified as to the condition of the junk yard, and that there were no containers that hold water. That the place was saturated with oil. He also testified that automobile fenders are cut in small pieces so that no piece is more than a foot square and there is nothing about it that could hold water; that there had been no bones on the premises for some time. They were told to remove them, and they shipped them out. They sometimes burn bits of leather and rubber.

H. B. Sanderson testified substantially the same as other witnesses about seeing no water or bones there, and that he had not noticed any disagreeable odor. He also said that he had seen fruit jars in barrels, but not arranged so that they held water.

The appellant himself testified at length about the condition of his junk yard, and that there were no containers that held any water. He said it would cost him $8,000 to move this junk to another place, and if he attempted to sell it at the present low market price he would lose $15,000. He testified that the blocking of the street was caused principally by persons driving automobiles and parking them there. He dismantles auto-

mobiles that he buys, and piles up the leather and sells that, and only burns the wooden part of the car. Does not use the sidewalk for his business. His fence did lean out over the sidewalk, but he corrected that. Buys all kinds of scrap iron, and all kinds of old machinery. Cuts them into small pieces, but never leaves any of it so it will hold water. He has never seen any mosquitoes about his junk yard. There are no standing pools of water there. After a rain there may be water in places, and then the oil is put there.

It would serve no useful purpose to set out more of the testimony. We have called attention to the evidence sufficiently to show that it was conflicting, and the chancellor found on conflicting evidence that the junk yard, as maintained and operated, was a nuisance. The general rule is stated as follows:

"But the unsightly appearance of a vacant lot, caused by its being used as a dumping ground for refuse material, does not of itself constitute it a nuisance to an adjoining owner nor entitle him to damages. Inasmuch as filth, refuse and garbage may constitute a nuisance unless disposed of in a suitable manner, it is generally conceded to be within the power of municipal authorities to enact ordinances providing for the collection and disposal of such matter. Indeed, the courts seem to be agreed that, in the exercise of the police power, the authorities of a municipality may rightfully require the destruction of garbage and refuse, even when they contain some elements of value. The municipal authorities, it is held, may regulate the removal and disposition of such substances, designate the agents who may rightfully remove and dispose of the same, and prohibit all persons except the designated ones from carrying such substances through the streets of the municipality." 20 R. C. L. 424.

It has also been said: "It seems that a municipal corporation has power, without special legislative grant, to prohibit the erection of works and factories and the pursuit of industries within the corporate limits which will be injurious to the public health, and destructive of

the comfort of the inhabitants, by subjecting them to offensive odors, fumes, noises, or vibration. * * * Again, neither the Legislature, nor a municipal body to which the Legislature has delegated power to control nuisances, may authorize a business to be conducted in such a manner as to constitute a nuisance. The maintenance of a manufacturing establishment which, though skillfully operated, covers neighboring property with smoke, soot and cinders, and causes the buildings thereon to vibrate, or reduces their rental and market value, has been held actionable in a State in which the constitutional amendment against uncompensated damage has been adopted, although expressly authorized by the Legislature.'' 20 R. C. L. 442.

The evidence in this case tends to show that there were containers which hold water among the junk deposited on the lot, and that this will breed mosquitoes, which will affect the health of the persons in that vicinity. In fact, the chancellor found that these facts are established by the evidence.

This court has 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.'' *Bickley* v. *Morgan Utilities Co., Inc.,* 173 Ark. 1038, 294 S. W. 38.

This court quoted with approval from the case of *Owens* v. *Phillips,* 73 Ind. 293:

''The right of appellants was not merely to have their house protected from wrongful injury, but they had

the further right to be protected in its comfortable enjoyment. Noises, odors, smoke and dust may possibly work the house itself no material injury, and yet render it impossible for the owner to live in it with comfort. The appellants were not bound to prove both an injury to the property itself and an interference with its enjoyment. * * * It is true, as a general rule, that such acts as result in a mere diminution in value of property, which can be fully and readily compensated in damages, will not supply grounds for an injunction, and parties will be left to the redress afforded by an action for damages. But, while this is true, it by no means follows that interference with the enjoyment of the property will not furnish grounds for relief by injunction, although the property itself may sustain no physical injury whatever. The right to enjoy property is as much a matter of legal concern as the property itself. * * * The owner of property is entitled to enjoy the ordinary comforts of life, and that right is not to be measured by the notions of the people of a particular locality. * * * No man has a right to take from another the enjoyment of what are regarded by the community as the reasonable and essential comforts of life, because the notions of the people of a given locality may not correctly estimate the standard of such comforts." *Durfey* v. *Thalheimer,* 85 Ark. 544, 109 S. W. 519.

The evidence in this case, however, indicates that appellant's junk piles may be so protected that no water can get into the containers and so protected that there may be no danger of breeding mosquitoes. And we think that the junk piles complained of should have a roof over them, and be so protected that there would be no chance for water to accumulate in containers and no chance for the breeding of mosquitoes, and appellant should be required to do this without any unnecessary delay.

Appellant, however, contends that it would cost him $8,000 to move the junk pile to another place. It is not shown what the cost would be to put a roof over it and protect it so that it would not constitute a nuisance. He also says that if he had to sell it at the low market price

he would lose $15,000. But, whatever the cost may be, either to move it or to protect it by a roof, it is the duty of every one to so use his property as not to injure that of another.

This court has said: "It is conceded that the operation of a hide and fur business is not a nuisance *per se,* but the contention is that the operation in the manner in which it is carried on in the locality where the place of business is situated constitutes a nuisance, and we are of the opinion that the preponderance of the evidence sustains this contention. The case affords, perhaps, an example where a business established at a place remote from population is gradually surrounded and becomes a 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 condition." *Ft. Smith* v. *Western Hide & Fur Co.,* 153 Ark. 99, 239 S. W. 724.

Appellant's business has been established for a number of years, and at the time it was established it was probably not an interference with the rights of any one. But it has become so because of the growth of the city, and, having become so, the private rights of appellant must yield to the public good.

We have therefore reached the conclusion that the appellant should be required to protect the property, as above indicated, without unnecessary delay, and that, if he does not do so, he should be required to remove it. The appellant should be permitted to put a roof over his property and protect it in the manner herein indicated within a reasonable time. And, unless it is so protected that it will not be a nuisance, he should be required to remove it. He may be required to remove it at any time if it becomes a nuisance. The junk pile, of course, can be

abated by proper proceedings if at any time hereafter it shall become a nuisance.

The decree of the chancery court is reversed, and the cause is remanded with directions to the court to render a decree in accordance with this opinion.

MISSOURI PACIFIC RAILROAD COMPANY *v.* JUNEAU.

Opinion delivered November 19, 1928.

[redacted]

E. B. Kinsworthy and *R. M. Ryan,* for appellant.

Murphy & Wood, for appellee.

MEHAFFY, J. The appellee brought suit in the Garland Circuit Court against the appellant, alleging that he was the owner of certain property, describing it, and that, in 1900, the Little Rock, Hot Springs & Western Railroad Company constructed its main line track in Valley Street, west of plaintiff's property, and about forty-five feet from said property; that since that time the Missouri Pacific has become the owner of the property, and that, some time in 1927, the appellant changed the location of its tracks, and placed its tracks in Valley Street, west of plaintiff's property, so that said track runs within about 16 feet of his property; that it crosses the sidewalk on the east side of Valley Street, a short distance south of plaintiff's property, and that it is now operating its trains and railroad business over said track, located within 16 feet of plaintiff's property; that it has abandoned and torn up the tracks over which it formerly operated. That plaintiff has a two-story building situated on his property, and is operating a grocery business on the first floor of said building, and occupies the upper story as a home and rooming house; that the change in the location of defendant's tracks has obstructed the use of Valley Street, and has made the property less accessible, and almost destroyed the use of Valley Street south of the plaintiff's property by pedestrians; that the defendant operates heavy trains and heavy engines over said track, and is constantly switching cars over said track along Valley Street; that the change in the location has greatly damaged plaintiff's property, on account of the noise and vibration caused by the operation of its trains and engines and the switching of cars, and the smoke and dirt from said tracks, and the dust and cinders caused by the passage of such trains, engines and cars over said track, and that it has obstructed the use of Valley Street by the public. That the change in its

tracks has greatly damaged plaintiff's business on account of the noise, smoke, steam, dust and vibration, and that plaintiff has been damaged in the sum of $3,000. It also alleged that the city of Hot Springs had not granted the defendant the right to change its location.

The appellant filed its answer, denying all the material allegations of plaintiff's complaint as to damaging his property, and alleged that the line constructed originally was 40.3 feet from the nearest point of plaintiff's property, and admitted that, since the relocation, its line was 21.3 feet from plaintiff's property. It admitted that it had abandoned and torn up the track over which it formerly operated. It denied that the location of the tracks and engines had obstructed the use of the street or made appellee's property less accessible, or that it destroyed the use of Valley Street south of plaintiff's property, and denied that the operation of its trains and engines damaged plaintiff's property in any way. It alleged in its answer that the city council of Hot Springs, in 1894, passed an ordinance granting a franchise or right-of-way over Valley Street, opposite appellee's property, and attached said ordinance to its answer. It also alleged that, when the ordinance was passed, there was a consent to the granting of said franchise and right-of-way by the property owners along the street. It also alleged that the city council of Hot Springs, in 1899, passed an ordinance granting the same rights as above mentioned to the Little Rock, Hot Springs & Western Railroad Company, and that there was no objection to granting of said ordinances by the citizens of Hot Springs. That in 1900 the Little Rock, Hot Springs & Western Railroad Company built a line of railroad track along Valley Street, adjacent to appellee's property, and began to operate its trains over it, and continued to do so until its property was sold to the St. Louis, Iron Mountain & Southern Railroad Company, and that more than ten years ago the appellant purchased all the property of the St. Louis, Iron Mountain & Southern Railway Company in Hot Springs, including the right-of-way

along Valley Street and adjacent to the property of appellee. That none of the property owners had ever objected to the building, maintaining and operating of said track, and that, under said ordinance, the appellee had no right or title in and over said Valley Street, or, if he had ever had such right, it was barred by the statute of limitations. That, when the track was originally built, Hot Springs was a small village, but that it has grown to a city of the first class and of great commercial interest, and that its business and traffic had grown so that it was impossible for appellant to perform its duties as common carrier. That the track as originally built was on the curve, and dangerous to be operated, and that in 1927 it moved its said tracks, as alleged by plaintiff, and is now operating its trains over said tracks under authority given to it by the ordinances above mentioned. It especially alleged that appellee had not been damaged, and pleaded the right and authority given to it by the ordinances as a complete defense and bar to the action. The ordinances grant to the railroad company the right to lay, maintain and operate its tracks and engines over said Valley Street, adjacent to appellee's property.

The appellee testified that his property was located on East Grand and Valley Streets, being part of lot 6, in block 40. The lot is 35 feet deep on Valley Street and 130 feet on Grand Avenue. That he acquired the property through his father, and had been in possession of it since 1905. Deeds to the property were introduced. He further testified that his property contained five rooms upstairs, and a store room and a four-room apartment with bath; that he rented out the five rooms upstairs, and ran a grocery and meat business downstairs. The size of the building was 40 feet wide, and it took up the entire ground, about 40 feet by 35 feet. The building was a frame building, with a concrete foundation. That the relocation of the tracks was made about ten months ago; that before the change was made the track was about 40 feet from his building, and that since the track has been changed it is 17 feet from the corner of his building to

the nearest rail, and was 23 feet 3 inches from the front of his building to the ball of the rail. That before the track was changed appellee never paid any attention to it. That he had a driveway along by his building, and wagons and trucks and everything went along there. That, since the track has been moved over, the vibration was so great that it caused a tremor of the whole building. That you could feel it all over, and that the smoke and cinders were bad. That he never noticed this before the change was made. Six trains ran over the track every day each way, and the switch engine worked in and over said track. The railroad yards are about 250 feet north of his property. The switch engine, in switching cars, had to pass over the track near his place, and it caused him inconvenience and discomfort, and he could not leave the windows up upstairs on the side of the building next to the track. That it increased the danger from fire. That when the heavy engines passed they shook the building very materially, and that it shook articles on the shelves in the store. That before the change was made there was no vibration, and that he was not inconvenienced by reason of cinders. That the switch engine operated over the track from eight o'clock in the morning to four in the afternoon, and that sometimes in the winter a night crew would operate until about 11 o'clock. Before the change, cars and wagons could park on the west side, but it was dangerous now to park there, and a man with a team is afraid that he will get caught if he parks between the railroad and the building. If a car was parked there, no one could pass. The rails were not buried down in the ground, but the whole rail sticks up. There is a light pole or telephone pole that sets off from the building. In the passageway between the pole and the track there is not sufficient room for a car to pass.

Appellee, over the objection of appellant, testified that there had been a decrease in his business. That, prior to the change of the track, people would send their little children to the store, but they are afraid to do so

now because the track is so close to the building. And appellee testified at length about his business and about the decrease in his business because of the relocation of the track. He also testified, over the objection of appellant, about ability to rent his rooms. Admitted that he had sued the railroad company twice before. That in 1912 the train ran over him, and cut off his leg. That he was working for them at the time. That he got $7,500 judgment against them, and that in another suit he sued the M. D. & G. for running through and taking part of his building, and that he recovered $1,900 for that. Before the relocation of the tracks he rented his rooms for $2 a week, and he now gets $1.50 a week.

He testified that engines will throw cinders more at 17 feet than they will at 40 feet, and that it depends upon the wind which way the cinders blow. That the present track is now 17 feet from his building, and that the little building that offsets into the street is 11 feet from the railroad track. That the closest rail to his house proper is about 17 feet. None of the railroad track is on his property. The house has been on his property about 40 years. His building faces Grand Avenue and does not face Valley Street. That the railroad company is not interfering with any entrance on Valley Street, but is interfering with the traffic along Valley Street. He also testified that the conditions on Grand Avenue were the same now as they were before the change.

G. C. Smith, W. T. Hawkins, Mrs. Dode Crawford, M. S. Bayless, George Hubbard, Jim Lowrey, C. A. Rutledge, R. S. Wood, Mrs. Sam Campbell, Tim O'Connor and Frank Rawson all testified about the situation of the property and tracks and the operation of trains before and after the relocation of the road, and to the accessibility to plaintiff's property, etc.

F. Leslie Body, S. J. Erickson, E. L. Howlett, T. J. Bledsoe, Leon Numainville, W. L. Calvert, E. J. Lassiter, T. C. Davis, A. F. Annen and E. F. Latta testified for appellant, in effect, that the relocation of the track did

not injure or damage appellee's property, and that they felt no vibration.

There is a conflict in the evidence on the material points, the witnesses for appellee testifying to certain facts that are denied by the defendant's witnesses. We deem it unnecessary to set out the testimony fully, because it was conflicting, and it was therefore the province of the jury to settle the facts.

The appellant contends that the evidence is totally insufficient to support the verdict of the jury, and argues, together with this proposition, that the verdict was contrary to law, contrary to evidence, and contrary to both the law and evidence. It is contended that trains cannot be operated without noise, smoke or cinders, and that, if appellant is to be penalized because of these things, there is no way or manner in which a steam engine or locomotive could be operated. And he cites and quotes from the case of *Metropolitan West Side Elevated Rd. Co.* v. *Goll,* 100 Ill. App. 323, cited in note, 22 A. L. R. 180. He quotes the following from the above case: "We are not referred to any cases in this State which hold that noise and disturbance by the running or operating of trains were of such character that at common law the same would be actionable." The above quotation is not quite correct. See same case in 100 Ill. App. 323. The opinion in the above case, among other things, states:

"Damage thereby caused to neighboring property owners was without remedy in this State until, by virtue of the constitutional provision made in 1870, that private property shall not be taken or damaged for public use without compensation, such damages have again become recoverable as at common law. * * * It cannot be doubted that at common law mere noise in the immediate vicinity of the premises, and especially of the dwelling house of a landowner, may be of such a character as to constitute an actionable nuisance, remediable by an action on the case for damages or by injunction. Noise and disturbances therefore, of such a character as at common

law would be actionable, are an element of damages for which recovery can be had in a suit like the one at bar."

The court also said in the same case: "But, when either a private person or a corporation so uses his or its property as to cause damage actionable at common law, then either or both are liable therefor, and the corporation is not protected from such liability by the fact that it may have been authorized by statutory enactment to do the things which occasioned such actionable damage."

The court also said: "There has been some conflict of opinion as to whether necessary noise incident to the operation of a railroad is an element for damage for which recovery can be had. * * * Such ordinary and necessary noise is generally considered to affect only a public and common right, for which no private action will lie. But it has been held in this State that mere noise made by a railroad company in the immediate vicinity of a dwelling house may be of such a character as to constitute an actionable nuisance."

It is also held by the same court that it is a question of fact for the jury to determine, and that, if one's property is injured by noise, smoke and dust, the property owner may recover damages therefor.

In 22 A. L. R., referred to by the appellant, it is stated: "If noise, smoke, dust, cinders or things of that sort can be shown to have damaged the property itself, then they should be considered by the jury in arriving at the amount of the recovery. If, however, they amount simply to an inconvenience or discomfort to the occupants of the property, they would not be an element of damages, and should not be considered by the jury."

It is also stated in the annotations in 22 A. L. R., referred to, that not only smoke and cinders may cause such damage as that a recovery can be had, but cutting off access by the laying and use of a switch close to abutting property gives the property owner right of damages; and that the cases uniformly hold that, if a grade of a street is changed by a cut or viaduct, so as to interfere with the abutting owner's ingress and egress, he is

entitled to damages. And, of course, the same rule would apply where, instead of changing the grade, they changed the location of the track, and that does not mean prevent ingress or egress, but interfere with it, and thereby damage the property.

When the track was originally laid, appellee, or the owner of the property, could have recovered all the damages that he suffered because of the railroad track and the operation of the track at that time; and that means future damages as well as present. That is, all the damages resulting from a proper operation of its trains. But if a relocation of a track damages the property in addition to the damage suffered because of the operation of the trains on the original track, then the property owner would have a right to recover.

Our Constitution provides: "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 full compensation therefor."

Therefore, if appellee's property was damaged by the relocation of this track and the operation of engines and trains over it as relocated, he has a right to recover whatever damages the evidence shows were caused by the relocation of the track and the operation of the trains over it as relocated.

The track was originally 40 feet from appellant's property. As now located, it is approximately 17 feet, and the proof shows that the track, located as it now is, is an interference with ingress and egress to appellee's property that did not exist before the relocation of the track. Also that operating engines and trains on the original track caused no vibration, and at the present location there is. To be sure, there is a conflict of evidence about this vibration, but it was the province of the jury to settle that.

Appellant argues that the ingress and egress to appellee's property has not been affected, but appellee testified that, before the track was changed, he had a

driveway along by his building, and wagons and trucks and everything went along there. That, since the track has been moved over, the vibration was so great it caused a tremor of the whole building; that you could feel it all over, and the smoke and cinders were bad. That cars and wagons used to park on the west side of the building before the change was made, but it is dangerous now to park there. And that a man with a team is afraid he will get caught if he parks between the railroad and the building; that if a car was parked there, no one could pass. If this is true, it certainly interferes with the ingress and egress to appellee's property.

In the Gulledge case, referred to by appellant, it is stated: "It is alleged that, by reason of the appropriation of said street by defendant for its roadbed, switches and switch stands, and the operation of the railroad along the street, plaintiff's property has been diminished in value to the extent of the sum of $2,000." *Ashley, D. & N. Ry. Co.* v. *Gulledge,* 121 Ark. 143, 180 S. W. 222.

And in that case the appellant railroad company insisted that the testimony was not sufficient to make out a case which rendered the railway company liable. But the court said that, under the well settled decisions of this court, the evidence was sufficient to warrant a recovery on account of the depreciation of appellant's property in value.

In speaking of the case referred to in 73 Ark. 1, *Little Rock & H. S. Rd. Co.* v. *Newman,* 83 S. W. 653, 108 A. S. R. 17, the court in the Gulledge case said that the access to the plaintiff's property was not taken away or rendered less convenient. Certainly the proof in the instant case shows that it was rendered less convenient and the access was interfered with.

It is unnecessary, however, to either cite or quote from decisions of this court, because it has been uniformly held, since the adoption of the Constitution of 1874, that damages may be recovered if caused by the construction or operation of a railroad, if caused to abutting property.

It is contended also by appellant that the court erred in permitting appellee to testify as to the decrease in his grocery business. We think this testimony, in connection with the testimony of appellee that the building of the track where it now is made it dangerous, and that small children who came there to purchase things before could not now come, was competent evidence. Of course he could not recover any speculative profits, but this was one way of showing that his property had been damaged.

It is also contended that the court erred in permitting appellee to show that the market value of his property had decreased. We do not agree with counsel in this contention. If the building of the railroad track near his property decreased its market value, it injured it. It damaged it, and for this damage the owner of the property is entitled to recover. And, after this testimony was objected to by the appellant, appellee was then asked to state whether that decrease in the market value of his property was caused by the change of the track or some other cause. If it was caused by anything else, of course it would not be proper, because, if the railroad company is liable at all, it is liable for the damage it caused, and not for damage caused by some other agency.

Appellant next objects to instruction number one. It is contended that the court should have told the jury that, unless the appellee had suffered some peculiar or special damage by reason of smoke, noise and cinders than that suffered by the other property owners in like circumstances, then he could not recover, and that a failure of the court to tell the jury this made instruction number one erroneous. In instruction number one the court stated the issues to the jury, and it did not undertake to do anything else other than state what the issues were.

It is next contended that the court erred in giving instruction number two. In that instruction the court told the jury that it should not determine whether or not the defendant had a right to lay its tracks along the street in question, and that there could be no damages recovered

by the plaintiff in this case on account of the location as first made; but, after the tracks had been once laid, they could not be changed or relocated without the consent of the owners, unless the defendant company should pay to the abutting owners of the property any damage that would be suffered on account of the relocation of the tracks. The court continued, in instruction number two: "In other words, the company would not have a right to relocate their tracks under the original grant or ordinance by the city, without being liable to the plaintiff in this case, if his property there has been damaged on account of the relocation of the tracks."

This was a plain statement to the jury of the law. If the relocation of the tracks caused damage to his property, he was entitled to recover. Otherwise, he was not entitled to recover. But the appellant says that it has been held that a right given a railroad company in a State cannot afterwards be impaired, and that the franchise as originally passed became a contract.

That might be true if the track remained where originally located, but the appellant and city of Hot Springs could not make a contract that would deprive any property owner of the right to recover damages if the building of the track or the relocation of it damaged his property. In other words, the changing a grade or relocating a line by which property is damaged, that was not damaged before the grade was changed or line relocated, gives the one whose property is damaged thereby the right to recover.

Appellant discusses other instructions, and especially instruction number three, but we think the instructions as a whole constituted a correct statement of the law, and that there was no error in the granting or refusing to grant any instructions.

The question as to whether the relocation of the track damaged the property of appellee was one of fact to be determined by the jury from the case, and the finding of fact by a jury is conclusive if there is any substantial evidence to sustain such finding. This court has

uniformly held that a verdict of a jury based on substantial evidence will not be disturbed by this court, although we might think that it was against the weight of the evidence. We do not pass on the weight of the evidence nor the credibility of the witnesses.

Since we hold that there was evidence sufficient to justify the submission of the case to the jury, it follows that the case must be affirmed.

FIRST NATIONAL BANK OF MINERAL SPRINGS *v.* HAYES-McKEAN HARDWARE COMPANY.

Opinion delivered November 19, 1928.

Feazel & Steel, for appellant.

Lake, Lake & Carlton, for appellee.

McHANEY, J. On November 15, 1926, one Joe Smith, being indebted to the appellee in the sum of $649.16 for borrowed money, executed his note therefor, secured by a mortgage on certain lands, containing the following clause: "And it is further stipulated that, in case the said Joe E. Smith and Gladys Smith shall make default in payment of taxes, or assessments for local improvements or other purpose, or of keeping said buildings insured as aforesaid, then the said Hayes-McKean Hardware Company or legal representatives may pay such taxes and assessments and effect such insurance, and

the amount so expended therefor, with interest at ten per cent. per annum from date of such expenditure until repaid, shall be considered a sum the repayment of which is intended to be hereby secured."

The mortgage was recorded on the date of its execution. On February 11, 1927, appellant secured a judgment against said Smith, in the circuit court of Sevier County, in the sum of $333.51. Thereafter, on March 23, 1927, appellee was forced to redeem the land covered by its first mortgage from tax forfeiture for State, county and road improvement district taxes, which it paid in the sum of $480.15, and at that time required said Smiths to execute another mortgage securing the payment of said taxes. Appellant caused an execution to issue on its judgment against Smith, in August, 1927, and had same levied upon the land covered by said mortgage, and on September 24, 1927, the sheriff sold Smith's interest therein to appellant.

On the 18th day of November, 1927, appellee instituted this action in the chancery court to foreclose its first mortgage against Smith, in which appellant was made a party defendant, and in which it prayed that all rights of appellant in the land which it claimed by reason of the execution sale be canceled in so far as it affected the rights and interests of the appellee. The court entered a decree foreclosing the mortgage for the full amount of Smith's indebtedness to appellee, and making its lien superior to that of appellant.

The only question presented by this appeal for our determination is the priority of the respective liens of the parties, appellant claiming that its judgment lien was superior to appellee's second mortgage covering the money loaned to redeem the land from tax forfeitures. Appellant admits that appellee, under the terms of its first mortgage, had the right to pay the taxes for Joe Smith to protect its lien, even if there had been no provision in the mortgage as heretofore set out, but it says that, by taking the second mortgage, appellee waived its rights under the first mortgage, and also any equitable

lien it may have had for the amount of the taxes paid in order to protect its lien under the first mortgage, for the reason that its judgment against Smith antedated the second mortgage.

We cannot agree with counsel in this contention. The payment of the taxes on the land was necessary in order to protect the interest of both parties. The payment of the taxes inured to the benefit of appellant as well as appellee, for, if neither had paid the taxes, the land would have passed to a stranger to the title and been lost to both parties.

Under the above clause in the mortgage, appellee was secured for all advances made for taxes, and it was unnecessary to take the second mortgage. The proof conclusively shows that the second mortgage was taken in ignorance of the provision contained in the first mortgage, and without actual knowledge of appellant's judgment against Smith. Appellee cannot be held to have waived a right of which it was ignorant. The uncontradicted proof shows that it was ignorant both of the provision in the mortgage and of its right under the law to an equitable lien for the payment of taxes. To hold that, by the mere fact of taking the second mortgage, it waived rights already given it, both under the first mortgage and the law, without regard to the mortgage, would be manifestly inequitable and unjust, and in the face of the uncontradicted proof that appellee did not intend to waive its rights.

A "waiver" has been defined to be "an intentional abandonment or relinquishment of a known right." Words & Phrases, Second Series, p. 1222. This definition was cited with approval in *Sovereign Camp W. O. W.* v. *Newsom,* 142 Ark. 132, 219 S. W. 759, 14 A. L. R. 903.

Therefore, since appellee did not know of its rights under the first mortgage and the law, and since it did not intend to relinquish any rights it had, it cannot be held to have waived its prior lien by taking the second mortgage. Rather, we think, instead of intending to abandon

any right it had, appellee was taking an abundance of precaution to protect its rights.

We find no error, and the decree is affirmed.

BARTON *v.* HARDIN.

Opinion delivered November 19, 1928.

Dobbs & Young, for appellant.

H. P. Warner, H. T. Harrison and *Abe Collins,* for appellee.

McHANEY, J. On May 3, 1920, appellee purchased for himself and the appellee, J. R. Hooten, 600 acres of timber land on the Cossatat River, in Sevier County, from Tom Edwards and J. Thomas Penny. The consideration was $20,000, $4,000 of which was paid in cash and the remainder in eight notes of $2,000 each, secured by a mortgage on the land. The deal was made through one Frank Ogden, who was introduced to appellee Hardin by appellant, who was a close personal friend of Hardin,

and who recommended each to the other in the highest terms as being absolutely trustworthy and reliable. The notes not being paid at maturity, Edwards and Penny and G. P. Pride instituted this action in the Sevier Chancery Court to foreclose the mortgage to collect said notes, the complaint alleging that Penny and Edwards had conveyed one of the $2,000 notes to Ogden as a part of his commission in the sale of the real estate, who, in turn, had sold the note to Pride, and that Pride was a "*bona fide* holder and owner of said note for value in due course of business."

Appellees answered, and filed a cross-complaint, and, after the taking of much testimony, it developed that Pride claimed only one-half interest in said note, and that the other half was owned by Barton by virtue of a secret arrangement between Barton and Ogden, who had divided equally the $1,000 cash paid on commission, and were to divide the proceeds of the $2,000 note. At this time the plaintiffs, Penny, Edwards and Pride, agreed with Hardin on a compromise of the litigation, but the interest of appellant in said note was not compromised. Appellant thereupon filed an intervention, claiming to own one-half of said $2,000 note, to which appellees responded, alleging that Ogden had procured these notes through fraud, to which appellant was a party, and he was therefore not entitled to recover.

The court entered a decree canceling the note and denying appellant's right to recovery, as follows:

"The court is of the opinion that there was a collusion between the intervener, Barton, and Frank Ogden to put over this deal with the defendant G. C. Hardin, and that Hardin was deceived and misled by the intervener in his dealings with Ogden; that the land was not as represented, and that such facts were known to Ogden and Barton when made, and that the intervener is in no position to come into chancery court and ask for the relief sought; that his complaint should be dismissed for want of equity; that the said note be canceled, and the title to the land quieted as against any lien against the

land by reason thereof, and that the intervener, W. B. Barton, should pay all cost relating to said intervention."

The principal attack made upon the decree by this appeal is that it was without sufficient allegations in the complaint, and that the proof thereof is insufficient to sustain a judgment for fraud. We cannot agree with counsel in this contention. We cannot undertake to review the testimony in detail, as it would unduly extend this opinion. It is the settled rule of this court, under decisions too numerous to mention, that the findings of fact made by a chancery court will not be disturbed on appeal unless they are against the clear preponderance of the evidence. Bearing this rule in mind, we find from the evidence that the appellee, Hardin, spoke to some of his friends in Fort Smith, who were timber people, including appellant, that he desired to locate a tract of high-grade land with a growth of high-class hardwood timber suitable for high-grade wagon stocks and handles, on river bottom land, above overflow, which would be suitable, after the removal of the timber, for a stock farm, and for the growth of alfalfa and other crops, and that he would expect to pay a good price therefor. Appellant volunteered to try to locate such a tract for him. Later, appellant brought a letter to Hardin from Ogden regarding this tract of land, and, still later, appellant brought Ogden to Hardin's office, placed one hand on Ogden's shoulder and one on Hardin's, stating that he was acting as a friend, and recommended Ogden to Hardin in the highest terms, stating that Ogden was a large landowner in Sevier County, a good judge of timber land, and a man of large means. Ogden stated that there was more than one million feet of first-class hickory and oak, more than one million feet of first-class gum, and other quantities of pine and cypress; that the land was not subject to overflow, except in some places, in exceedingly high water, it would overflow a few inches, but that for all practical purposes it was above overflow. Hardin requested Ogden to go and look at the land himself and

satisfy himself that it was the character of timber land that Hardin desired to purchase. The land was first priced to Hardin at $40 per acre, and later he reduced the price to $20,000 for the whole tract, stating that his principals were willing to do that in order to get established in that vicinity a stock farm of that character. It was made clear to Ogden that Hardin could not go to see the land himself, but was relying upon his representations. It later developed that these representations were false; that the amount of timber was greatly overestimated, there being only about 200,000 feet of hickory and oak and about a half million feet of gum, and very little pine or cypress. The land was subject to overflow with almost every rise of the river, and wholly unadapted to the purposes for which Hardin had made the purchase. Most of the testimony of Hardin was not denied by Ogden, and appellant did not take the stand.

Under this state of facts we are of the opinion that the chancellor was justified in entering the decree aforesaid. At least it cannot be said that it is against the preponderance of the evidence. It is suggested that Hardin sent Davidson to examine the land for him, but this is disputed by both Hardin and Davidson. Davidson went to look at the timber only, and on his own account, for the reason that he was purchasing or marketing the products of Hardin and Hooten, and desired to see the character of timber that was to produce the stock to be marketed by him. Appellant made no representations regarding the land, but, being a partner with Ogden, he will be held bound by the fraudulent representations of his partner, and will not be permitted to share the fruits of the fraud on any theory of estoppel or laches in failing to move to rescind sooner.

Appellees did not discover appellant's connection with the fraud until the trial of the case, and they thereupon immediately interposed the defense herein stated.

Moreover, appellant is not entitled, under the facts in this case, to invoke the aid of a court of equity, as he does not come with clean hands.

As said by this court in *O'Conner* v. *Patton,* 171 Ark. 626-638, 286 S. W. 822-826: " 'He who comes into equity must come with clean hands,' or, as it is sometimes expressed, 'he that hath committed iniquity shall not have equity,' is one of the cardinal maxims of equity. Says Mr. Pomeroy: 'Whenever a party who, as actor, seeks to set the judicial machinery in motion and obtain some remedy, has violated conscience, or good faith, or other equitable principles, in his prior conduct, then the doors of the court will be shut against him *in limine;* the court will refuse to interfere on his behalf, to acknowledge his right, or to award him any remedy.' 1 Pomeroy Eq. Jur., § 397, and numerous cases cited in note."

Now, as we have already shown, appellant, acting as a friend of Hardin's, introduced Ogden to him in glowing terms as to his standing and honesty, thereby making it possible for Ogden to perpetrate the fraud in the sale of this land. Then on the trial of this case it developed that he was sharing in the fruits of the fraud, and came into a court of equity to enforce the collection thereof. He is therefore in no better position to enforce this demand than Ogden would have been.

We find no error, and the decree is affirmed.

DUBARD *v.* NEVIN.

Opinion delivered November 26, 1928.

[redacted]

J. G. Waskom, for appellant.

Ogan & Shaver, for appellee.

HART, C. J., (after stating the facts). The judgment of the circuit court was correct. Payment of the warrants was refused by the county treasurer on the ground that the bank, which had them for collection, held them for three days without presenting them, and that this was an unreasonable time, and resulted in loss to the county treasurer because the bank became insolvent; for, if the warrant had been presented in time, he had on deposit in the bank a sum more than sufficient to pay the warrants. This was no defense. The school warrants were orders upon the county treasurer to pay out of the school funds in his hands the amounts specified; and, although the warrants are negotiable in form and transferable by delivery, they are not negotiable instruments in the sense of the law merchant. *First National Bank of Waldron* v. *Wisenhunt,* 94 Ark. 583, 127 S. W. 968; and *Vale* v. *Buchanan,* 98 Ark. 299, 135 S. W. 848. Hence the rule in regard to the presentation of negotiable paper is not applicable. Our statute did not require the warrants to be presented within any particular period of time, and there was no reason why the county treasurer should not have paid them when they were presented by the State Bank Commissioner. The affairs of the insolvent bank had been turned over to him for liquidation under the statute, and he had a right to collect the warrants.

Again, it is insisted that the writ of mandamus should not be issued against the county treasurer in this case because the officers of the bank did not present the warrants to the treasurer for payment during the first three days they were in the hands of the bank for collec-

tion, for the reason that the officers of the bank knew that the treasurer would pay the warrants out of the funds on hand in the bank belonging to him as county treasurer, and that this might result in hastening the insolvency of the bank, which the officers, at the time, were trying to prevent. Even if this were true, it would not defeat this action. The holders of the warrants were not guilty of any improper conduct whatever. In good faith they sent the warrants to the bank for collection, without any qualifications or restrictions of any kind as to the time within which they should be presented for payment. The holders of the warrants could not be held liable in any sense for any misconduct of their collecting agent in withholding the warrants during the three days in question. The holders could in no sense be held parties to any wrongful or illegal act of their agent in the premises.

Therefore the judgment of the circuit court, directing the issuance of the writ of mandamus to the county treasurer to pay the warrants, was correct, and it will be affirmed.

[redacted]

HOOD *v.* YOUNG.

Opinion delivered November 26, 1928.

[redacted]

Hill, Fitzhugh & Brizzolara, for appellant.

Dobbs & Young, for appellee.

HART, C. J., (after stating the facts). The decree of the chancellor was wrong. The testimony of J. M. Young and J. W. Young, to the effect that E. W. Hood came into their office and told them, in the presence of Reginald Lane, that he was going to assume the payment of the mortgage indebtedness when he purchased the property from Lane, does not entitle Young to recover against Hood the amount of the mortgage indebtedness. Suppose it to be true that Hood did tell Young that he was about to purchase the property from Lane and would assume the mortgage indebtedness, he evidently afterwards changed his mind. He not only did not execute the deed which had been prepared by Young to that effect, but he had his attorneys prepare a new deed, in which he stated that he had purchased the property subject to the mortgage of Young. He executed the deed in this form, and delivered it to Lane. Lane accepted the deed, and its terms became the contract between the parties. The clause in the deed to the effect that the deed was made subject to the mortgage of Young was contractual in its nature, and bound the parties. It could not have even been contradicted by parol evidence. *Wilson* v. *Nugent,* 174 Ark. 1115, 299 S. W. 18.

The chancellor seems to have proceeded on the theory that the assumption of the mortgage indebtedness by Hood was a part of the consideration for the execution of the deed by Lane to Hood. Hood denies that he ever agreed to execute a deed in this form. On the other hand, both of the Youngs testified that he did state to them, in the presence of Lane, that such was his agreement. This did not make any difference. Assuming it to be true, the parties evidently changed their minds. Instead of executing the deed with the clause that he assumed the balance of the Young mortgage, Hood declined to execute this deed, and had another one prepared by his attorneys, in which it was stated that the deed was subject to the Young mortgage. In this form the deed was executed by Hood and delivered to Lane. As we have just seen, the clause that the deed was subject to the Young mortgage was contractual in its nature, and became the contract between Hood and Lane, who were the contracting parties. There is no clause in it indicating that Hood assumed the Young mortgage. On the contrary, the deed expressly recites that it is made subject to the Young mortgage. Young was not a party to the contract between Hood and Lane, and had no rights under it except what the contract itself gave him. Hence the chancellor erred in holding that Hood agreed to assume the mortgage indebtedness to Young.

For that error the decree will be reversed, and the cause remanded with directions to dismiss the complaint against E. W. Hood. No appeal was taken by Nell A. Lane, and the judgment and decree of foreclosure against her are not affected by this appeal.

CHICAGO TITLE & TRUST COMPANY *v.* HAGLER SPECIAL SCHOOL DISTRICT NO. 27.

Opinion delivered November 26, 1928.

[redacted]

Carmichael & Hendricks, for appellant.

Peyton D. Moncrief, A. G. Meeham, John W. Moncrief, and *R. D. Rasco,* for appellee.

HART, C. J., (after stating the facts). After the transcript was filed in this court, counsel for appellants ascertained that the deposition of E. F. Horning, one of the bondholders, had been lost. The decree recites that the case was heard upon the pleadings and depositions of certain witnesses, specifically named, and among them is the name of E. F. Horning. Counsel for appellants applied to the chancery court from which this appeal was taken to supply the lost deposition. The chancery court granted their request, and, upon proper proof, the lost deposition was supplied and made a part of the record, and so certified by the clerk of the chancery court, under the direction of the chancellor.

It is earnestly insisted by counsel for appellees that no such power existed in the chancery court. We cannot agree with counsel in this contention. Section 8342 of Crawford & Moses' Digest provides that, whenever

any of the public records, including all records, papers and proceedings of every description, of record or on file in any court, or clerk's or recorder's office, or other public office of a county, shall be lost, or burned, or otherwise destroyed, the same may be reinstated and restored in the manner hereinafter provided. This court has held that, independent of statute, a court of general jurisdiction possesses the inherent power to substitute or restore its lost or destroyed records, and such power is not taken away by a statute unless a clear intention to do so appears in the body of the statute itself. *Fort Smith Automobile & Supply Co.* v. *Nedry,* 100 Ark. 485, 140 S. W. 711. So it will be seen from the language of the statute that it is merely declaratory of the common law.

The rule and the necessity for it were clearly stated by Mr. Justice Mitchell of the Supreme Court of Minnesota, in *Red River & Lake of the Woods Railroad Company* v. *Sture,* 20 N. W. 229, as follows:

"Independently of statute, and by virtue of its inherent powers, unaffected by lapse of time, every court has the right to replace its records when lost or destroyed by accident, negligence, or wantonness. If it had not this power, the rule that the record imports absolute verity, and is exclusively admissible evidence of matters properly incorporated in it, would work much mischief. The power which enables a court to supply an entire record after judgment extends to supplying any pleadings or papers in civil cases prior to judgment."

Under our practice, depositions, when filed, or oral evidence ordered to be reduced to writing and filed as depositions, become a part of the record in a chancery court. *Fletcher* v. *Simpson,* 144 Ark. 436, 222 S. W. 710; *Harmon* v. *Harmon,* 152 Ark. 129, 237 S. W. 1096; *McGraw* v. *Berry,* 152 Ark. 452, 238 S. W. 618; *C. A. Rees & Co.* v. *Pace,* 156 Ark. 473, 246 S. W. 491; *Rose* v. *Rose,* 9 Ark. 507; *Lemay* v. *Johnson,* 35 Ark. 225; and *Casteel* v. *Casteel,* 38 Ark. 477.

Of course, the court should proceed cautiously in the matter of restoring lost records, especially lost depositions; but this was done in the case at bar.

The chancellor held that the contract of the school district for the sale of the bonds was invalid, because the trustee named in the bonds and in the mortgage given to secure the same was a foreign corporation, which had not complied with our statute authorizing foreign corporations to do business in this State. We do not agree with this construction placed upon our statute prescribing upon what conditions foreign corporations may do business in this State. The language of the statute shows that it was intended to prevent a foreign corporation from doing business in this State, for which it was organized in another State, until it had procured the required certificate to do business in this State. In *Kephart* v. *People,* 28 Colo. 73, 62 Pac. 946, the Supreme Court of Colorado had under consideration a statute of that State which provided, among other things, that, if a foreign corporation fails to pay a prescribed fee to the Secretary of State, it shall not exercise any corporate powers or do any business in the State until the fee shall be paid; and it was held that the statute did not prevent an action by the foreign corporation to collect State warrants bought at its place of business in the State where such corporation was created. In *Bamberger* v. *Schoolfield,* 160 U. S. 149, 16 S. Ct. 225, it was held that a corporation of one State does not carry on business in another State by discounting a note sent it from the other State. In *Equitable Credit Co.* v. *Rogers,* 175 Ark. 205, 299 S. W. 747, it was held that a foreign corporation which has purchased in another State a note and contract of sale from a motor vehicle concern doing business within this State, in attempting to collect such note, was not doing business within the State.

The record does not show in what business the Chicago Title & Trust Company was engaged. In the bonds and in the mortgage involved in this suit, that corporation was named as trustee, and the bonds recite that

they are payable at its place of business in the city of Chicago, Illinois. The Chicago Title & Trust Company has no beneficiary interest whatever in the bonds, and, if it should go out of existence or refuse to act, the bondholders would have the right to have a substituted trustee appointed; and we do not think the act of bringing suit by such corporation in this State to enforce the collection of the school bonds was such an exercise of corporate power as comes within the inhibition of the statute. It follows that the Chicago Title & Trust Company was not doing business in this State by merely bringing suit for the collection of the bonds sued on.

It is also insisted that the bonds sued on are invalid because the Legislatures of 1917 and of 1919 passed acts detaching portions of the special school district created by the Acts of 1915, and embraced these detached portions in new school districts, and in the acts creating the new districts recited that the Constitution of the State of Arkansas with regard to giving notice of the passage of special acts had not been complied with in act 314 of the Acts of 1915.

This declaration on the part of the Legislatures of 1917 and 1919 could have no other effect than to impair the obligation of the original contract under which the bonds were issued, in violation of the Constitution of this State and the Constitution of the United States.

In *Ennis Waterworks* v. *City of Ennis,* 233 U. S. 651, 34 S. Ct. 767, it was held that although, when the assertion is made that contract rights are impaired, it is the duty of the court to determine for itself whether or not there was a valid contract, in considering a contract arising from a State law, the Supreme Court of the United States will treat it as though there was embodied in its text the settled rule of law which existed in the State when the action relied upon was taken. In *Hill* v. *American Book Company,* 171 Ark. 427, 285 S. W. 20, it was held that where, by public law, officers are appointed to enter into a contract for the State, the law under

which they act is as much a part of the contract as if transcribed therein.

As we have already seen, Hagler Special School District No. 27 was created by a special act of the Legislature of 1915. The Legislature in passing the act, under our decisions, necessarily found that the notice required by the Constitution was given, and its action could not be reviewed by the courts. *Davis* v. *Gaines,* 48 Ark. 370, 3 S. W. 184; *Booe* v. *Road Imp. Dist.,* 141 Ark. 140, 216 S. W. 500; and *Gibson* v. *Spikes,* 143 Ark. 270, 220 S. W. 56.

The bonds in question in this suit were issued by the directors of Hagler Special School District pursuant to the power conferred upon them by the special act creating the district, and the terms of that act and the construction placed upon the provisions of the Constitution relating to its passage necessarily form a part of the contract for the issuance of the bonds. If the contract was valid and enforceable when entered into between the parties, it is perfectly plain that no act or declaration of subsequent Legislatures could alter its terms injuriously to the parties thereto without impairing the obligations of the contract.

We now come to the question whether the Legislature of 1917 and that of 1919 could detach material portions of territory from the original district, which issued the bonds, and thereby defeat or impair the rights of the purchasers of the bonds in the collection thereof. This could not be done. It is well settled that school districts are creatures of the Legislature, and that the Legislative power to create or abolish school districts, or change the boundaries thereof, is full and complete. *Special School District No. 2* v. *Special School Dist. of Texarkana,* 111 Ark. 379, 163 S. W. 1164; and *Kies* v. *Lowrey,* 199 U. S. 233, 26 S. Ct. 27. It is equally well settled, however, that it is a plain violation of our own Constitution as well as of the Constitution of the United States to enact a law which has the effect of impairing

the obligation of a contract. In *Louisiana* v. *New Orleans,* 102 U. S. 203, Mr. Justice Field said:

"The obligation of a contract, in the constitutional sense, is the means provided by law by which it can be enforced—by which the parties can be obliged to perform it. Whatever legislation lessens the efficiency of these means impairs the obligation. If it tends to postpone or retard the enforcement of the contract, the obligation of the latter is to that extent weakened."

To the same effect see *Edwards* v. *Kearzey,* 96 U. S. 595, and *Seibert* v. *Lewis,* 122 U. S. 284, 7 S. Ct. 1190.

The territory comprising Hagler Special School District, and the revenue for school purposes derived from it at the time the bonds were issued and sold, constituted the principal protection of the bondholders. It was a material part of the contract that such creditors should have the right to have a school tax levied and collected as provided by law upon the whole territory embraced in the school district as it then existed. Of course, this court has recognized that the Legislature, in the exercise of its powers to change the boundaries of school districts, might make immaterial changes which could not in any sense impair the vested rights of the bondholders; but it could not take away material portions of the district, as was done in this case, and thereby seriously impair or affect injuriously the vested rights of the bondholders, who, as creditors of the district, had the right to have the territory remain as it was at the time the bonds were issued. Every case must be determined upon its own circumstances, but the record in this case shows that the severance of territory from the original district by the Legislature of 1917 and of 1919 seriously impaired the enforcement of the contract, and disturbed or tended to defeat the rights of the bondholders as creditors of the district. Therefore the acts are void in so far as the bondholders are concerned. As sustaining this view, under essentially a same state of facts, see *Midland Special School Dist. of Sebastian County* v. *Central Trust Co. of Illinois,* 1 Fed. Rep. (2d) 124.

The result of our views is that the chancellor erred in dismissing the complaint of appellants for want of equity. For that error the decree will be reversed, and the cause will be remanded with directions to the chancery court to render judgment in favor of the bondholders for the amount of the bonds sued on, and to foreclose their mortgage upon all of the property embodied in such mortgage in Hagler Special School District No. 27 as it existed at the time the bonds were issued and the mortgage executed, and for such other proceedings as may be necessary under the principles of equity and not inconsistent with this opinion. It is so ordered.

GOODE *v.* ÆTNA CASUALTY & SURETY COMPANY.

Opinion delivered November 26, 1928.

F. G. Taylor, for appellant.

John A. Sherrill, for appellee.

SMITH, J. Appellant brought suit against certain persons doing business as Tolbert Bros. & Company and

the Ætna Casualty & Surety Company, and for his cause of action alleged "that the defendants, Tolbert Bros. & Company, are indebted to this plaintiff in the sum of $663.08 on account, which is for labor performed by laborers in the employ of said defendants, Tolbert Bros. & Company, which were assigned to plaintiff by said laborers and approved by said defendants, Tolbert Bros. & Company, except the sum of $128.13, which is for stock feed sold and delivered by plaintiff to Tolbert Bros. & Company, and which was used to feed the stock used by them under their contract with the Highway Commission of the State of Arkansas, hereinafter mentioned * * *."

The complaint further alleged that Tolbert Bros. & Company, as contractors, executed a bond, with the surety company as surety, to the State Highway Commission, conditioned that the said contractors should build the certain road covered by the contract, and should, among other things, "pay all bills for material and labor entering into the construction of said work or used in the course of performance of the work, and shall complete said work within the time specified in said contracts," etc.

A motion was filed to make the complaint more definite by requiring plaintiff to "file as an exhibit the original assignment alleged to have been obtained by plaintiff from said laborers, together with the approval of the defendants, Tolbert Bros. & Company."

In response to this motion, plaintiff amended his complaint to allege "that he has no assignment, and that there was no written assignment of said labor to him, but that he claims by agreement between said laborers and defendants, Tolbert Bros. & Company, the labor was paid for by this plaintiff, and that constitutes in law an assignment of the amount of labor so paid for by him."

These allegations, in connection with those of the amended complaint which the plaintiff later filed, state, in effect, that the plaintiff, who is a merchant, furnished supplies to the contractors' employees, at the request of the contractors and upon the understanding and with the

agreement that the contractors should pay for these supplies to the extent of the wages of the employees, and this agreement was alleged to constitute an assignment of the wages.

A demurrer to the complaint as amended was sustained as to the surety company, and, as the plaintiff refused to plead further against that defendant, the complaint was dismissed as to it, and this appeal is from that judgment.

It clearly appears that the bond executed by the contractors to the State Highway Commission covers the wages of the laborers employed in constructing the road, and these laborers had a cause of action to sue on the bond. But the plaintiff has only an account against these laborers for supplies furnished them in different amounts, and if it be said that the complaint sufficiently alleges an agreement on the part of the laborers to assign to plaintiff their causes of action against the surety company, it is answered that the alleged agreement was an oral one, and not evidenced by any writing.

In the case of *St. L. I. M. & S. Ry. Co.* v. *Camden Bank,* 47 Ark. 541, 1. S. W. 704, it was held that an open account is not an assignable instrument within the meaning of the statute, and a party to whom it is transferred cannot sue on it alone, but must make his assignor a party to the suit, this decision being based upon what is now § 1090, C. & M. Digest, which reads as follows: "Where the assignment of a thing in action is not authorized by statute, the assignor must be a party, as plaintiff or defendant." Plaintiff could not therefore sue upon the oral contract of assignment of the accounts without making the assignors parties.

The complaint alleges, however, a direct sale of stock feed, sold and delivered to the contractors, which was used to feed the stock employed by the contractors in the performance of the contract with the Highway Commission; but it is answered by the surety on the contractors' bond that it is liable only for the value of such material as actually entered into the construction of the road, and

that it is not liable for the value of feed furnished the stock which was used in the work on the road. This contention appears to be sustained by the following cases: *Pierce Oil Corporation* v. *Parker,* 168 Ark. 400, 271 S. W. 24; *Heltzel Steel Form & Iron Co.* v. *Fidelity Deposit Co. of Maryland,* 168 Ark. 728, 271 S. W. 325. See also *Southern Surety Co.* v. *Simon,* 172 Ark. 924, 299 S. W. 960. The surety is therefore not liable for the value of the feed.

From what we have said it appears that the court below properly sustained the demurrer to the complaint; but it is insisted that the surety company is liable for the amount of the accounts upon a written agreement to pay them after the accounts had been incurred and default had been made in their payment. If it be said that the complaint is sufficient to raise the issue that there was a supplemental agreement on the part of the surety company to pay plaintiff the accounts due them, it may be and is answered that no consideration for such a promise is alleged.

We conclude therefore that, upon a consideration of the whole case, the demurrer to the complaint was properly sustained, and the judgment is affirmed.

DIXIE CULVERT MANUFACTURING COMPANY *v.* PERRY COUNTY.

Opinion delivered November 26, 1928.

Horace Chamberlin, for appellant.

Boyd Cypert, for appellee.

SMITH, J. Appellant filed a petition in the county court of Perry County, which it says is in the nature of a suit in replevin. It was alleged therein that petitioner sold the county certain culverts of the aggregate value of $2,424.76, in the year 1926; that petitioner endeavored to collect the purchase price of the culverts from the county, but that it was shown in the trial thereof that the agreement for payment was in violation of Amendment No. 11 to the Constitution. That judgment of the county court was affirmed on the appeal to this court (174 Ark. 107, 294 S. W. 381), where it was held that the amendment designated as No. 11 prohibited a county from incurring any obligation in any year exceeding the revenues of that year, it being there said that such contracts were void, and could not be paid out of the revenues of a succeeding year.

The petition further alleged that the county still has the culverts in its custody and control, and that, by virtue of the above-mentioned decision of the Supreme Court, the title and right to possession remained in petitioner, and demand for the surrender thereof had been made and refused. The petitioner alleged that by reason of the detention of the culverts it had been damaged to the extent of $1,750 in addition to the value of the culverts, which had been sold and delivered to the county within three years prior to the institution of this suit, and the culverts had not been taken from petitioner for any tax or fine or under any judgment or order of any

court, nor had they been seized under any execution or attachment against its property. Petitioner prayed judgment against the county in the sum of $1,750, and that, if it be shown that the county cannot deliver the culverts, it have judgment against the county for the value thereof.

Attached to the complaint as an exhibit thereto was an order of the county court—the date of which is not given—reciting the terms of the contract of purchase of the culverts by the county and the fact that the culverts had been delivered to the county in accordance with said contract and had been placed in the roads of the county, in consideration of which facts the contract of sale was ratified by the county court.

The county court denied the prayer of the petition, and an appeal was duly prosecuted to the circuit court, where a demurrer was filed, which alleged that the circuit court had no jurisdiction of the subject-matter, and that the matter in controversy had been formerly adjudicated. The demurrer was sustained, and the cause of action dismissed, and this appeal is from that judgment.

It affirmatively appears that the culverts have been placed in the roads of the county and have become a part thereof. They have therefore ceased to be personal property, and an action in replevin will not lie for their possession, even though it had been brought in a court having jurisdiction of that action, which the county court has not. *Dent* v. *Bowers,* 166 Ark. 418, 265 S. W. 636.

It is pointed out that petitioner prayed for an alternative judgment in the county court, if the culverts could not be re-delivered, for their value; but it is answered in the brief on behalf of the county that this, in effect, is a second suit upon a cause of action which this court has already held cannot be maintained.

It is argued in the brief of petitioner, although it was not alleged in its petition, that the revenues of the county were not exhausted when the contract for the pur-

chase of the culverts was made, and the opinion on the former appeal is questioned as being an improper interpretation of Amendment No. 11.

In reply to these arguments, it suffices to say that, if we were convinced now that the opinion on the former appeal was erroneous (and we are not), it would profit appellant nothing, as the former opinion is the law of this case, even though it might be overruled in some other case. Upon the former appeal appellant's right to recover the contract price of the culverts was denied upon the ground that the contract for the purchase price of the culverts was made in violation of the amendment to the Constitution commonly referred to as No. 11, and that opinion is decisive of this claim. This amendment imposes upon one who makes a contract with a county, city or incorporated town the penalty of losing the value of the article sold in violation of its inhibitions, and imposes upon any officer who issues a warrant or certificate of indebtedness in violation of its inhibitions a heavy fine, with the penalty of loss of office. No right to recover the culverts could therefore be asserted if they had not ceased to be personal property, because a violation of this constitutional amendment must be shown in the assertion of that right. The law of this subject was fully considered and discussed at length in the case of *Carter* v. *Bradley County Road Imp. Dists.*, 155 Ark. 288, 246 S. W. 9, and no useful purpose would be served by again reviewing the authorities.

The demurrer was properly sustained, and the judgment of the court below so doing is therefore affirmed.

WISEMAN *v.* GRAHAM.

Opinion delivered November 26, 1928.

[redacted]

John Mayes, for appellant.

SMITH, J. In October, 1924, appellees shipped a car of apples from Springdale, Arkansas, to Winchester, Tennessee, and Eura Baggett was sent along to sell the apples. About the same time appellant, Bradley, also shipped from Springdale a car of apples to Winchester, Tennessee, and J. B. Wiseman was sent along to sell these apples. Neither shipper knew of the other shipment until after the arrival of the apples in Winchester.

The two cars arrived in Winchester about the same time, and both were unloaded in the same building, and for about a week each agent sold for his principal as many apples as he could. Baggett testified that he and Wiseman had more apples than they could sell, and both were on expense, and each had a helper employed. Baggett proposed that Wiseman take charge of both cars and employ one assistant, and that the apples be sold for the joint account of the owners, and, after expenses were paid, that the balance be equally divided. Baggett further testified that, pursuant to this understanding, he turned his apples over to Wiseman and came home, and

Wiseman later submitted to him a statement showing the sale of $305.50 worth of apples after this agreement had been made. It is undisputed that Wiseman collected for appellees $16.55 on account of overcharge on freight.

Wiseman denied that he had agreed to sell appellees' apples, or that he had sold any of them. He testified that Baggett sold as many of the apples as he could, and left, after asking witness to pay a board bill of $18 for him. This witness did by giving the boarding-house keeper apples belonging to Baggett's principal. Witness had the greatest difficulty selling the apples belonging to Bradley, and four or five weeks were required for that purpose. He further testified that the apples which he sold did not pay expenses, and that he had no authority from his principal except to sell his principal's apples. He admitted collecting the excess freight, but testified that he did this as an accommodation. It was not denied that a tender of this excess freight was made and declined.

There was a verdict and judgment in favor of appellees for $100, and this appeal is from that judgment.

An instruction was asked on behalf of appellant to the effect that Wiseman was a special agent, without power or authority to enter into the alleged contract with Baggett as the agent of appellees. This instruction was refused, and appellant then requested the following instruction: "You are instructed that all parties dealing with a special agent must ascertain the limitations upon his authority, and his principal is not bound by any act of his special agent unless such act was expressly authorized by this principal." This instruction was also refused.

The court submitted to the jury the question of fact whether Baggett and Wiseman had made a contract, and, if so, what its terms were, and directed the jury, if they found there was a contract for the joint sale of the apples, to state an account between the parties and to return a verdict accordingly.

The motion for a new trial questions only the sufficiency and competency of the testimony to establish a

joint adventure for the sale of the apples. The verdict of the jury is conclusive of the fact that Baggett and Wiseman made an agreement for a joint adventure in the matter of the sale of the apples, and we think the court did not err in refusing to declare as a matter of law that the testimony was insufficient to support a finding that Baggett and Wiseman had authority to make such an agreement. It is true Baggett and Wiseman were special agents, but the agency was special in the sense that the agency was confined to the sale of the apples, but their agreement related to this subject, and did not extend beyond it.

The receipt of the two cars of apples on the same day "flooded" the apple market at Winchester, and by the end of the first week, when the agreement was made, it was apparent to both agents that the expense of selling the apples would consume, not only the profits, but the total proceeds of the sale, and a joint adventure, whereby expenses were to be shared and proceeds to be divided, was an agreement which, we think, the jury was warranted in finding was within the scope of the authority of these agents to make in the discharge of their agency to sell apples.

The contract made between Baggett and Wiseman was not a delegation of the agency of either, but was an agreement whereby Baggett employed a subagent, in doing which a joint adventure was created.

A leading case on the right of an agent to employ a subagent or an assistant is that of *Day* v. *Noble,* 2 Pick. (Mass.) 615, 13 Am. Dec. 463. In that case the master of a vessel, who had carried goods to a distant port with orders to dispose of them to the best advantage, was held to have authority, failing to find a purchaser, to place the goods in the hands of a merchant to be sold for the owner's benefit.

The judgment of the court below must be affirmed, and it is so ordered.

NATURAL GAS & FUEL CORPORATION *v.* ALOTTO.

Opinion delivered November 26, 1928.

J. M. Shackleford and *Buzbee, Pugh & Harrison,* for appellant.

W. R. McHaney and *J. B. Milham,* for appellee.

HUMPHREYS, J. Appellee was injured by an automobile driven by W. D. Hawkins, while making meter connections with the pipe line through which natural gas was carried to consumers in the town of Louann,

Arkansas. A ditch 6 feet long by 4 feet deep had been excavated about the middle of the main street in the town for the purpose of making the connection. In excavating the same the dirt had been thrown out on the sides of the ditch, and served as some protection against injury to workmen engaged in making the connection. As a further protection a telephone pole was laid at right angles to and immediately in front of the ditch. The ditch was near the intersection of two streets where there was much traffic. There was a distance between it and the sidewalk on one side of 19 feet, and 25 feet on the other side, for the public to drive around the ditch. In making the connection it was necessary for the workmen doing the work to look down.

Appellee brought this suit in the circuit court of Ouachita County against appellant to recover damages for the injury received while making the meter connection, alleging that he was in the employ of appellant at the time, and that it failed to use due care to furnish him a reasonably safe place in which to work. Also that his foreman, R. J. Lewis, committed acts of negligence attributable to appellant by inducing him to go in the ditch and tighten up the connections on the promise to stand there and keep watch for the traffic, or warn appellee of its approach, and in walking away from the ditch without informing appellee and without appellee's knowledge of his departure.

Appellant filed an answer, denying that appellee or his foreman was in its employ at the time of the injury, as well as all other material allegations in the complaint, and interposed the further defenses of assumed risk and contributory negligence.

The cause proceeded to trial, and at the conclusion of the testimony appellant requested the court to instruct a verdict, which the court refused to do, over its objection and exception. The cause was then submitted to the jury upon the pleadings, testimony introduced by the parties and instructions of the court, which resulted

in a verdict and judgment against appellant for $1,500, from which is this appeal.

Appellant contends that the trial court committed reversible error in refusing to instruct a verdict for it, for two alleged reasons:

First. The undisputed proof shows that the accident was due to the negligence of a third person, and that it could not have been reasonably anticipated by the defendant.

Second. That plaintiff, at the time of the accident complained of, was not engaged in the performance of any duties for the Natural Gas & Fuel Corporation, but was working with a crew in the employ of Public Utilities Corporation; that the undisputed proof shows that the man R. J. Lewis, of whose alleged negligence plaintiff complains, was in the employ of Public Utilities Corporation.

(1). The undisputed proof does not show that the injury was caused solely by the negligence of a third party, nor that it was an injury that could have been reasonably anticipated. Appellee testified that the injury resulted from a failure of his foreman, R. J. Lewis, to stand watch for him, as he had promised to do, while he made the connection. Dr. Cotner testified that he saw Lewis standing by the ditch, keeping watch for awhile, but, after a few minutes, he went away and left appellee unprotected. R. J. Lewis testified that appellee kept watch for him while he was working in the ditch. C. H. Vick testified that it was the custom to put two men on ditch jobs like this, so that, by alternating, one could keep watch while the other worked. We think that this proof, if believed by the jury, indicated that the injury was the result of the concurring negligence of the driver of the automobile and R. J. Lewis.

(2). Neither does the undisputed proof show that appellee was employed by the Public Utilities Corporation. Appellee testified that he was working for appellant at the time he was injured. He was corroborated in his statement by J. A. Chinn, who testified that he was

employed by appellant, and was working in the public utilities department; that both McNeil and Lewis were working under him, and that he paid appellee for the work he was doing at the time of his injury, as the representative of appellant. With this testimony in the record it cannot be said that the undisputed evidence showed that appellee was working for the Public Utilities Corporation at the time he received the injury.

Appellant also contends that the trial court committed reversible error in giving instruction No. 3, which is as follows:

"You are instructed that it was the duty of the defendant to exercise ordinary care to furnish plaintiff with a reasonably safe place in which to perform his work, and, if you believe from the evidence in this case that defendant failed to exercise ordinary care to furnish plaintiff with a reasonably safe place to do his work, and plaintiff was injured thereby, and that the injury was caused by such failure on the part of the defendant to exercise such care to furnish a reasonably safe place to work, then you are told to find for the plaintiff in this action."

The instruction is criticised on the alleged ground that it excluded from the jury's consideration the defense of assumed risk and the issue of whether or not appellee was employed by appellant at the time he received the injury. The instruction does not mention either defense, and, standing alone, it would be subject to the criticism made, but instruction No. 2 immediately preceding it, which was given by the court, told the jury that appellee assumed all risks incident to his employment, except the risk growing out of the negligence of appellant or its employees, unless he knew of such negligence and appreciated the danger thereof. Instructions numbers 4 and 5, given by the court, imparted the information to the jury that, in order to fix liability upon appellant for the injury, it was necessary to find that he was in its employ at the time. The court also told the jury that they must consider the instructions given in

the case as a whole, and, when so considered together as a whole, they constituted the law by which they should be governed in making up their verdict.

In view of the juxtaposition of instructions numbers 2, 3, 4 and 5, and the court's instruction to the effect that no one instruction should be regarded by them as the law of the case, but, in arriving at the verdict, they must be governed by all of the instructions, it cannot be said that the defenses referred to were excluded from the jury's consideration.

The instruction is also criticised because it told the jury as a matter of law to find for appellee merely upon the finding that appellant had failed to exercise ordinary care to furnish appellee with a reasonably safe place to work. It is argued that appellee assumed all dangers incident to the location of the job and its physical surroundings, and that the only act of negligence attributable to appellant, under the testimony introduced by appellee, was the failure of R. J. Lewis to keep watch, if he promised to do so, while appellee was working in the ditch. In other words, the argument is made that the instruction was abstract and misleading in submitting the issue of whether or not appellant exercised ordinary care to furnish appellee a reasonably safe place in which to work, because there was no evidence tending to show such neglect aside from the failure of R. J. Lewis to keep watch, if he promised to do so.

The majority of the court is of the opinion that, if the jury found R. J. Lewis had promised to keep watch, and walked away without the knowledge of appellee while he was at work in the ditch, thus leaving him unprotected, the jury might have found, under the circumstances, that appellant failed to furnish appellee with a reasonably safe place to work after the departure of R. J. Lewis.

Lastly, appellant contends for a reversal of the judgment because the court gave appellee's requested instruction No. 4, which is as follows:

"You are instructed that, if you find from a preponderance of the evidence in this case that the plaintiff was in the employ of the defendant company and was working for it under the orders and instructions of its foreman, and you find from the evidence that he was in the exercise of ordinary care for his own protection, and you find from the evidence that he had not assumed the risk, and you find from the evidence that he was injured on account of the negligence of the defendant company, its agents, servants or employees, as alleged in the complaint, it will be your duty and you are told to find for the plaintiff."

The instruction is criticised because it also, like instruction No. 3, submitted the issue to the jury of whether appellant was negligent in failing to furnish appellee a reasonably safe place in which to work. As stated above, a majority of the court is of the opinion that the testimony warranted the submission of that issue to the jury.

The writer is of the opinion that the only evidence introduced tending to show that appellant was negligent was its failure to keep a watchman at the ditch while appellee was making the meter connection, and that the trial court committed reversible error in submitting any other issue to the jury.

In accordance with the majority opinion, the judgment is affirmed.

LINCOLN RESERVE LIFE INSURANCE COMPANY *v.* JONES.

Opinion delivered November 26, 1928.

Henry Stevens, for appellant.

Wade Kitchens, for appellee.

HUMPHREYS, J. Appellee, beneficiary in a life insurance policy for $1,000, No. 2684, issued by appellant

to Amanda Harris, brought suit, after her death, against appellant to recover $758.04, alleging that said amount was due him after deducting the amount loaned on the policy by appellant to the insured and himself. He also prayed in the complaint for the statutory penalty of 12 per cent. and a reasonable attorney's fee.

Appellant filed an answer, admitting the issuance of the policy to Amanda Harris, insuring her life for said sum, payable at her death to appellee, and that the amount due on the policy above the amount advanced by it to the insured and appellee was $758.04, but that it paid said amount to J. T. Bagby, to whom the policy had been assigned by the insured and appellee, and that it paid same to Bagby under the representation of appellee that he, Bagby, was the assignee of said policy. It prayed for a dismissal of the complaint, and a judgment for its costs.

The cause was submitted to the jury upon the pleadings, the testimony adduced by the parties and the instructions of the court, resulting in a verdict for $250 against appellant, for which amount the court rendered judgment, together with a penalty of 12 per cent. and an attorney's fee of $50, from which is this appeal.

The record reflects the following undisputed facts: Appellant insured the life of Amanda Harris for $1,000 on the 17th day of March, 1914, naming appellee in the policy as beneficiary, and reciting that he was the insured's nephew. The insured and appellee borrowed $200 from appellant upon the policy on March 17, 1921, and duly assigned the policy to it as security for the loan. The policy remained in the possession of the insurance company after the assignment, and was never returned to the insured or to appellee.

The rules of the company provide that assignments of policies should be made in duplicate and both copies sent to the company, one of which the company was to retain and the other to be returned to the insured, and also contained the provision that the company should not be responsible for the validity of any assignment.

Pursuant to the rules for the assignment of the policy, the insured and appellee executed and mailed duplicate assignments to appellant on the 11th day of June, 1923. Appellant retained one of the assignents and mailed the other to J. T. Bagby. The assignments are as follows:

"For value received, I, Amanda Harris, being of legal age, hereby assign and transfer unto J. T. Bagby of Russellville, Arkansas, the policy of insurance known as policy No. 2684, issued by the Lincoln Reserve Life Insurance Company upon the life of Amanda Harris of Stamps, Arkansas, c/o G. Jones, box 187, and all dividend, benefit and advantage to be had or derived therefrom, subject to the conditions of the said policy and the rules and regulations of the company, not exceeding the amount justly due and owing to J. T. Bagby by said Amanda Harris at the time of her death. Witness our hands and seals this 11th day of June, nineteen hundred and twenty-three.

her
"Amanda X Harris,
mark
"General Jones."

(Certificate omitted).

A note bearing the same date of the assignment was executed, either at the time or on a subsequent date, by the insured and appellee to J. T. Bagby, for $571.50, bearing interest at the rate of 10 per cent. per annum from date until paid, which is as follows:

"$571.50 Stamps, Ark., June 11, 1923.

"On demand, after date, I, we or either of us promise to pay to the order of J. T. Bagby five hundred seventy-one and 50/100 dollars, for value received, payable at Bodcaw Bank, Stamps, Ark., with interest from date at the rate of 10 per cent. per annum until paid. And it is hereby specially agreed that if this note is placed in the hands of an attorney for collection I, we, or either

of us promise to pay ten per cent. additional on the full amount due for attorney's fees.

"Demand, notice and protest waived.

her
"Amanda X Harris,
mark
"General Jones."

This note was not sent to the company, but was delivered to Bagby at some time or place, either directly or by mail. A copy of the note was sent to the company by Bagby, and had a notation to the effect that it was secured by the policy. The original note was introduced in evidence, and bears no such notation.

After the assignment was received by J. T. Bagby he paid premiums on the policy until the death of Amanda Harris, who died on August 19, 1926, amounting to $237.41.

On September 14, appellee made proof of Amanda Harris' death, according to the rules of the company, stating that he was her grandson and the beneficiary designated in the policy, and made a claim for the amount due on the policy, except the amount theretofore borrowed. It was stated in the proof that J. T. Bagby at Russellville, Arkansas, was the assignee of the policy. On September 17, 1926, J. T. Bagby filed with appellant an affidavit to the effect that the amount due him as assignee of the policy was $808.91.

On September 28, 1926, appellee wrote to appellant in reference to the claim, urging that it pay him, and received information from it of the Bagby affidavit, some time prior to October 20, 1926.

On October 15, 1926, appellant issued a voucher payable to J. T. Bagby, as assignee, and General Jones, Russellville, Arkansas, as beneficiary, for $758.04, in payment in full of its liability to both of them under the policy. On October 20, 1926, before receiving information that appellant had issued the voucher, appellee wrote to appellant as follows:

"Magnolia, Arkansas, 10-20-'26.

"Lincoln Reserve Life Insurance Company,
Birmingham, Alabama.

"Gentlemen: Please note the policy of Amanda Harris, No. 2684. The claimant statement have reached the home office before with necessary proof. Now, as to J. T. Bagby of Russellville, Arkansas, affidavit. I don't know anything about it, but if the affidavit exceeds three hundred dollars cancel for the statement is bogus. The writer is a policyholder, part of the Co., policy No. 7064, and am expecting policy number 2684 to be paid as willed. Hope this will meet your approval. For information write General Jones, Magnolia, Ark. Looking to hear from you in return mail, yours for future business.

"General Jones,
"Magnolia, Arkansas.

"P. S. Now, if the Bagby claim is of a nature unreasonable, cancel the whole claim and pay as per willed, except that the company holds policy for."

On October 22, 1926, before receiving appellee's letter of October 20, 1926, appellant wrote to him as follows:

"General Jones,
Magnolia, Ark.

"Dear sir: *Re:* Policy No. 2684, Amanda Harris, deceased. We have your letter of the 28th in reference the above claim. Under date of October 18 we mailed to our general agents, Messrs. Gough & Dearing, your voucher No. 3384, in the amount of $758.04. This voucher was made payable to J. T. Bagby, assignee, and yourself as the beneficiary in the policy. Messrs. Gough & Dearing will deliver this voucher to you and Mr. Bagby, and it will be necessary for you both to indorse it before it can be paid. At that time you can straighten out the matter of the amount due Mr. Bagby. Of course we know nothing about the amount of this indebtedness, and feel

sure you can straighten it out to your mutual satisfaction when the check is delivered to you.

"Yours very truly,

"H. C. Lockhart, Asst. Sec'y."

On the 9th of November, 1926, as an accommodation to J. T. Bagby, the voucher in favor of Bagby and appellee was recalled and a new one issued for the same amount payable to Bagby. Bagby cashed the voucher.

The record reflects a dispute in the testimony as to whether there was any consideration for the $571.50 note. J. T. Bagby testified that it was executed and delivered to him to cover the advances of money he had made from time to time and on the date of the note to Amanda Harris and appellee.

Appellee, over the objection and exception of appellant, was permitted to testify as follows:

"After Bagby had paid two premiums, he wanted some instrument of writing so he could get some money in case of my death, as I was beneficiary under the policy, and one-half of the policy would have been five hundred dollars, and I gave him a note for that, but this note was not to be considered unless I died, it was not to come up in my lifetime. It was just for his protection. That was made after the premiums were paid. The note was dated the same date as the premiums were."

Appellant's first contention for a reversal of the judgment is the admission of the oral testimony of appellee explanatory of the execution of the $571.50 note by himself and Amanda Harris to J. T. Bagby. The explanation was to the effect that the note was without consideration, and for the purpose of splitting the policy equally between appellee and Bagby upon the death of Amanda Harris, provided Bagby would pay the premiums on the policy as they matured. This court has ruled that: "No rule of evidence is violated by admitting oral proof of the consideration for a promissory note for the purpose of showing want of failure of consideration, or illegality of consideration." *Little* v. *National Bank,* 105 Ark. 281, 152 S. W. 281. Appellant

contends, however, that the admission of oral testimony had the effect of denying the validity of the assignment of the policy. This might be true if the assignment had been absolute and not partial, and had stated that it was made to secure the payment of the note, or if the note had recited that the policy was assigned to secure its payment. The assignment only covered such amount as might be due and owing by Amanda Harris at the time of her death. In order to determine the amount, it was necessary to ascertain whether the note was valid, as it had been introduced by appellant as a part of the indebtedness which Amanda Harris and appellee owed Bagby at the time of her death. The introduction of this oral evidence did not have the effect of contradicting the written assignment, which was a partial assignment only.

Appellant's next contention for a reversal of the judgment is that, when appellee testified that he was the grandson instead of a nephew of Amanda Harris, he defeated his right of action as beneficiary in the policy, because the beneficiary named in the policy was a nephew of the insured. Appellant's answer admits that appellee was a beneficiary named in the policy. After admitting in its answer that appellee was a beneficiary and treating with him throughout as the beneficiary, in order to escape liability to him on the policy it should have shown by the evidence that there were two persons by the name of General Jones, one the grandson and the other the nephew of Amanda Harris, and that it was her intention to make the nephew and not the grandson her beneficiary.

Appellant's next contention for a reversal of the judgment is that the court should have construed the written assignment by Amanda Harris and appellee to J. T. Bagby as an absolute assignment of the policy, thereby vesting in him authority to collect the entire amount due thereon. The language of the assignment does not warrant that construction. It was plainly stated in the assignment that it was made to secure what was "justly due and owing Bagby by Amanda Harris

at the time of her death." This constituted a partial assignment, and limited Bagby's interest under the assignment to such amount as Amanda Harris might owe him at her death, leaving the balance due under the policy payable to the beneficiary therein. The case of *Page* v. *Bernstein,* 102 U. S. 664, and *Manhattan Life Insurance Co.* v. *Hennesy,* 99 F. 64, 39 C. C. A. Reports 631, cited by appellant in support of its contention, involved absolute assignments or transfers of the policy, and are not applicable in the instant case, because the Bagby assignment was only a partial one. The case of *Cheeves* v. *Anders,* 87 Tex. 287, 28 S. W. 274, 47 A. S. R. 107, also cited by appellant in support of its position, did not turn upon the question of an assignment but upon the liability of the insurer on the policy. In the instant case appellant admitted its liability, and, as a defense, justified itself in paying the balance due on the policy to Bagby on the theory that the policy had been absolutely assigned to him.

Appellant's next contention for a reversal of the judgment is that appellee instructed it to pay the entire amount due on the policy to Bagby if his claim was reasonable, and that, upon the presentation of the note and proof that he had paid the premiums, it was justified, under appellee's instruction, in paying all that was due on the policy to Bagby, because the note and the amount of premiums paid to him exceeded the amount it owed on the policy. As a basis for this contention appellant relies upon the letter written to it on October 20, 1926, by appellee. The letter is not susceptible of the construction placed upon it by appellant. It plainly states that, if Bagby's claim is in excess of $300, it was bogus, and, in a postscript to the letter, said that "if of a nature unreasonable to cancel the claim and pay as per will, except what the company holds the policy for." We think the proper construction of this letter is that any amount Bagby might claim above $300 was an unreasonable amount, and that the most appellant could have paid Bagby under the authority of the letter was $300.

Appellant's next contention for a reversal of the judgment is that the court erred in submitting the case to the jury upon the sole issue of what amount Manda Harris, at the time of her death, and appellee justly owed Bagby. We think the court properly construed the assignment to be a partial one on its face, and that the letter written by appellee to appellant meant that it should not pay Bagby any amount in excess of $300, and that, in view of this construction, the only issue left in the case for determination by the jury was the amount justly due Bagby at the time of the death of Amanda Harris.

Lastly, appellant contends for a reversal of the judgment because the court assessed a penalty of 12 per cent. and allowed $50 as an attorney's fee.

Appellee recovered only $250, and, according to our construction of his complaint, he brought suit for $758.04, the balance due on the policy after deducting therefrom the amount he and Amanda Harris owed the company. Under the authority of *Fidelity-Phoenix Fire Ins. Co.* v. *Friedman,* 117 Ark. 71, 174 S. W. 215, "a recovery for less than the amount sued for does not justify an allowance of an attorney's fee and the assessment of a penalty provided by statute."

The judgment is therefore modified by reducing it by the amount of the penalty and attorney's fee, and, as modified, it is affirmed.

St. Louis Southwestern Railway Company *v.* Terral.

Opinion delivered November 26, 1928.

John R. Turney, A. H. Kiskaddon, Gaughan & Sifford, Elbert Godwin and *Woolridge & Woolridge,* for appellant.

W. R. Donham, for appellee.

HUMPHREYS, J. This is an appeal from a judgment rendered in favor of appellee in the Pulaski Circuit Court, Third Division, for $1,500 on an intervention filed by him to enforce a lien under the attorneys' lien statute, against the proceeds of a judgment rendered in said court in a friendly suit brought by Mrs. J. E. Armstrong, as the administratrix of the estate of her husband, J. E. Armstrong, for the benefit of herself as a widow and the next of kin, against appellant, to recover damages for injuries received by him while in its employ, which caused his death. Appellee predicated his right to a lien on the proceeds of the judgment upon allegations that he had entered into a written contract with Mr. and Mrs. J. E. Armstrong to bring suit; that, after the death of J. E. Armstrong, he obtained the appointment of Mrs. J. E. Armstrong as the administratrix of the estate of her deceased husband in order to bring the suit; and that he subsequently brought the suit for her in her representative capacity against appellant in the circuit court of Calhoun County, which suit was removed to the Federal court at El Dorado, and afterwards dismissed by her

without his consent. The written contract of employment was made an exhibit to the complaint, and is as follows:

"This contract, made and entered into by and between Terral & Cruce, a firm of lawyers of the city of Little Rock, Arkansas, parties of the first part, and J. E. Armstrong and wife, parties of the second part, witnesseth:

"That whereas the said J. E. Armstrong was injured by the Cotton Belt Railroad Company on August 26, 1927, and is desirous of prosecuting his claim for damages against said Cotton Belt Railroad Company for damages arising from said injuries, and that said parties of the second part, by this contract, employs said parties of the first part to represent them and prosecute their claims, and agree to pay them as their fee one-half of the amount recovered, either by litigation or compromise settlement. It being understood that no compromise or settlement shall be made without the consent and approval of said parties of the second part; and parties of the first part, upon their part, hereby agree to prosecute said case through all courts necessary, using their very best skill and ability, for a fee as above stated.

"Witness our hands and seals on this, the 7th day of September, 1927.

"Terral & Cruce,
"Parties of the first part.
"J. E. Armstrong,
"Mrs. J. E. Armstrong,
"Parties of the second part."

On motion of appellant, C. M. Cruce, who signed the contract with appellee, was made a party to the intervention, and prayed and filed a disclaimer alleging that he was not a lawyer but merely a law student in Terral's office, and that the contract was signed "Terral & Cruce" solely at the instance of J. E. Armstrong, who desired the contract drawn in that manner, as Cruce was a friend of his and was familiar with the investigation of Armstrong's injury. He was dismissed as a party, and the cause proceeded thereafter in the name of Tom J. Terral as intervener.

Tom J. Terral testified that, after his employment, he made investigations and gathered facts preparatory to bringing the suit, and after the death of J. E. Armstrong he carried on negotiations with appellant's claim agent in an effort to make a settlement with the knowledge of Mrs. Armstrong; that she and members of her family came to his office and discussed the case with him; that, after a failure to settle with the claim agent, he informed Mrs. Armstrong it would be necessary to administer upon the estate of her husband to enable him to file a suit, and advised that she take out letters of administration; that she consented, and he obtained her appointment as administratrix for the purpose of bringing the suit; that he thereafter filed a suit for her in her representative capacity in the circuit court of Calhoun County against appellant to recover $60,000 damages on account of the injuries received by her husband while in its employ, which resulted in his death; that, on motion of appellant, the suit was transferred to the Federal court at El Dorado, and during the pendency thereof he learned that a settlement had been effected, and filed an intervention for his fee, praying that same be declared a lien upon the proceeds of the settlement agreed upon, but that his intervention was dismissed for the want of jurisdiction, and without prejudice to him; that on the afternoon of November 22, 1927, he received a letter from Mrs. Armstrong, discharging him, upon the alleged ground that she had no authority, as administratrix of the estate of her husband, to employ a lawyer to represent her or his estate in a suit to recover damages for the injuries received by him while in appellant's employ, and that the contract of employment signed by her had no legal value or in any way bound her as administratrix of the estate of her deceased husband.

Mrs. Armstrong testified that, although she knew Mr. Terral was handling the case after her husband died, she never employed him to do so, and when he had her appointed administratrix he informed her that it was for the purpose of administering on her husband's estate,

and did not tell her that it was for the purpose of bringing suit; that she never authorized him to bring suit, and did not know that he had brought a suit until after she wrote him a letter informing him that she was not bound by the contract of employment signed by herself and husband, and requesting him to return his copy of the contract to her.

The record reflects that the letter she wrote to Terral was dictated by her pastor, Dr. Glenn E. Green, with the assistance of the claim agents of appellant company and the Missouri Pacific Railway Company, all of whom participated in the settlement or compromise of the claim with Mrs. Armstrong, without consultation with Terral. Pursuant to the compromise agreement she received $3,000 for the benefit of herself as widow and next of kin, and $575 for the benefit of the estate. She afterwards dismissed the suit pending in the Federal court, and brought this suit for the purpose of effectuating the settlement she had made with appellant.

The first contention of appellant for a reversal of the judgment is that Mrs. Armstrong's signature to the written contract of employment was mere surplusage, and, as she had no interest in the subject-matter of litigation until after the death of her husband, the contract was a nullity as far as she was individually concerned, and did not and could not bind her in capacity as administratrix, because she was appointed administratrix some time after the death of her husband. It may be said, in passing, that she had a contingent interest in the subject-matter of the litigation at the time she signed the contract as widow, in case her husband should die as a result of the injury. But, be that as it may, Mrs. Armstrong certainly adopted the contract as her own after the death of her husband, if the testimony of Terral is accepted as true. The trial court accepted his testimony as true, and determined the disputed issue of fact with reference to a subsequent ratification of the contract against appellant, and, as the finding was based upon substantial evidence, the verdict cannot be disturbed by this court on appeal.

Terral testified that Mrs. Armstrong and other members of the family visited his office after the death of J. E. Armstrong and consulted with him with reference to the case during the negotiations with appellant for a settlement, and, after failing to compromise the claim, she agreed to accept the appointment as administratrix of her husband's estate in order to enable him to file suit against appellant for her, in her representative capacity, to recover damages for the injury received by her husband resulting in his death, and that, with her full knowledge, he subsequently brought the suit. This conduct and these acts on her part necessarily led appellee to believe that she had adopted and made the contract her own. Her conduct and acts are inexplicable upon any other theory than that of an adoption by her of the contract.

What we have said with reference to the effect of her conduct and acts after the death of her husband necessarily disposes of appellant's second contention for a reversal of the judgment, which is that there was no ratification by Mrs. Armstrong of appellee's action in instituting suit on her behalf in the Calhoun Circuit Court.

Appellant's third contention for a reversal of the judgment is that the contract was void *ab initio,* and not subject to ratification. This contention is based upon the fact that the contract was signed by Cruce, in connection with Terral, who was not licensed to practice law. By reference to the contract it will be seen that it was signed by "Terral & Cruce" as parties of the first part. The first paragraph of the contract is as follows:

"This contract made, and entered into by and between Terral & Cruce, a firm of lawyers of the city of Little Rock, Arkansas, parties of the first part, and J. E. Armstrong and wife, parties of the second part, witnesseth."

Appellant cites in support of its contention the case of *McIver* v. *Clark,* 69 Miss. 408, 10 So. 581. This is a Mississippi case, and in that State a privilege tax is imposed by statute upon each person practicing law. The

statute imposing the license tax contains the following provision: "All contracts made with any person who shall violate this act, in reference to the business carried on in disregard of this law, shall be null and void." The court interpreted the statute as invalidating the contract signed by a firm of lawyers when one of them had paid his license tax and the other had not. There is no statute in our State nullifying a contract made by a lawyer who has not paid his license tax. The case cited is not applicable to the facts in the instant case.

Continuing, appellant argues that a void contract cannot be ratified. Three cases are cited in support of this position. *Texarkana* v. *Friedell,* 82 Ark. 531, 102 S. W. 374; *First National Bank of Waldron* v. *Whisenhunt,* 94 Ark. 583, 127 S. W. 968; *Dell Special School District* v. *Johnson,* 129 Ark. 211, 195 S. W. 373. These cases all turn upon a lack of power to make the contract in the beginning. In the instant case there was no lack of power to make the contract. Such a contract as this is not prohibited and condemned as null and void by statute.

Appellant's last contention for a reversal of the judgment is couched in the following language:

"Proof as to the alleged ratification of the contract was not competent, in view of plaintiff's intervention, in which he sought to recover and fix the statutory attorney's lien on the judgment rendered in the Pulaski Circuit Court, solely on the existence of the written contract introduced in evidence."

It is true that the written contract was attached to the intervention as an exhibit, but the conduct and acts of Mrs. Armstrong after her husband's death with reference to the case were alleged in the intervention. We do not understand that appellee relied solely upon the written contract as a basis for recovery, but relied upon the conduct and acts of Mrs. Armstrong after the death of her husband as a ratification or adoption of the written contract as her own. We think the proof of ratification was competent.

No error appearing, the judgment is affirmed.

WILSON *v.* INTERSTATE CONSTRUCTION COMPANY.

Opinion delivered November 26, 1928.

U. C. May and *Starbird & Starbird,* for appellant.

Evans & Evans, for appellee.

KIRBY, J. Appellants brought this suit to enjoin the appellee company from proceeding with the construction of the State highway through the city of Booneville, over the route condemned therefor by the county court at the instance of the State Highway Commission.

The complaint alleged that, under the order and judgment of the county court condemning the land, at the instance of the State Highway Commission, a copy of which was attached to the complaint, the appellee, under its contract with the State Highway Commission, was

about to forcibly enter and appropriate plaintiffs' lands, without compensation; that the county judge, Ray Blair, had made the order of condemnation, but had not paid or offered to pay for the lands taken; that the lands were wholly within the city of Booneville, a city of the second class, and the highway will be and is a part of the streets of the city of Booneville; and the county court was wholly without jurisdiction to condemn lands for streets in the city of Booneville, and without jurisdiction to make an order allowing a claim for damages for lands condemned wholly within such city.

A general demurrer and answer was filed. The answer alleged that the State Highway Commission, prior to any date in the complaint, took over the road, now State Highway No. 10, and had a survey made for the purpose of determining the proper route of the same, and, after such survey and determination, called upon the county court of Logan County to open, change and lay out said Highway No. 10; that the county court, on February 6, 1928, made and entered an order, changing, opening and laying out a right-of-way for said highway, and the same crosses the farms of the plaintiffs Speer and Wertz, and takes a few feet of the north side of the land of plaintiff Wilson; that the lands condemned by the county court for said Highway No. 10 were within the corporate limits of the city of Booneville; that the State Highway Commission has taken over said highway for the purpose of construction and maintenance, including that part of it which is a part of Main Street, in Booneville; denied that plaintiffs had no adequate remedy at law, and that no provision for damages was made, and that the county court was without authority to make the order, and prayed dismissal for want of equity.

A temporary injunction was granted, and the cause was tried on June 14, 1928, upon the amended complaint, answer, and demurrer of the defendant. The temporary injunction was dissolved, and the demurrer to the amended complaint sustained, and, the plaintiffs refusing to plead further, the complaint was dismissed for want of equity.

The order of the county court attached to the complaint reads:

"On this the 6th day of February, 1928, is presented to this court the petition of the State Highway Commission of the State of Arkansas, asking for changes in whole or in part of State Highway No. 10, section No. 2, which is a part of the State Highway system located in this county; said road being commonly known here as the Greenwood-Booneville road. It is further ordered that, if there is any landowner who is affected by this order, who feels himself aggrieved or damaged by reason of any changes in whole or in part of route over his land, he must present his claim to this court within one year from the date of this order, or be forever barred."

The lands condemned for the right-of-way were to widen and also slightly change the route of State Highway No. 10.

Appellants insist that the county court was without power or jurisdiction to condemn the lands in a city of the second class to widen a street which was designated and had become State Highway No. 10. Section 3 of act No. 5 of the Extraordinary Session of 1923 designates as State highways primary and secondary roads as designated by the Highway Commission and approved as shown on the Highway Commission's map, and provides "except that portion of said roads traversing in towns of 2,500 or over inhabitants." See *Bonds* v. *Wilson,* 171 Ark. 328, 284 S. W. 24.

Section 69 of said act No. 5 provides:

"The State Highway Commission shall call upon the county court to change or widen, in the manner provided by § 5249 of Crawford & Moses' Digest, any State highway in the county where the State Highway Engineer deems it necessary, for the purpose of constructing, improving and maintaining the road. In the event the county court should refuse to widen the road, as requested, the commission may refuse to construct, improve or maintain that portion of the road until a suitable right-of-way is provided." This statute has not

been repealed by later acts. *England* v. *State Highway Commission,* 177 Ark. 157, 6 S. W. (2d) 23.

Section 1 of act 184 of 1927 authorizes the State Highway Commission to designate such streets or parts of streets within the corporate limits of cities of the first and second class as are actual or direct continuations of duly designated and established State highways passing through such cities of the first and second class, selecting the most direct and practical route through such municipal corporations to make the State highway passing through continuous. The amendment to this section, by act No. 8 of the special session of 1928, § 1, gives the Highway Commission additional power to designate streets or parts of streets within incorporated towns as a continuation of duly designated and established highways passing through such municipalities. This later act gave the authority to the Highway Commission to select and designate the route of the State highway through cities of the first and second class, and the amendment thereto appears to authorize the Highway Commission to designate the streets or parts of streets as a route for the State highway through corporate towns.

Since the Highway Commission is given authority to designate the streets and select the route for continuation of a State highway passing through cities of the first and second class, selecting the most direct and practical route for the continuous highway, and the county court is given authority to change or widen in the manner provided any State highway in the county where the State Highway Engineer deems it necessary for the purpose of constructing, improving and maintaining such State highway, the county court had the power to provide a suitable right-of-way by the changing and widening of the streets selected and designated as such highway. It follows that the court did not err in so doing.

It has also been held that payment for the taking of private property for the construction of a public road need not precede the taking of the property, and that, in order to give courts of equity jurisdiction to prevent the

taking of the property on the ground that the complainant had no adequate remedy at law, it devolves upon him to show there was no sure and certain way for him to be paid, the burden being upon him to prove that there were no funds on hand in the county treasury with which to pay his claim for damages. The allegation here, however, was only that the county court had made the order of condemnation but had not paid or offered to pay for the land condemned. *Crawford County* v. *Simmons,* 175 Ark. 1051, 1 S. W. (2nd) 561. See also *Independence County* v. *Lester,* 173 Ark. 796, 293 S. W. 743.

The court did not err in sustaining the demurrer and dismissing the complaint, and the judgment is affirmed.

DUNN *v.* TURNER HARDWARE COMPANY.

Opinion delivered November 26, 1928.

Henry Stevens, for appellant.

McKay & Smith, for appellee.

KIRBY, J. This appeal is prosecuted from a judgment in the Columbia Circuit Court rendered against appellant upon a supersedeas bond. It was alleged that appellee herein obtained a judgment on the 24th day of July, 1923, in the chancery court against defendants, G. A. Dunn, J. M. Dunn, J. W. Rushing and Joe Joiner, for possession of a brick store building, situated on lot 151, in Magnolia, Arkansas, and for damages in the sum of $1,000; that on August 4, 1923, the defendants, for the purpose of staying proceedings on the judgment, executed an appeal bond, with C. C. Taylor as surety, agreeing to perform the judgment appealed from, in case it should be affirmed or any judgment or order rendered, not exceeding the amount of $1,000, "and all rents and damages to the property during the pendency of the appeal upon which the Turner Hardware Company is kept from possession of said property by reason of the appeal." That the appeal was perfected and the decision of the chancery court affirmed in December, 1924. That plaintiff was deprived of the possession of the property during the pendency of the appeal, upon a supersedeas issued by the clerk of the chancery court upon the filing of the bond, preventing the sheriff from taking possession of the said property and delivering it to plaintiff. That the rental value of the property during the pendency of the appeal until the final determination of the cause in the Supreme Court amounted to $1,350, for which judgment was prayed. A copy of the original judgment and the appeal bond are exhibited with the complaint.

The answer admitted the recovery of the judgment, the appeal therefrom, the execution of the bond, and the supersedeas. Alleged that the $1,000 judgment appealed from had been paid, and denied liability for the payment of rent during the pendency of the appeal, alleging a breach of the bond that released the sureties because of the filing of another suit for possession of the store by appellee before the determination of the cause on appeal. It was alleged that appellee had filed suit for possession on the 5th day of April, 1924, and caused a writ to be

issued and placed in the hands of the sheriff for execution, making it necessary for defendant, Dunn, to execute a bond in the sum of $4,800 in order to retain possession, which he did, and under which he held possession of the property till June 1, 1924, at which time it was delivered to appellee. Denied that he had been in possession of the property or in control of same, under the bond sued on, since the 5th day of April, 1924, when the appeal in the case was still pending and undetermined.

A reply was filed, denying the allegations of the answer and any violation of the terms of the appeal bond by appellee herein, and that defendant was dispossessed by any action of appellee before the disposition of the appeal. There was testimony introduced tending to show the rental value of the property from the execution of the supersedeas bond until its delivery to appellee, and a judgment for the rents rendered against appellants.

Appellants insist that the sureties were released from liability upon the appeal and supersedeas bond for any rents accruing during the pendency of the appeal, because appellee had attempted to procure possession of the property by a written demand and suit brought before the case had been finally determined. It does appear that the appellee demanded possession of the property after the bond was made and before the cause was decided by the Supreme Court, and also brought suit against appellants and had a writ of possession issued on the 5th day of April, 1924, but appellants refused to surrender possession, and gave bond for its retention. Later appellants surrendered possession of the building on June 3, 1924. The appellants, upon signing the supersedeas bond, became liable for all rents and damages to the property during the pendency of the appeal, by which the Turner Hardware Company was kept from possession of the property. Had appellants surrendered the possession to appellee after the appeal was perfected and the supersedeas bond executed, before the determination of the appeal, they could not, of course, have been held liable to the payment of any rent thereafter accruing, and this

without regard to whether the possession was voluntarily surrendered or upon a writ of possession sued out in another case. The answer shows, however, that the possession was never surrendered by appellants until in June, when the building was turned over to and accepted by appellee. The fact that a bond was given by appellants to retain possession in the later suit brought before the determination of the appeal by the Supreme Court, and that the sureties on such bond would also have become liable to the payment of the rents upon judgment against appellants for the possession of the property, could not release the makers and sureties upon the appeal bond from liability to the payment of rent accruing during the pendency of the appeal, until the possession of the property was delivered to the appellee.

Some of the instructions are complained of, but, on the whole, they declare the law correctly, and the testimony objected to as incompetent and having been erroneously admitted was brought out upon cross-examination of the witness by appellants, and the error, if any, was invited, and harmless under the circumstances.

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

DUMAS *v.* DANIELS.

Opinion delivered November 26, 1928.

Pat McNalley and *Jordan Sellers,* for appellant.

W. J. Goodwin, for appellee.

MEHAFFY, J. This is a suit brought by appellee, R. B. Daniels, to reform a mineral deed so as to show a conveyance of 1/32 of the mineral rights and so as to give plaintiff the right to collect and receive ¼ of any oil royalties and gas rentals that may be produced on the following described land: "The southwest quarter of northeast quarter, section 11, township 17 south, range 14 west, Union County, Arkansas."

It is alleged that on October 28, 1922, appellant, G. C. Dumas, agreed with appellee, Daniels, to sell and convey to him a 1/32 interest in the oil, gas and mineral rights in, on, under and pertaining to the following described lands; then follows a description of the land.

It is further alleged that it was the agreement between the parties that by said sale it was intended that G. C. Dumas should convey to R. B. Daniels a one-fourth interest in the 1/8 royalty reserved and to be reserved under any oil and gas lease pertaining to said property; that the said deed recited in the granting clause a conveyance of 1/32 part of the oil, gas and mineral rights, but, in designating the amount of royalty to be collected by virtue of said instrument, a mutual mistake was made, and the amount was stated in the deed as a 1/32 interest of any oil royalty or gas rentals, when it should have stated a one-fourth interest in any oil royalty or gas rentals.

Appellee states that he paid the appellant, and the appellant refused to correct the error, and that said error prohibits him from making a sale of the mineral rights owned by him, and the prayer is to reform the deed as above mentioned.

G. C. Dumas filed answer, denying all the material allegations of the complaint. There was thereafter an amendment to the complaint filed, making Medford Dumas a party, alleging that said Medford Dumas had purchased some interest in the land in controversy, and praying a reformation against him also.

Medford Dumas answered, alleging that he purchased without notice, and asking that the complaint be dismissed.

Thereafter, on the 9th day of February, E. Holt Ashford, Aylmer Montgomery, Kate Ward and Emma Henderson filed petition to be made parties, setting up the deed of A. E. Ashford, one of the grantees in the deed sought to be reformed, and alleging that they were the only heirs, and they adopted the complaint of the appellee, R. B. Daniels.

The testimony of appellees tended to show that the allegations in the complaint were correct. The deeds were introduced, and defendant's testimony tended to show that the deed was according to the intention of the parties.

It is unnecessary to set out the testimony in full. The testimony as far as necessary will be referred to in the opinion.

The court entered a decree to the effect that the deed under which appellees hold title to said mineral rights provided that the grantees should take a 1/32 part of the royalty reserved under the original lease, now expired; and that said clause is repugnant to the granting clause, which conveyed 1/32 part and interest in and to all of the oil, gas and mineral rights, and the said clause is therefore rejected. The court also held that the appellees, other than R. B. Daniels, were the sole heirs at law of A. E. Ashford, who had died in the year 1923. The court further found that Medford Dumas, one of the defendants, was not an innocent purchaser of any part of the mineral rights sued for, and that the sale under which appellees claim title is in all things legal, and that R. B. Daniels is the owner of one-half of 1/32 mineral rights, and that E. Holt Ashford, Aylmer Montgomery, Kate Ward and Emma Henderson are the joint owners of one-half of the 1/32 mineral rights, and that they are entitled to take and receive as their portion of the gas, oil and minerals of the said deed, 1/32 part of the total production from the said described lands. It

was ordered by the court that the title to 1/32 part be vested in the plaintiffs, free from all claims whatsoever of G. C. Dumas and Medford Dumas, and the appellee's title thereto was forever quieted. The appellant excepted, and prayed an appeal to the Supreme Court.

It is first contended that the complaint does not state a cause of action, and that it is contradictory in its allegations, and sets out as a basis for reformation an impossible agreement between the parties.

A case very similar to the instant case is that of *Dumas* v. *Crowder, ante,* p. 143. It involves the same lands; the same contentions are made, although the plaintiff in that case was different from the plaintiff in this case; but the same contention was made as to the complaint not stating a cause of action, etc. In the case decided in October of *Dumas* v. *Crowder, ante,* p. 143, this court said:

"Appellants now say that there remains only one question for this court to consider, and that is, whether the complaint states a cause of action against any or all of the defendants. Appellants cite *Rowe* v. *Allison,* 87 Ark. 206, 112 S. W. 395, and quote therefrom the following: 'There is no oral testimony before the court, and there are no recitals of evidence in the judgment, and therefore a conclusive presumption must prevail that the evidence sustains the decree of the court, so far as it is possible for a decree based on the complaint to be sustained by evidence. If the decree is without the issues, or the complaint does not state a cause of action, this presumption cannot aid the appellee. *Jones* v. *Mitchell,* 83 Ark. 77, 102 S. W. 710. Where the decree is not responsive to the issues, it is void. *Rankin* v. *Schofield,* 81 Ark. 440, 98 S. W. 674.'

"Appellants say that the complaint herein does not state a cause of action against any of the appellants. We cannot agree with counsel in this contention, except as to M. L. Dumas and Olive E. Dumas, who should be eliminated from the second deed of appellant G. C. Dumas to appellee, as reformed by the chancery court.

Both parties agree that they should be eliminated from this deed, and we concur with this agreement. The deed referred to is Exhibit B to the complaint.

"In this case appellants did not demur to the complaint. They filed an answer, thereby treating the allegations of the complaint as sufficient to put them to answer. They are therefore asserting for the first time, in this court, that the complaint does not state a cause of action. As said by this court in *Cohn* v. *Hager,* 30 Ark. 25: 'If the defendant had doubted the sufficiency of the pleadings, he should have demurred, and brought the question of its legal sufficiency before the court; but, instead of this, he has treated them as sufficient in law to put him to answer, and, having answered and gone to trial upon the issue formed, even if the pleadings were technically insufficient, the question cannot for the first time be raised in this court.''

It will therefore be seen that the identical question presented here was presented to the court in the case of *Dumas* v. *Crowder, supra,* and it was there held that, since the appellant did not demur to the pleadings, but filed answer and treated the complaints as sufficient, and testimony having been introduced without objection, the pleadings must be treated as amended to conform to the testimony taken without objection. This question is ruled by the case of *Dumas* v. *Crowder.*

It is next contended that the decree is not responsive to the issues, and many authorities are cited in support of the contention, such authorities holding that a decree reforming an instrument must be responsive to the issues presented. Appellant argues that the sole issue in the case at bar was the right to reformation, and that this issue is not mentioned or hinted at in the decree.

"The term 'reform' means to correct; to make anew; to rectify. Here we have all the foundation of the judgment, including the verdict of the jury, which is the basic rock on which the judgment is formulated. We have, following this, the final judgment of the court,

which is the sentence. This itself adjudicates the guilt of appellant and sentences him, in accordance with the verdict and judgment. From this data certainly we can do this which the court *a quo*, in due order, should have done. We accordingly hold that the judgment of the court below should be reformed and corrected, so as to make it read, in connection with the judgment as entered and following the verdict, as follows * * * The State's motion to reform is accordingly granted." *Wm. McCorquodale* v. *State of Texas,* 211 U. S. 432, 29 S. Ct. 146, 53 Law ed. 269.

"The equitable remedy of reformation of written intruments, or the equity to reform a written instrument, is the remedy afforded by courts of equity to the parties and the privies of parties to written instruments which import a legal obligation to reform or rectify such instruments whenever they fail, through mistake or fraud, or a combination of both fraud and mistake, to express the real agreement or intention of the parties." 23 R. C. L. 308.

"Reformation is that remedy in equity by means of which a written instrument is made or construed so as to express or conform to the real intention of the parties, when some error or mistake has been committed. This rule is usually limited to mistakes of fact, although relief has been granted because of a mistake of law." 34 Cyc. 904.

It will therefore be seen that the chancery court corrected and rectified the instrument; reformed it so as to make it what he found the parties intended. This was responsive to the issues. This was what the appellee asked. To be sure, they possibly did not get all they asked in reforming the deed, but they asked for a reformation, a correction, and the court entered a decree correcting it.

It is next contended that the Ashford heirs were never made parties. They came into court, asked permission to be made parties, alleged that A. E. Ashford was dead, and that they were his sole heirs at law. Testi-

mony was taken; no objection was made to their being made parties; and the court found that one of the original grantees, A. E. Ashford, had died, and these appellees were his sole heirs at law.

The appellant next argues that there was a variance; that no deed similar to the one set out in the complaint was exhibited or introduced in evidence. There was no objection on the part of appellants to the Ashford heirs being made parties; it clearly appeared that their ancestor was one of the original grantees, and no objection was made to proof on this issue.

It is next contended that there is not sufficient proof of a mutual mistake. We think that the testimony of the witnesses, together with the conveyance itself and the provisions therein, justified the chancellor in finding that there was a mistake, and that the decree reforming the deed was proper. But it is said that no reformation could be had against M. L. Dumas. We do not agree with the appellants in this contention. The testimony shows that M. L. Dumas was a brother of G. C. Dumas, and he testified that he acquired an interest in this land in 1925, and that he had a conversation with R. B. Daniels and Mr. Ashford, but that this conversation was with reference to a seven-eighths interest.

There is other testimony tending to show the knowledge of M. L. Dumas, and it is further shown in the testimony that Daniels was wholly unfamiliar with conveyancing, knew nothing whatever about it, and that this was the first transaction of the kind he had ever been interested in, and that he accepted the deeds on the statement of Mr. Dumas, thinking he was getting the interest to which he was entitled, and that he understood from Dumas that he was to get 1/32 of the output of the entire 40 acres, and that this included one barrel out of every 32; and, if this were true, of course it would include a portion of the part reserved by Dumas. On the other hand, Dumas was in the habit of dealing in leases of this character; familiar with transactions of this kind; knew the appellees, and must have known that they were not

familiar with transactions of this kind, and that they relied on his statement.

Our conclusion is that the chancellor was justified in reforming the instrument as he did, and the decree is therefore affirmed.

KULL *v.* NOBLE.

Opinion delivered November 26, 1928.

June R. Morrell, for appellant.

Collins & Collins, for appellee.

MEHAFFY, J. The appellee, plaintiff below, brought this suit in the Sevier Circuit Court against the appellant, defendant below, to recover the sum of $104, with interest, alleged to be the balance due on the price of a certain piece of machinery known as a hog machine. The evidence shows that there is a difference between the

make of the hog machine used in sawmills and the machine used in veneer mills; that they required a different arrangement. The appellant operated a veneer mill, and manufactured boxes, baskets, crates, caskets, etc., and it is contended that this machine was unfit for use in a veneer mill. The machine was bought by correspondence, and it was described and known as 2-C Mitts-Merrell hog machine. The appellant contended that the machine was bought through representations in advertising matter, and that it was represented as of the kind and character used in a veneer plant. And he also contended that it was wholly unfit for use in a veneer plant. He also alleged that he had made an advance payment of $96, and asked judgment in a cross-complaint for that amount, with interest.

Appellant, according to his testimony, bought the machine, relying solely upon the representations of the plaintiff in its advertising matter, and had no opportunity to inspect the machine, but that it was shipped subject to an inspection; that, when he saw it, he found that it was not the kind and character represented by appellee, and he refused to accept it, and promptly notified the appellee that the machine was at the station subject to his order. The appellee refused to take the machine back, and brought suit for the balance due. There was a verdict for the appellee for $104, with interest, and this appeal is prosecuted to reverse the judgment entered thereon.

The evidence showed that the machine was a known, described and defined article of manufacture, and was bought by appellant, relying on the description in advertising matter. The appellee is not a manufacturer, but a dealer in second-hand machines. The undisputed proof shows that this was the kind of machine ordered, and the undisputed proof also shows that it was unfit for use at appellant's plant.

Appellant's first contention is that the court erred in refusing to permit witness Kull to testify that he would not have bought the machinery if he had seen the descrip-

tion as contained in appellee's Exhibit G. Appellee's Exhibit G was a description of machine which appellee's evidence showed was mailed to the appellant, but which appellant's evidence shows was never received. And it appears from appellant's testimony that, if he had received this exhibit, he could have told from it that the machine was unfit for his use. But this testimony was not competent, because, when one buys a known manufactured article, calls for that article and gets the article that he asked for, it is not competent to show that, if he had possessed more accurate information about it, he would not have purchased it, or would have purchased some other kind of machine.

If one should order an Underwood typewriter of a certain make and certain number, and an Underwood typewriter of that make and number was shipped to him, it would be wholly immaterial whether it was fit for his use or not, and he would not be permitted to testify that, if he had known anything more about it, or if he had seen the machine, he would not have purchased it. And that is true of the testimony offered by appellant as to this exhibit. He himself says that he purchased or ordered what is known as 2-C Mitts-Merrell hog machine from the appellee. He says he knew nothing about this kind of a machine, but that he ordered it from the list that appellee furnished him; that, when he inspected it on its arrival, he ascertained that it was not the kind of a machine he wanted; that it was a sawmill hog, instead of a veneer hog, and that he could not use it. He said he relied solely, in ordering this machine, upon the representations contained in the list which he had, and that he never received the cut introduced as Exhibit G to the testimony of appellee.

Appellant next contends that the court erred in refusing to submit appellant's theory of the case to the jury. He insists that a peremptory instruction should have been given on behalf of the appellant, for the reason, as he contends, that the undisputed testimony shows that the machine in question was not such a machine as

that used in veneer plants; and that, if appellee did not know the kind of business in which appellant was engaged, it had the machine advertised as a veneer machine.

It is true that the undisputed proof shows that the machine was not such a machine as was required by the appellant. But it was the identical machine that appellant ordered, and, as we have already said, when one purchases a well-known article of manufacture, orders a particular kind of machine, and receives the kind he ordered, there is no warranty that it shall answer the particular purpose intended by the buyer.

Appellant next contends that the court erred in refusing to give its requested instruction number six. That instruction, in effect, told the jury that, if appellant had no opportunity to inspect the machine, he had a right to rely upon the representations of the plaintiff as to the use for which the machine was intended. And that if they found, through advertising matter or otherwise, that appellee had represented to the appellant that the machine was suitable, when in truth and in fact it was not, the appellant had a right to reject it and rescind the contract, provided they further found that the appellant did not know that the machine was not suitable for use in a veneer mill, and relied upon the representations of the plaintiff that it was suitable.

There was no contention on the part of appellant that he had any representations from the appellee in any way except the advertisements; and instruction number 6 permitted appellant to recover if he relied on the advertisements, although he ordered a known, described and definite article and received the kind of a machine he ordered. The court did instruct the jury as follows:

"If you believe from the evidence that the machine in controversy, shipped to defendant by plaintiff, was of the described kind and condition, and equipped as agreed upon by the plaintiff and defendant, your verdict will be for the plaintiff in the sum of $104, with interest thereon at the rate of 6 per cent. per annum from April 2, 1927, to this date."

This instruction was given by the court upon its own motion, and was numbered one.

It will be seen that, before they could find for the plaintiff, the machine must be of the described kind and condition, and accepted as agreed upon by the plaintiff.

The court also of its own motion gave instruction number 2, which is as follows:

"If you find from the evidence that the said machine was not of the described kind and condition, and equipped as agreed upon in the contract between plaintiff and defendant, you will find for the defendant upon his counterclaim in the sum of $96, with interest thereon from April 5, 1927, to this date, at the rate of 6 per cent. per annum."

It appears to us that the instructions are so plain that they could not have been misunderstood by the jury, and they were in harmony with the principles of law governing cases of this kind, and were all on that particular question that either party was entitled to.

Appellant also complains that instructions numbers 2, 3 and 4, requested by him, should have been given; that they are upon the theory of an implied warranty. He contends, however, that there is an express warranty that the machine is reasonably fit for the use intended. There is no warranty, either express or implied, as to the fitness of an article when the buyer indicates a known and described article, and purchases it. There is, of course, a warranty that it is the article that he purchased, but there is no warranty, either express or implied, that it is fit for the purpose for which the buyer intends to use it. If one should purchase a typewriter, as said above, he would not be required to take it, unless, of course, it was the kind of a typewriter he ordered. But if the seller shipped him the kind ordered, it would be wholly immaterial whether it was fit for the purchaser's use or not.

The appellant says that the court evidently relied on the case of *Western Cabinet & Fix. Mfg. Co.* v. *Davis,* 121 Ark. 370, 181 S. W. 273, but insists that the court there said that the designation "Western 30 iceless"

fountain was not such a designation as would make it a known and definite article of commerce, and that that case supports the contention of appellant here. But the article mentioned in the Davis case was a soda fountain, and the court said it was a soda fountain or nothing. It was stated by the court that it was either adapted to that use or it was worthless, and that the use which appellee proposed to make of the fountain was the only use to which any one could put it, and that, for that reason, the term "Western 30 iceless" fountain did not designate a known, defined and definite article of commerce, the employment of which evidenced a meeting of the minds of the parties upon the thing bought and sold, and excluded the implication of a warranty. The court further said: "But here these parties were contracting for a fountain to be used in furnishing cold carbonated drinks, and as an incident thereto to preserve the flavors, fruits, and condiments used in that connection, and the manufacturer knew, of course, the uses to which it was to be put, and the jury was justified in finding that there was an implied warranty."

But the court also said in that opinion: "But no such warranty arises out of a contract to make or supply a specific, described, or definite article, although the manufacturer or dealer knows that the vendee buys it to accomplish a specific purpose, because the essence of this contract is the furnishing of the specific article, and not the accomplishment of the purpose. In other words, a warranty that a machine, tool, or article sold is fit and suitable to accomplish a particular purpose or to do a specific work may be implied when the manufacturer or dealer knows the purpose or work to be effected, and the purchase of the machine, tool, or article is in reality an employment of the vendor to do the work by making or furnishing a machine, tool, or article to effect it."

The iceless fountain, according to the proof in the Davis case, was a brine system for keeping the soda fountain cool, and it was admitted that it was an experiment; that the fountain had not done what the seller

expected it to do, and that, in saying it was a usable fountain, he meant that a person could go ahead and use it by putting ice in the drinks if they were not drawn cool enough. It was also admitted in that case that the company which manufactured the fountain had only been engaged for seven or eight months, and that the fountain was not in general use. It is also shown that they had ceased to manufacture the fountain.

We think that the case not only may be distinguished from the case at bar, but the principles announced in that case justify the giving of the instructions by the court in the instant case. That was a sale by the manufacturer of a soda fountain. It was not a known and described article of commerce; it was not in general use; was manufactured as an experiment, and discovered, after it was manufactured, that it was unfit for the purpose for which it was manufactured. In the instant case the machine was not manufactured by the seller, but was advertised and sold as a second-hand machine, and was a known and described article of commerce.

Appellant calls attention to a number of other decisions of this court, and quotes from the case of *Curtis & Co.* v. *Williams,* 48 Ark. 325, 3 S. W. 517, as follows:

"Proof of the express warranty by the defendant of the quality of his machinery was not essential to a recovery. Ordinarily, upon the sale of chattels, the law implies no warranty of quality, but there are exceptions to the rule as well established as the rule itself. One of these exceptions is where the manufacturer undertakes to sell goods manufactured by himself to be used for a particular purpose, and the vendee has not had an opportunity to inspect the goods. In that case the vendee necessarily trusts to the judgment and skill of the manufacturer, and it is an implied term in the contract that he shall furnish an article reasonably fit for the purpose for which it is intended."

One difference between the case in the 48th Ark. and the instant case is that there a manufacturer undertakes to supply goods manufactured by himself, to be used for

a particular business, and the purchaser has no opportunity to inspect the goods. Here the seller was not the manufacturer; it was not made or sold, so far as the seller was concerned, for any specific purpose. But here a particular defined article was ordered by the purchaser and shipped by the seller.

Attention is called to the case of *S. F. Bowser & Co.* v. *Kilgore,* 100 Ark. 17, 139 S. W. 541. The court in that case said:

"Where there is a contract for the sale of an article which is not at the time in existence or ascertained, or where there is a sale by sample, the agreement that such article shall be of a certain description or quality is not merely a warranty, but it is a condition upon the performance of which depends the completion of the contract of sale, and the sale does not become absolute until the article has been inspected and found to conform to the description of kind or quality."

In the first place, this is not a case where an article was not at the time in existence; it was not only in existence, but it was held by the seller for sale as used or second-hand machinery, and it was not a sale by sample. We therefore think the above case is not authority for the contention made by the appellant in this case.

Then attention is called by appellant to 24 R. C. L. 164, and it is urged that the text supports the contention of appellant here. The text quoted is to the effect that there may be warranty without any technical set of words, and that it may be inferred upon 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, immediately following the part quoted by appellant, is the following: "But it has been said that the words used must be tantamount to a warranty, and not dubious or equivocal."

Again it is said: "Where a known, described, and defined article is ordered of a manufacturer, although it is stated to be required by the purchaser for a particular purpose, still, if the known, described, and defined thing

be actually supplied, there is no warranty that it shall answer the particular purpose intended by the buyer.'' Williston on Sales, 2d ed. 229.

''There would be no reason for the seller to be bound by an implied warranty when the buyer described particularly the kind of article it wanted to purchase and the manufacturer sent that particular article. It might not be suitable for the use intended by the purchaser, but the seller would certainly have a right to assume that, when the purchaser described the article, called for a particular kind, that was the kind desired. * * * Even though inspection would not reveal the defect in the goods, it is possible for the buyer to select them, relying upon his own judgment, and, if he does this, the seller, at least in the absence of guilty knowledge, will not be liable on an implied warranty.

''The rule excluding implication of warranties in sales of known, described and definite articles is simply an application of the general principle stated in both statutes, that reliance on the seller's skill and judgment is a prerequisite to the imposition of an obligation upon him.'' *Crow* v. *Fones Bros. Hdw. Co.,* 176 Ark. 993, 4 S. W. (2d) 904.

The case was submitted to the jury on proper instructions, and there was evidence sufficient to support the verdict, and the judgment is therefore affirmed.

BANK OF MULBERRY *v.* HAWKINS.

Opinion delivered November 26, 1928.

Starbird & Starbird, for appellant.

J. B. Perrymore and *O. D. Thompson,* for appellee.

McHaney, J. Appellant was the holder of a mortgage on certain lots in Mulberry, Arkansas, to secure a note of $10,000 executed to it by S. B. Hawkins. Appellee and his brothers occupied the building on said premises, and operated a grocery store and grist mill therein. Appellee later retired from the firm of Hawkins Brothers, and the building was later rented to others, but the personal property involved in this action was permitted to remain in the building. The note for which said mortgage was given not being paid at maturity, appellant foreclosed same in the chancery court, and purchased the property covered by the mortgage. Appellee was made a party defendant in this action, for the reason, as alleged in the complaint, that he was a tenant of the property subject to the mortgage.

Thereafter appellee instituted this action of replevin to recover the personal property in the building, consisting of counters, grist mill, electric motor, corn sheller, etc. The mill and motor were fastened to the floor, or set on concrete foundations, but the testimony tended to show that they were susceptible of being removed without injury to the realty.

The action was instituted before a justice of the peace, who dismissed same on motion of this appellant, for the reason that, in the judgment of the justice of the peace, he had no jurisdiction, because the action involved the title to real property.

On a trial in the circuit court appellee and his father, S. B. Hawkins, both testified that the property involved belonged to the appellee, and that there was no intention on their part of it becoming fixtures when it was installed in the building. The testimony further showed that S. B. Hawkins had been renting the property with this personal property in it, and collecting the rents as though he owned all of it. The appellee testified that he permitted his father to collect the rents with the machinery and equipment in the building, but did not intend to pass title to the property to him. The court submitted the matter to the jury under an instruction to the effect that, if they found that the property replevied was not permanently attached to the land, but was acquired and placed in the building by the appellee with the intent to use same for his own use and benefit, then they should find for the appellee, but if the jury found that the property was permanently attached to the land and could not be removed without injury to the freehold, it became real estate, and their verdict should be for the appellant. The jury returned a verdict for the appellee, hence this appeal.

It is the general rule that the intention of the party in placing the property in the building, that is, whether it shall remain personal property or become permanent fixtures, will govern. In the recent case of *Continental Gin Co.* v. *Clement,* 176 Ark. 864, 4 S. W. (2d) 901, this court said:

"The principles of law governing this case have been many times discussed by this court, and are well settled. And it has been repeatedly held by this court that, as between the vendor and purchaser of articles, the intention of the parties is the real test" (Citing cases).

See also *Ark. Cold Storage Co.* v. *Fulbright,* 171 Ark. 552, 285 S. W. 12. In this case it was said: "The case of *Choate* v. *Kimball,* 56 Ark. 55, 19 S. W. 108, is a leading one in this court, and in that case we laid down, as the principal tests of removability, the intention of the party making the annexation and his situation and relation to

the owner of the soil—whether the annexation was intended to be made as a permanent accession to the freehold or merely for the benefit of the party making it."

Here, when the property was put in the building, it was put in as trade fixtures, and the general rule as to the removal of trade fixtures is more favorable to the right of removal where the relation of landlord and tenant exists than in regard to any other relationship. It was so held in the last cited case. The relationship existing between appellee and his father at the time of the installation of this property in the building was that of landlord and tenant, and the property was permitted to remain there in the building by virtue of an arrangement between appellee and his father for the use of such tenants as might occupy the building, the father to collect the rent for the building, but never acquiring any title in said property.

It is urged that appellee had a reasonable time in which to remove the property from the building after he ceased to be a tenant. This would be true ordinarily, but the landlord in this case is not claiming the right to hold the property, but only his purchaser at the foreclosure sale. We find no error, and the judgment is affirmed.

BUSH *v.* ECHOLS.

Opinion delivered November 26, 1928.

Jonas F. Dyson, for appellant.

Ross Mathis, for appellee.

McHaney, J. Appellees brought this action against the mayor, recorder and aldermen of the town of Cotton Plant, Arkansas, and against the State Board of Municipal Corporations, to have declared void all proceedings taken by said town and the State Board of Municipal Corporations in raising the town of Cotton Plant from an incorporated town to a city of the second class, and to enjoin the council from exercising any of the powers conferred upon cities of the second class, including the imposition of a tax upon automobiles, the issuance of bonds under Amendment No. 16 of the Constitution, and the carrying into effect of two ordinances providing for the issuance of sewer and waterworks bonds in the sums of $40,000 and $60,000, respectively.

It was alleged in the complaint that, in order to accomplish these purposes, the mayor and council procured a petition signed by ten qualified electors of said town, praying that a census thereof be taken under §§ 7662 and 7663, C. & M. Digest; that said petition was presented to the council on the 7th day of February, 1928, and that it immediately passed a resolution directing the taking of said census, and directing the town marshal to do so as an enumerator; that said marshal was inter-

ested in the result of such enumeration, and that he proceeded to take said census and returned his enumeration to the mayor on February 22, 1928, who immediately transmitted to the Board of Municipal Corporations at Little Rock a purported resolution of the town council, praying that it be raised to a city of the second class.

It was further alleged that, if there were any such resolutions as above mentioned passed by the town council, no notice thereof was given as provided by law, no publication thereof, and that the plaintiffs had no knowledge that a census had been returned by the enumerator, and that same was not left on file in the office of the mayor for thirty days, as provided by § 7663, C. & M. Digest; that in taking said census the names of at least 200 persons were included on the list of inhabitants of said town who were not then and are not now inhabitants thereof; that 50 schoolchildren, living in rural territory or in other towns, were included in the list; that 10 persons who were employed by the Federal government, and were only temporarily in the town in the performance of their duties in building a levee on White River, were included, as also 100 persons who do not live in the town, but were there as refugees because of flood conditions; that the names of 40 persons living in rural territory near Cotton Plant were included in the list, and that the whole list, including those wrongfully enumerated, showed a population of 2,044 inhabitants in said town, but that, if the names of those so wrongfully included were stricken from the list, the population would be less than 1,800 persons. It is further alleged that the names of said persons were fraudulently placed in the returns for the purpose of inducing the Board of Municipal Corporations to believe that said town had a population of more than 2,000 inhabitants, when in fact it did not have same, and for the further purpose of enabling the town council to demand illegal exactions in the form of taxes from these plaintiffs and other property owners of said town, and particularly for the purpose of enabling the town council to issue bonds for public improvements, against the will

of the majority of property owners of said town, and upon a vote of persons in said town who own no property. The complaint contained further allegations that fraud was practiced on the Board of Municipal Corporations, and that it was thus induced to believe that the city had the required population, when, as a matter of fact, it is and can be only an incorporated town. Further allegations are contained in the complaint regarding proposed bond issues, the passage of ordinances for the building of sewers and waterworks, and the attempt on the part of the town to operate as a city of the second class.

We will not attempt to set out all the allegations of this complaint. Appellant thereupon filed a motion to dismiss the complaint, which the court treated as a demurrer, and overruled same, the order being as follows:

"Being sufficiently advised, the motion of the defendants is overruled in point of law, to which action of the court the defendants except, and pray that their exceptions be noted of record. The defendants standing on their motion to dismiss, and refusing to plead further, it is by the court considered, ordered, adjudged and decreed that the defendants be enjoined from acting in excess of their authority as officers of an incorporated town, and particularly from issuing any bonds or creating any obligations that an incorporated town has no authority or power to issue or create; and the action of the said defendants and the board of municipal corporations in declaring said town a city of the second class is canceled and vacated."

If the chancery court had jurisdiction, certainly this complaint stated a good cause of action, unless appellees were precluded from maintaining it after the lapse of thirty days from the filing of said enumeration with the mayor. No objection was raised to the jurisdiction in the motion to dismiss, but only that it involved a collateral attack on the proceedings, and could not be maintained after said thirty days had elapsed. This conten-

tion is made under § 7663, C. & M. Digest, which is as follows:

"Before said enumerators shall enter upon their duties they shall make and subscribe to an oath to well and faithfully perform their duties, and their return shall be taken as true. Provided, however, the returns so made by the census enumerators shall be filed in the office of the mayor, and shall be subject to examination of the public for thirty days, and any correction thereof may be made, if proper proof be made before the board of aldermen to their satisfaction, authorizing the correction sought to be made. Said enumerators shall be entitled to and receive two and one-half cents per name for all names found to be authentic by the board of aldermen, to be paid by the town or city."

It will be noticed that the 30-day provision of this statute relates to the time in which interested persons may have the enumeration corrected by application and proof satisfactory to the board of aldermen. One of the allegations in the complaint was that the list was not on file in the mayor's office for 30 days, and was never properly filed there for the inspection of the public, and appellees prayed an order of the court requiring appellants to furnish same to them, to be examined and copied. This procedure was jurisdictional. The mayor and board of aldermen had no authority, under the statute, to take any further steps looking to the raising of the status of the town to a city of the second class until said enumeration list had been filed in the office of the mayor and kept there for the inspection of any interested person for the full period of 30 days. The census taken showed a population of 2,044, but the complaint charged that more than 200 of these names were fraudulently included in the census. If this fact is true, and it must be so treated, as it is not denied, and is admitted on demurrer, then, for two reasons, the State Board of Municipal Corporations had no jurisdiction. First, the census list must remain on file in the mayor's office for 30 days before action is taken, and second, the town did not have a population

exceeding 2,000 inhabitants, as provided by § 7451, C. & M. Digest. If these allegations were not true, they should have been denied by an answer and the plaintiffs put to their proof.

But it is said that the exhibits attached to the motion to dismiss showed on their face that all proceedings were regular, including the filing of the census list with the mayor and its remaining on file in his office for 30 days. This is shown by the certificate of the mayor attached to the papers filed with the State Board, but the court was not bound to accept this certificate as conclusive of the fact, and it left the allegation of fraud in the census list undenied. According to the complaint, the whole procedure of the town officials was cloaked with secrecy, no publicity given, no notice, either actual or constructive, and honeycombed with fraud. The proceedings had and done were therefore void.

Did the chancery court have the power to grant the relief prayed?

Section 13 of art. 16 of the Constitution provides: "Any citizen of any county, city or town may institute suit in behalf of himself, and all others interested, to protect the inhabitants thereof against the enforcement of any illegal exactions whatever."

This section is authority for this procedure. Appellees are attempting by this action to protect the inhabitants of Cotton Plant from illegal exactions in taxation. The case of *Waldrop* v. *K. C. S. Ry. Co.*, 131 Ark. 453, 199 S. W. 369, L. R. A. 1918B, 1081, is authority for this action. There the county court had made a void order incorporating the town of Ogden. The railroad company attacked the legality of the organization of the town several years later, to avoid the payment of an illegal exaction of taxes. This court sustained the action of the chancery court in enjoining the collection of such taxes, on the ground that the order incorporating the town was void, and open to the attack made.

We are of the opinion that the court had jurisdiction, and properly enjoined the town officials, under the situ-

ation existing and as matters were submitted to it. If, however, the town has the required population, and will take all necessary steps looking to this end, it may yet be raised to a city of the second class.

Affirmed.

McWILLIAMS *v.* KINNEY.

Opinion delivered December 3, 1928.

[redacted]

Hays, Priddy & Rorex, for appellee.

Jesse Reynolds and *Paul McKennon,* for appellant.

HART, C. J., (after stating the facts). The first assignment of error is that the court erred in giving instruction No. 3 at the request of the plaintiff, which reads as follows:

"Gentlemen of the jury, if you find from the evidence that the defendant, McWilliams, at and during the time plaintiff and his wife were living together, began to pay attention to the plaintiff's wife, and began visiting and courting her during the absence of the plaintiff, and by such methods, or any other methods, wrongfully stole away and alienated her affections from her husband, until she finally deserted the plaintiff, then the plaintiff is entitled to recover such damages as you believe from the evidence he has sustained under these instructions."

It is insisted that the use of the phrase, "or any other methods, wrongfully stole away and alienated her affections from her husband," submitted to the jury allegations not contained in the complaint. We do not agree with counsel in this contention. The plaintiff alleges that the defendant became a visitor in the home of the plaintiff, and wrongfully began to pay court to his wife; that he would frequently take her out riding in a car when the plaintiff was down in the coal mines at work; that he met her clandestinely many times; that he bought her many costly presents, and that, under the guise of friendship, he alienated her affections until she became dissatisfied with her condition and station in life; that she became cold towards the plaintiff, and finally neglected and abandoned him, because of the wrongful conduct of the defendant; that defendant, as a part of his plan, procured her to move to Clarksville for the pretended purpose of sending their son to school, but

really for the purpose of getting the plaintiff's wife more completely under his control; that the defendant, in carrying out his plan to alienate the affections of the plaintiff's wife, procured her to obtain a divorce, and paid all the expenses thereof. From these allegations of the complaint it will be seen that the object of the court in using the language now complained of was to submit to the jury any of the grounds of the complaint alleged which were sustained by the proof. Only a general objection was made to the instruction by the defendant, and, if he thought the meaning now contended for might have misled the jury, he should have made a specific objection to the instruction, and doubtless the court would have changed the verbiage in order to overcome his objection.

It is next insisted that the court erred in refusing to give instruction No. 2, requested by the defendant, which reads as follows:

"You are instructed that, before the plaintiff can recover, he must prove each of the material allegations in his complaint by a preponderance of the testimony."

The court did not err in refusing to give this instruction. The plaintiff was not required to prove each of the material allegations in the complaint. He was only required to prove one or more of them. The gist of the action was that the defendant had alienated his wife's affections.

The next assignment of error is that the evidence is not legally sufficient to warrant the verdict. We cannot agree with counsel for the defendant in this contention. In testing the legal sufficiency of the evidence to support the verdict, we must view it in the light most favorable to the plaintiff. When that is done, the jury was warranted in finding that the defendant broke up the home of the plaintiff and induced his wife to obtain a divorce from him, and to marry the defendant. The jury might have found from the attendant circumstances that he was the procuring cause of the separation of the plaintiff and his wife. It will be remembered that

they were frequently seen riding together during the absence of the plaintiff. Two of the witnesses testified that they saw the wife of the plaintiff riding with the defendant in the summer time, with the front curtains of the automobile up, and that she had on a man's hat and overalls. One witness further testified that, when they would return to the home of the plaintiff, the defendant would take the curtains down and drive off by himself. Then, too, the fact that the plaintiff went to the town of Clarksville to live, and soon after brought suit for divorce against her husband, is a fact of some importance. It is worth while to note that she married the defendant shortly after she secured the divorce. These facts, if believed by the jury, warranted it in finding that the defendant had alienated the affections of the wife of the plaintiff, and caused her to abandon him and to secure a divorce from him. *Hodge* v. *Brook,* 153 Ark. 222, 240 S. W. 2; and *Rainwater* v. *Emberton,* 158 Ark. 573, 250 S. W. 866.

It is generally held that a spouse against whom a divorce has been granted may maintain an action for alienation of affections occurring prior to the divorce, since the decree is not *res judicata* with respect to the plaintiff's cause of action, and does not operate as an estoppel by judgment. Case-note to 20 A. L. R. 943; *Luke* v. *Hill,* 137 Ga. 159, 73 S. E. 345, 38 L. R. A. (N. S.) 559; *Hostetter* v. *Green,* 159 Ky. 611, 167 S. W. 919, L. R. A. 1915C, 870; *Durham* v. *Durham,* 125 Mich. 109, 83 N. W. 1005; *DeFord* v. *Johnson,* 251 Mo. 244, 158 S. W. 29, 46 L. R. A. (N. S.) 1083; *Prettyman* v. *Williamson,* 1 Pen. (Del.) 224, 39 Atl. 731; *Knickerbocker* v. *Worthing,* 138 Mich. 224, 101 N. W. 540, and case-note to 6 Ann. Cas. 663.

Finally, it is insisted that the judgment should be reversed because the verdict is excessive. This was not made a ground in the motion for a new trial, and for that reason we cannot consider this alleged assignment of error. *Glasscock* v. *Rossgrant,* 55 Ark. 376, 18 S. W. 379; *Kansas City Sou. Ry. Co.* v. *Short,* 75 Ark. 345, 87 S. W. 646; *Battle* v. *Draper,* 149 Ark. 55, 231 S. W. 869.

Therefore the judgment will be affirmed.

SECURITY TRUST COMPANY OF FREEPORT *v.* MARTIN.

Opinion delivered December 3, 1928.

Evans & Evans, for appellant.

Dean, Moore & Brazil, for appellee.

HART, C. J., (after stating the facts). The decree of the chancellor was wrong in so far as the rights of the Security Trust Company of Freeport are concerned.

The theory upon which Martin brought this suit is that he released his vendor's lien in order that Hendricks might obtain a loan and pay him the balance of the purchase price on the land. The parties did not intend that the release would be effective until Martin received the money in satisfaction of the amount of the lien. In making this contention, they rely upon the general rule that, where a mortgage or other lien on real estate has been released or satisfied through mistake, it may be restored in equity and given its original priority as a lien. 41 C. J. 586.

It is equally well settled that such relief cannot be obtained to the injury of the intervening rights of an innocent third party, who relied upon the release, unless he is chargeable with notice of the mistake or will not be prejudiced by the reinstatement. 41 C. J. 586 and 587, and cases cited in notes 42 and 43; *Sheldon* v. *Holmes,* 58 Mich. 138, 24 N. W. 795; *Carbon Hill* v. *Marks,* 204 Ala. 622, 86 So. 903; *Waltham Cooperative Bank* v. *Barry,* 231 Mass. 270, 121 N. E. 71; and *Purdy* v. *Huntington,* 42 N. Y. 334, 1 Am. Rep. 532.

In the case at bar the Security Trust Company of Freeport furnished to the F. B. Collins Investment Company of Oklahoma City, Oklahoma, which was the agent of J. S. Hendricks, the money with which to discharge the lien of George C. Martin. The money was furnished by it in good faith, and it did not have any notice of facts which would lead to knowledge of the insolvency of the F. B. Collins Investment Company of Oklahoma City, Oklahoma, and did not act in collusion with it in failing to pay the money to Martin. Having furnished the money in good faith, in reliance upon the release or discharge of the lien indebtedness by Martin against the land, its rights could not be affected by the failure of the broker or agent of Hendricks to turn it over to Martin. To so hold would affect injuriously the vested rights of the Security Trust Company of Freeport.

Such is the effect of our decision upon an analogous state of facts in the case of *Maccabees, Incorporated,* v. *Pierson,* 177 Ark. 243, 6 S. W. (2d) 305.

It is next sought to uphold the decree on the ground that the F. B. Collins Investment Company was a foreign corporation which was not authorized to do business in the State of Arkansas. This contention is not sound. The application for the loan was sent by Hendricks from his residence in Conway County, Arkansas, to the F. B. Collins Investment Company, at its office at Oklahoma City, Oklahoma. The contract was made there, and it cannot be said in any sense that the foreign corporation was doing business in this State by entering into a contract with a resident thereof in the State of Oklahoma. *Davis & Worrell* v. *General Motors Acceptance Corporation,* 153 Ark. 623, 241 S. W. 44; *Commercial Credit Co.* v. *Blanks Motor Co.,* 174 Ark. 274, 294 S. W. 999; *Equitable Credit Co.* v. *Rogers,* 175 Ark. 205, 299 S. W. 747; *Linograph Co.* v. *Logan,* 175 Ark. 194, 299 S. W. 609; *Smith* v. *Brokaw,* 174 Ark. 609, 297 S. W. 1031; and *International Textbook Co.* v. *Pigg,* 217 U. S. 91, 30 S. Ct. 481.

It follows that the court erred in decreeing the restoration of the lien of George C. Martin, in so far as the rights of the Security Trust Company is concerned; and for that error the decree will be reversed, and the case will be remanded with directions to render judgment in its favor for the notes sued on by it and for a foreclosure of its mortgage as prayed for in its cross-complaint, and for such other proceedings according to the principles of equity as may be necessary to enforce its rights, which are not inconsistent with this opinion. It is so ordered.

ARKANSAS NATURAL GAS COMPANY *v.* OLIVER.

Opinion delivered December 3, 1928.

Wynne & Miller, for appellant.

Philip McNemer, for appellee.

HART, C. J., (after stating the facts). It is earnestly insisted by counsel for appellant that the evidence is not legally sufficient to warrant the verdict, and that, under the undisputed facts, the judgment should be reversed, and the cause of action dismissed. In this contention we think counsel for appellant are correct.

In the first place, there can be no recovery unless the gas company is shown to have been negligent. *Torrans* v. *Texarkana Gas & Electric Co.*, 88 Ark. 510, 115 S. W. 389.

This court has held that a public service corporation furnishing gas to consumers is required to use ordinary care in constructing and maintaining its gas pipes in such condition as to prevent the escape of gas, whereby a person or his property might be injured; and if it fails to use such care, and, by reason of such failure, loss or injury occurs, it is liable in damages. With respect to the responsibility for damages caused by the

escape of gas, our own court, in common with various others of last resort, determines the common law liability in such a case upon the principles of negligence applicable to the care and maintenance required of the handling of a dangerous substance or instrumentality. In such cases, ordinary care is commensurate with the danger to be avoided. *Pine Bluff Water & Light Co.* v. *Schneider,* 62 Ark. 109, 34 S. W. 547, 33 L. R. A. 366; *Pulaski Gas Light Co.* v. *McClintock,* 97 Ark. 576, 134 S. W. 1189, 1199, 32 L. R. A. (N. S.) 825; and *Little Rock Gas & Fuel Co.* v. *Coppedge,* 116 Ark. 334, 172 S. W. 885; and case-note in 25 A. L. R. 262.

In an effort to sustain the judgment, counsel for appellees seek to apply the principles announced in *McWilliams* v. *Kentucky Heating Co.,* 166 Ky. 26, 179 S. W. 24, L. R. A. 1916A, p. 1224. In that case the gas mains were in the public road near the surface, and at a place where it was expected and intended that vehicles should go. At the time of the accident the county officers were engaged in the reconstruction or repair of the macadam road near the dirt road, and in its work had been using a steam roller. In the course of the work the person injured was directed by the county officer in charge to run the roller along the dirt road next to the macadam road to a point where it would be needed for use on the macadam road. While doing this, the spike on one of the wheels punched holes in an iron pipe that had been placed in the dirt road, and the escaping gas, coming in contact with the fire in the engine, caused an explosion and the envelopment of the engine in flames. The dirt road was as much a part of the public road as the macadam road. The gas company was held to be under the duty to exercise ordinary care to keep and maintain its mains in such condition as that the public road would be in a reasonably safe condition, considering the uses and travel to which it might reasonably be anticipated it would be subjected at any time, and to take notice of the use and travel over the road, and exercise such care as might be necessary to maintain the road in a reason-

ably safe condition to meet such requirement. The court said that the duty imposed upon the gas company was to exercise ordinary care in the maintenance of its gas mains, and imposed upon it the duty of exercising ordinary care at all times, while the mains were in the public road, to guard against injury from any use of the road in view of the modern methods of use that it might be subject to. In the application of this rule it was the duty of the gas company to anticipate that it would be necessary to repair the macadam road, and that a steam roller might be driven over the dirt road alongside of the macadam road for that purpose. Hence it could not be said as a matter of law that the gas company, in the exercise of ordinary care, could not have foreseen this use of the road and was not required to anticipate that this accident might have occurred. In that case, however, the court recognized the law to be that the gas company in maintaining its gas main was not required to provide against extraordinary or unusual conditions, or to anticipate or guard against accidents arising from extraordinary or unusual causes which could not reasonably have been anticipated to exist at the time the injury complained of occurred. The county had a right to use all parts of the road and to operate the steam roller over any part of it that was necessary. Hence it was a question for the jury whether or not the gas company was negligent in not anticipating that the steam roller would have to be driven over the dirt road for the purpose of repairing the macadam road, and for that reason the gas company should have placed its main deep enough under the ground to prevent the steam roller from punching holes in them and thereby causing loss or injury.

In the case at bar the facts are essentially different. The gas main was laid under the ground on the land of a private person, under an easement obtained for that purpose. There was no leak in the gas main at the point where the accident occurred, and the pipe was laid a sufficient depth under the ground to prevent any injury

from any ordinary use that might have been made by the owner of the ground or any one else. The undisputed facts show that the pipe was laid and maintained by appellant in a perfectly safe condition for any use that the gas company might have anticipated would be made of it in the future, and that this condition had continued for 17 years. It was not required to make a continual inspection of its pipe lines in order to anticipate any extraordinary or unusual excavations which might cause injury to those making them. It was not required to anticipate that the road might be changed and a new road laid out, and a borrowpit constructed for the purpose of excavating dirt for the purpose of making a dump or roadbed on the new road. If a county or State officer desired to do this, notice should have been given to appellant, in order that it might have the right to test whether or not the public use or necessity would require it to change its pipe line. It must be remembered that it was under the duty to maintain its pipe line in a safe condition to furnish gas to its customers, and in the exercise of such duty it could not be required to tear up its pipe line for the purpose of securing a borrowpit for a change in the public road, unless the public necessity required such course. In any event it could not be required to change the location of its pipe lines without notice to do so, and an opportunity to be heard on the question.

The escaping gas and the ensuing explosion which caused the loss was not caused by any failure of appellant to keep the gas mains in safe condition. It was due solely to the act of appellee's servants in excavating the dirt in the borrowpit to an unusual depth, of which the gas company had no notice and of which it was not required to take notice.

The explosion was not due to the negligence of appellant, but was caused by the acts of appellees in making the excavation under such circumstances as constituted negligence on their part.

Under the undisputed facts, we are of the opinion that the loss complained of was not due to the negligence of appellant, but resulted from the negligence of appellees. Therefore the court should have directed a verdict in favor of appellant as requested by it. For the error in not doing so the judgment will be reversed, and, inasmuch as the cause of action seems to have been fully developed, it will be dismissed here. It is so ordered.

HUMPHREYS, J., (dissenting). Appellant was handling a dangerous commodity, and the law imposed a duty upon it to exercise ordinary care to prevent or avoid injury to all persons and their property engaged in repairing or reconstructing the road within the boundaries of the State highway, as designated in the condemnation proceeding.

The court sent the case to the jury upon the theory that appellant was liable for damages to the shovel, provided they found from the testimony that it had a pipe line, through which it conveyed gas, within the right-of-way condemned by the county court for a public highway, if it failed to exercise ordinary care to maintain its gas main in a reasonably safe condition for travel, and to take notice of the kind and type of machinery which might be used for the construction of said road and the changes and improvements constantly being made in all classes of road, as well as the machinery used in improving and constructing same. The duty imposed upon appellant by this declaration of law was predicated upon the county court order condemning the land and authorizing the State Highway Department to enter and reconstruct the road within the designated boundaries of the right-of-way. In other words, the court treated the Highway Department and its contractors as being in the lawful possession of the right-of-way, with a superior right to that of appellant to use the surface, or, to state it differently, that appellant's right to occupy the right-of-way with its pipe line was subservient to the right of the Highway Department to repair and reconstruct the road.

The rule of law announced by the trial court as applicable to the facts in the instant case is supported by the weight of authority, and I do not understand that the majority opinion contravenes the principle of law enunciated, but asserts that the principle was not applicable. The principle or rule announced was applied to the facts in the case of *McWilliams* v. *Kentucky Heating Company,* 166 Ky. 26, 179 S. W. 24, L. R. A. 1916A, 1224. The majority opinion differentiates the instant case from the McWilliams case, and concludes with the statement that the facts in the instant case, according to the undisputed testimony, are insufficient to sustain the verdict and judgment. In interpreting the facts in the instant case the majority opinion, I think, ignores the fact that appellant failed to mark its pipe line so that those rightfully near it might know where it was; and that appellant also failed to notify the Highway Department and the appellee herein of the whereabouts of the pipe line. It knew where its line was, but its deed to the easement for the pipe line did not designate what part of the forty-acre tract it passed through so that others might know from reading it. According to the testimony, it had a line-walker, who passed up and down the line often to ascertain its condition, and who must have seen appellee and his employees working near the pipe line with a large steam shovel that dug into the earth deeper than the pipe line had been buried. Not only had the county court condemned the right-of-way and turned it over to the Highway Department, which extended at least ten feet beyond appellant's pipe line, but the State Engineer had staked off the boundaries of the highway thus condemned. This pipe-line walker must have known that the pipe line was within the right-of-way as staked off by the State Highway Engineer. There can be no question that, had the Highway Department known where the pipe line was and had notified appellant to bury it deeper in the earth, it would have been compelled to do so. This being the case, its right to use the surface was

subservient to that of the Highway Department. It could place its pipe deeper in the earth and accomplish the same purpose as where it was. The highway had to use the dirt on the surface to a depth below where the pipe line was buried to fill in the roadbed. I think the burden rested upon appellant to notify the Highway Department and appellee that its line was within the condemned right-of-way for highway purposes, and, after giving the notice, it was incumbent upon it, under the law, to bury the pipe deeper, if necessary. The majority opinion placed the burden of notice upon appellee and the Highway Department, when neither knew where the pipe line was, and when appellant did know its whereabouts, and that it was within the highway boundary as condemned and staked off. Although the facts are somewhat different in the McWilliams case, yet they are no stronger than the facts in the instant case when viewed most favorably to appellee.

For the reasons given I think the judgment of the circuit court should be affirmed.

GANNER *v.* GANNER.

Opinion delivered December 3, 1928.

Wallace Bourland and *Cravens & Cravens,* for appellant.

Pryor, Miles & Pryor, for appellee.

SMITH, J. Appellant brought this suit for divorce from appellee, his wife, on the ground of desertion. Appellee filed an answer, denying that she had deserted

appellant, but alleged in a cross-complaint that appellant had deserted her, and upon these allegations she prayed a divorce and permanent alimony.

The court dismissed the complaint of appellant for want of equity, and granted the prayer of appellee for a divorce upon the ground of desertion, and ordered appellant to pay appellee $75 per month as alimony, and also a fee for her attorney, and this appeal is from that decree.

The parties were married in January, 1918, and were finally separated in February, 1927, but, prior to the last-named date, they had lived apart for varying intervals. When the parties first began to live apart there was probably no thought on the part of either that a permanent separation would finally result.

Appellant was employed by the American Railway Express Company, and his duties resulted in his frequent transfer from one city to another. After the marriage, the parties lived with appellant's parents for about three weeks, when they moved to the home of appellee's parents in Russellville, and lived there until appellant was transferred to Fort Smith, where they lived until May, 1919, when appellant was transferred to Newport, where he was stationed for nine months. Appellee did not accompany appellant to Newport, and the testimony is conflicting as to why she did not do so, the testimony on the part of appellant being to the effect that appellee's parents would not permit her to leave their home to go to Newport, while that on the part of appellee was to the effect that she remained in Russellville in accordance with their understanding, as appellant had made no provision for her going to Newport, but, during the time appellant was stationed at Newport, he spent the Saturdays and Sundays in Russellville with appellee.

Appellant was again transferred to Fort Smith, where he bought a home, but this was later sold. The testimony is sharply conflicting as to why the home was sold. Appellant's version of the sale is that the house was sold because appellee did not want to keep house,

while appellee says the house was sold because it was thought that boarding would be less expensive.

There was testimony on the part of appellant to the effect that appellee had deserted appellant by refusing to live in Fort Smith, while that on appellee's behalf is to the effect that appellant grew tired of the bonds of matrimony, and had so advised appellee. There is certain corroboration of the testimony of each of the parties, which we do not set out, as no useful purpose would be served by so doing.

Appellee testified that, about Christmas, 1926, appellant asked her if she would not come to Fort Smith to live, and she said that she certainly would. Appellant spent the Christmas holidays with appellee, and during that time she asked him when he wanted her to go to Fort Smith. Appellant said "In a few days," and left. A few days later appellant returned, and she renewed her inquiry, and appellant said that he would advise her. Appellant returned to Fort Smith, and appellee wrote him three letters, asking when he wanted her to come, but these letters were not answered. One of the letters was answered, but not this question. Receiving no answer, appellee went to Fort Smith, and appellant said to her, "I certainly think you had your nerve to come." On this occasion appellant told appellee he was tired of married life, and offered her $500 to get a divorce. He carried her to the depot, gave her $10, and she had never heard directly from him since.

Appellant denied having told appellee that he was tired of married life, and testified that he wanted her to live with him in Fort Smith, but he admits that he did not ask her to do so.

Without further review of the conflicting testimony, we announce our conclusion to be that the case is similar to that of *Rigsby* v. *Rigsby,* 82 Ark. 278, 101 S. W. 727, and is controlled by it.

If the separation of these parties, which at first was probably intended to be temporary, was not brought about by appellant, it was, at least, assented to by him, and he did not thereafter write appellee to return, nor

did he in any manner indicate that it would be agreeable for her to do so; on the contrary, the testimony warranted the court in finding—as was found—that appellant repulsed the advances made by appellee in this respect. As this separation had continued for more than a year when this suit was brought, the court was warranted in finding that appellant had willfully deserted appellee for more than one year without reasonable cause, and that she is entitled to a divorce.

No complaint is made of the amount of the alimony allowed if appellee is entitled to a decree, and, as we think the finding of the chancellor is not against the preponderance of the evidence, the decree must be affirmed, and it is so ordered.

UNION INDEMNITY COMPANY *v.* COVINGTON.

Opinion delivered December 3, 1928.

Buzbee, Pugh & Harrison and *Ward & Caudle,* for appellant.

Richard M. Priddy, J. H. A. Baker, George F. Hartje, Robert Bailey, and *C. M. Wofford,* for appellee.

SMITH, J. The building committee of the Russellville Masonic Lodge, on behalf of the lodge, entered into a contract on September 10, 1926, with the T. P. Miller Construction Company, to erect a Masonic temple in the city of Russellville, and on September 27, 1926, a bond was executed by the construction company, with the Union Indemnity Company as surety, to the building committee as obligee, in the sum of $30,500, which recited the building contract, and obligated the contractor and the indemnity company to "save harmless the said obligee from any pecuniary loss resulting from the breach of any of its terms" on the part of the contractor, with the provision, however, that the bond was issued subject to the following conditions:

The bond was conditioned that no liability should attach to the surety unless, in the event of any default, the obligee should, within thirty days after being advised thereof, deliver written notice of the default to the surety. The bond provided also that, in case of default, the surety should have the option to complete the contract, in which event the surety should be subrogated "to all the rights and properties of the principal arising out of the contract, including all deferred payments and retained percentage." It was also provided that "in no event shall the surety be liable to other than the obligee, or for a greater sum than the penalty of this bond, or be subjected to any suit, action or other proceeding thereon that is instituted later than the first day of August, 1927."

Notwithstanding the fact that the bond was executed September 27, 1926, it was not filed with the clerk of the

circuit court of the county in which Russellville is situated until May 18, 1927.

On May 11, 1927, the Twin City Brick & Tile Company filed a claim for a lien for material furnished against the temple building, and suit was brought to enforce this lien on October 30, 1927. The surety company was not made a party to this suit.

On September 3, 1927, Willie T. Covington brought suit against the building committee and the surety company, praying judgment for the amount of certain material used in the construction of the building. This suit was for putting on the roof, which was completed about March 1, 1927.

The suit of the brick company, praying a lien against the building, and that of Covington, praying judgment against the surety company, were consolidated, and several material furnishers intervened in the consolidated case and were made parties thereto. Certain of these interveners filed their accounts with the clerk of the circuit court as required, and within the time limited by § 6922, C. & M. Digest, and, upon the assumption that the bond of the surety company was a statutory bond, inuring to the benefit of all persons who had furnished material or performed labor on the building, they prayed judgment for the amount of their respective demands. Other interveners, who did not within ninety days file their accounts with the clerk of the circuit court, prayed judgment upon their interventions filed after the expiration of that time against the surety company, upon the theory that the bond had been executed pursuant to § 6915, C. & M. Digest, and that suit might be brought upon the bond at any time within six months after the completion of the building.

A member of the building committee testified that the building was completed, so far as the contractor was concerned, on July 25, 1927, although some work was done after that date.

The court below decreed that, inasmuch as the brick company had proceeded to enforce and foreclose its lien

before the bond of the surety company had been filed with the clerk of the circuit court as the statute required, its right to a lien became fixed, and was not displaced by the subsequent filing of the bond, but that, after the filing of the bond, the right to foreclose a lien ceased, and the material furnishers and laborers, except the brick company, were relegated to a suit on the bond of the surety company, and upon this theory rendered judgment against the contractor and the surety company for the amount of all claims except that of the brick company.

The surety company has perfected an appeal, and the Masonic lodge has prayed and perfected a cross-appeal.

It is necessary, first, to determine the character of the bond executed by the surety company. It is insisted that it was executed under § 6915, C. & M. Digest, and that any cause of action arising under it could have been sued on at any time within six months after the completion of the building, and that the filing of this bond displaced the right of the plaintiffs and interveners in this suit to assert a lien against the building, and that the plaintiff brick company should have sued on this bond, and that the others properly did so. We are of the opinion, however, that the bond is not a statutory bond, and, if it were, the applicable statute is not § 6915, C. & M. Digest, but is § 6912, C. & M. Digest.

Act 446 of the Acts of 1911 (Acts 1911, page 462) contains three sections relating to the execution of a bond by the principal contractor, whereby any building, etc., under construction may not be subject to the liens provided for in § 6906, C. & M. Digest. These sections of the act of 1911 became and are §§ 6912, 6913 and 6915, C. & M. Digest.

Section 6912 is applicable to buildings generally, that is, all buildings, etc., not covered by § 6913 or by § 6915, C. & M. Digest, and it has been held that, in cases where § 6912 is applicable, it is optional on the part of both the owner and the contractor to make a bond, that is, it is a matter of contract between the owner and the

contractor as to whether a bond shall be executed or not. *Stewart-McGehee Construction Co.* v. *Brewster,* 171 Ark. 200, 284 S. W. 53. And it has been held that, if no bond is given, the laborer or material furnisher must comply with § 6922, C. & M. Digest, by filing a verified account with the clerk of the circuit court; but, where the bond is given, the person who, in the absence of the bond, would have a lien, might sue on the bond without complying with § 6922, C. & M. Digest. But the beneficiaries under the statute who do not comply with § 6922, C. & M. Digest, must institute suit on the bond before the time has expired for establishing liens, which, as was said in the case of *Acme Brick Co.* v. *Swim,* 168 Ark. 185, 269 S. W. 369, is within ninety days after the last item of material was furnished or work done. See also *Stewart-McGehee Construction Co.* v. *Brewster, supra.* If § 6922, C. & M. Digest, is complied with, suit may be brought on the bond at any time within fifteen months. Section 6913, C. & M. Digest, relates to public buildings, and it, of course, does not apply here.

Section 6915, C. & M. Digest, relates to the building or repair of "any church, hospital, orphanage or charitable institution or benevolent institution," and there is no testimony in the present record showing it to be such.

There is certainly no presumption that the temple or building of a fraternal organization is a benevolent or charitable institution, and there is no testimony here to that effect. If it were, suit might be brought on the statutory bond covering its construction at any time within six months after the completion of the building. Section 6916, C. & M. Digest.

We conclude therefore that, if the contractor's bond upon which the indemnity company became surety were a statutory bond, the applicable statute is § 6912, C. & M. Digest, and, as we have seen, suit on this bond must be brought within ninety days after the material has been furnished or the work done by those who do not comply with § 6922, C. & M. Digest.

The suit of the brick company was brought within that time, and was brought, not upon the bond, but to foreclose the statutory lien, and we think the court properly granted the relief prayed.

We are of the opinion, however, that the court was in error in rendering judgment against the surety company in favor of other material furnishers, for the reason that the bond was not a statutory one, and was executed for the sole benefit of the Masonic lodge.

It was held in the case of *Mansfield Lbr. Co.* v. *National Surety Co.,* 176 Ark. 1035, 5 S. W. (2d) 294, that a bond given by a contractor, binding him and his surety to indemnify the owner against claims for labor and material, which was not filed with and approved by the clerk of the circuit court as required by the statute, was not a statutory bond, but that, even though it were not a statutory bond, if its obligations were broad enough to cover the demands of persons having contracts for labor or material, such persons might sue on the bond for the amount of their demands. Here the bond, though dated September 27, 1926, was not filed with the clerk until May 18, 1927, and was not even then approved by the clerk.

Contrary to the provisions of the statute that the statutory bond shall be for the benefit of all material furnishers, etc., the bond here sued on recites "that in no event shall the surety be liable to other than the obligee, or for a greater sum than the penalty of the bond, or be subjected to any suit, action or other proceeding thereon that is instituted later than the 1st day of August, 1927." This limitation as to the time within which suit may be brought is contrary to the statute.

It was held in the case of *Union Indemnity Co.* v. *Forgey & Hamson,* 174 Ark. 1114, 229 S. W. 1032, that naming the commissioners of a drainage district as the obligee in a bond, instead of the State of Arkansas, and making the bond in a less sum than the statute required, did not prevent the bond from being a statutory one, where it had been executed under a statute requiring the execution of a bond and in attempted compliance with the statute.

But we cannot construe the bond here sued on to be a statutory bond, when its obligations expressly negative that construction. This is not a case where the bond contains conflicting obligations; on the contrary, there is nothing in the bond to indicate that its protection inures to any one except the obligee, the Masonic lodge, and the recital is express that the surety shall be liable only to the obligee. We may construe contracts, but we have no right to make them, and we must therefore hold that the bond protects only the Masonic lodge, and the court was therefore in error in rendering judgment in favor of any of the interveners on the bond, and that judgment will be reversed and the interventions dismissed as to the surety company. *Wallace Equipment Co.* v. *Graves,* 132 Wash. 141, 231 Pac. 458; *Massachusetts Bonding & Ins. Co.* v. *Hoffman,* 34 Ga. App. 565, 130 S. E. 375. See also *City of Erie, to use of Schafer,* v. *Diefendorf,* 278 Pa. 31, 122 Atl. 159.

We think, however, that those laborers and material furnishers who complied with § 6922, C. & M. Digest, should have liens declared in their favor. It is true they did not pray this relief, but did pray judgments against the bond. However, this prayer was upon the assumption that the filing of the bond had displaced the liens. The lodge was a party to the proceeding, in which the amount and validity of these demands were adjudged, and the court, instead of awarding judgments on the bond, should have declared liens on the building.

It appears that the building committee has on hand six thousand dollars which would be due the construction contractor (against whom judgment was rendered by default, and who has not appealed) had the building been constructed and completed according to the contract. This sum will be prorated and credited to the claims of those laborers and material furnishers who are entitled to liens under this opinion, and liens will be declared upon the building for the balance, to be enforced in the manner provided by law, and the cause will be remanded, with directions to enter a decree in accordance with this opinion.

SMITH *v.* UNION COUNTY.

Opinion delivered December 3, 1928.

Allyn Smith, for appellant.

HUMPHREYS, J. Appellant filed petitions in the county court of Union County, in the years 1926 and 1927, to be relieved from the payment of his personal property tax in Union County, which was assessed to him in said county over his protest. He based his petitions for relief upon the ground that he had assessed and paid taxes upon the same property in Baxter County for both years, alleging that he was a resident of the latter county within the meaning and intent of § 9890 of Crawford & Moses' Digest, which is as follows:

"Every person of full age and sound mind shall list the real property of which he is the owner, situated in the county in which he resides, the personal property of which he is the owner, and all money in his possession; and he shall list all moneys invested, loaned or otherwise controlled by him, whether for himself or as agent, attorney, or on account of any other person or persons, companies or corporations whatsoever, and all moneys deposited, subject to his order, check or draft, and credits due from or owing by any person or persons, body corporate or politic, whether in or out of said county or State."

On a hearing each petition was denied, from which appeals were taken to the circuit court, the first appeal being filed November 8, 1926, and the second on November 14, 1927.

In the circuit court the cases were consolidated and tried on the 12th day of March, 1928, resulting in an affirmance of the judgments of the county court denying the petitions, from which is this appeal.

The facts reflected by the record are as follows: Appellant established a home at Cotter, Baxter County, in 1906, in which he and his mother actually lived until her death in January, 1922. Immediately after her death he opened a law office in connection with Sizer & Gardner in Monett, Missouri. He left his home and law office in Cotter furnished, locked, and unrented, when he went to Monett. He made his personal property returns for that year in Baxter County, Arkansas, and returned to Cotter to cast his vote. He later severed his connection with Sizer & Gardner, and returned to Cotter on account of ill health, where he actually occupied his home and office for a period of eighteen months, assessing and paying taxes on all his personal property in Baxter County. In December, 1924, he went to Smackover, in Union County, and opened a law office, leaving his home and law office in Cotter furnished just as it had been, locked, and unrented. In 1925 he assessed all his personal property and paid his taxes, including his poll tax, in Baxter County. In June, 1925, he purchased a lot in Smackover, and built a law office. In September of that year he shipped his Arkansas Reports and some of his office furniture to his office in Smackover, leaving a desk and most of his office furniture and library in his office at Cotter. In 1926 he assessed all his personal property, including the property he had shipped to Smackover, and paid taxes thereon, including his poll tax, in Baxter County. He returned to Cotter to cast his vote at each election since he opened his office in Smackover. In 1925 and 1926 the assessor of Union County, over the protest of appellant, assessed the personal property he had moved to his office in Smackover from Cotter. Occasionally he returned to Cotter, and during the time he was there he would actually occupy his home and office, and he and his daughter, who teaches school in Kansas City, spend a part of each summer in

Cotter, at which time they actually occupy the home and he actually occupies his office. At all other times the home and office remain furnished, locked, and unrented, since opening his office in Smackover. He does a general practice at Smackover, and has been there constantly, except when he went away on business and such time as he spent with his daughter in Cotter during the summer months. He has always claimed Cotter as his home.

In the case of *Crone* v. *Cooper,* 43 Ark. 547, after reviewing many cases discussing the meaning of residence, domicile and citizenship, we said: "We may conclude from the cases that, in contemplation of the attachment laws, residence implies an established abode, fixed permanently for a time for business or other purpose, although there may be an understanding existing all the while to return at some time or other to the principal domicile; but so difficult is it found to provide a definition to meet all the varying phases of circumstances that the determination of this question may present, that the courts say that, subject to the general rule, each case must be decided on its own state of facts." In the case referred to the court ruled that, notwithstanding the fact that the debtor had a home or domicile in St. Louis, Missouri, yet he was a resident of Walnut Ridge, in this State, where he spent about three-fourths of his time, conducting a partnership contract business in connection with his partner, Oppenheimer. In that case his family actually resided in St. Louis, and the debtor was in the habit of speaking of St. Louis as his home. According to the facts in the instant case, appellant spent most of his time in Smackover in the practice of his profession, and actually lived there, from the time he opened his office, instead of at Cotter, where he maintained a closed, unrented and unfurnished home and office. Residence, as used in § 9890, Crawford & Moses' Digest, means the place of actual abode, and not an established domicile or home to which one expects to return and occupy at some future time. We think the construction placed upon the

word "residence" under the attachment laws of this State should be placed upon the same word under the taxing laws of the State.

No error appearing, the judgment is affirmed.

GREAT SOUTHERN FRATERNAL UNION *v.* EWING.

Opinion delivered December 3, 1928.

Frank B. Pittard and *John H. Quidor,* for appellant.

Philip McNemer, for appellee.

HUMPHREYS, J. This suit was instituted by appellees against appellant, in the Third Division of the Pulaski Circuit Court, to recover $300 upon a life insurance policy issued by appellant to their father, who died on November 24, 1925. in which they were named as beneficiaries.

Appellant filed an answer to the complaint, interposing the defense that appellees' father, the insured, committed suicide, which was an excepted risk under the terms of the policy.

The cause, by agreement, was submitted to the trial court sitting as a jury, resulting in a verdict and consequent judgment against appellant, from which is this appeal.

Appellant's sole contention for a reversal of the judgment is that the undisputed testimony, and the only reasonable inferences that might be drawn therefrom, overcame the presumption that the law indulges against a person taking his life with his own hands. The rule of presumption against suicide was succinctly stated in the case of *Grand Lodge of A. O. U. W.* v. *Bannister,* 80 Ark. 190, 96 S. W. 742, in the following language:

"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."

The record reflects, according to the undisputed testimony, that Lem Briggs, the insured, was living with his daughter, the appellee, and that during her absence, not to exceed ten minutes, her father was shot in the abdomen. Appellee had left her father alone in the house, and gone for a few minutes to the home of her mother-in-law, who lived a block away. Upon her return she found her father, who had been shot, in a semi-conscious condition, sitting in a rocking-chair, with his eyes partially shut. There was a burnt place in his clothing where the bullet had entered his body on the left side. Appellee tried to talk to him, but he made no statement to her then, nor afterwards in the hospital where he was taken for treatment, and where he died. No pistol or gun was found in the house where the insured was shot. Appellee met no one coming from the house as she returned after her short visit to her mother-in-law.

R. F. Montague, who resided near appellee at the time her father was shot, testified that he went over to

her home to offer his assistance, and heard an old woman by the name of Ewing talking to the insured, and heard him say to her, "I did it myself."

The record reflects that appellee stated to several parties that her father committed suicide, but she denied making the statements, so this issue of fact was not undisputed.

The undisputed facts detailed above are insufficient to overcome the presumption of law against suicide. The rule relative to the presumption against suicide announced by this court plainly states that such presumption cannot be overcome by simply showing that the death of an insured was self-inflicted. The shot may have been an accidental one, and the presumption is that it was, unless shown that it was purposely fired. If the language used by the insured to the Ewing woman had reference to the wound, the statement failed to disclose whether he fired the shot accidentally or purposely. The burden rested upon appellant to show that the shot was purposely fired by the insured. As the undisputed proof did not show that the shot was intentionally fired by the insured into his body, it became a question of fact for determination by the jury. The test as to when the facts are sufficiently disputed to become an issue for the jury was correctly stated in the case of *Industrial Mutual Indemnity Co.* v. *Watt,* 95 Ark. 456, 130 S. W. 532, and is as follows:

"If reasonable men, viewing the facts, which are undisputed, might come to different conclusions as to whether the deceased committed suicide, then the facts, although undisputed, were properly submitted to the jury."

No error appearing, the judgment is affirmed.

SALZER CHEVROLET COMPANY *v.* GENERAL MOTORS ACCEPTANCE CORPORATION.

Opinion delivered December 3, 1928.

Allyn Smith, for appellant.

Barber & Henry, Troy Lewis and *Clayton Freeman,* for appellee.

KIRBY, J. Appellee brought this suit in the Pulaski Circuit Court, as a holder in due course of a contract note executed by David Connor, to recover $360 balance due of the unpaid purchase price of a Chevrolet truck sold to him on the usual sales agreement by the Smackover Chevrolet Company.

Connor denied the indebtedness on the note, and alleged that he had been released by the Smackover Chevrolet Company and its successors, by disposition of the truck to a third party with the consent of the sellers. Thereupon appellee amended its complaint, setting up the written agreement, under which it was alleged appel-

lant had become liable upon its indorsement of the Connor paper, and appellant company, successors to the Smackover Chevrolet Company, was brought in by proper service. The appellant company demurred generally, and specially to the amended complaint, and, the demurrer being overruled, answered, denying liability and that Connor had been released by it or its predecessors from his obligation.

It appears from the testimony that the predecessors of appellant company sold the truck to David Connor, in Union County, on a regular automobile title-retaining sales contract, and thereafter sold and indorsed the note and contract to the appellee company, and it is not denied that appellant company, successors to the selling company, takes its place in liability upon the contract of sale and indorsement made by its predecessors. This contract provides that "dealer is not protected against loss resulting from conversion, confiscation and collusion, under the following circumstances: (h), where any settlement is made by the dealer with the purchaser without the consent of General Motors Acceptance Corporation." After the car had been sold and the contract and note had been transferred to the appellee, Connor was allowed to sell the automobile to a third person, and he claimed release from all obligation under his contract, which was to be performed by the purchaser. This purchaser removed the automobile from the State, and it has never been found. The appellee company finally located Connor in Pulaski County, and brought suit against him for the balance of the unpaid purchase price of the truck. Connor answered, alleging he had been released by the selling company and its successor, and the complaint was amended to include the appellant company as successor to the selling company as a defendant.

There was testimony tending to show that the appellant company had released Connor from his contract of purchase, and permitted the delivery of the truck to Corn, to whom Connor, being unable to pay, had sold it, upon payment by him of a $10 fee for covering the costs of

transfer. This was denied by Salzer, of appellant company, and no contention was made that appellee, holder of the note and sales contract, had consented to or been informed of the transfer and delivery of the truck to Corn, who disappeared with it. The court instructed the jury to return a verdict for appellee against Connor, and, under instructions not objected to, the jury returned a verdict against appellant company, who alone appealed.

The appellant company could not release the purchaser of the truck from payment of the note given for the balance of the purchase money thereof and duly transferred to appellee, nor, so far as appellee was concerned, escape liability under its contract by permitting the transfer of the truck by the purchaser to a third person, without the consent of or information to the holder of the purchase money note and sales contract retaining the title thereto. The court did not err therefore in directing a verdict against Connor for the balance due on the note for the unpaid purchase money of the truck. This is true, even though it be conceded that Connor might otherwise have been relieved from liability to the selling company on account of its agreement about the transfer and sale of the truck to Corn, the third person. The question of whether appellant company had released Connor from the performance of the contract by allowing the sale and delivery of the truck to Corn, so far as concerns the parties, and would have amounted to a settlement with the seller of the truck and its conversion within the meaning of the contract between the appellee and the selling company, was submitted to the jury under instructions unobjected to, and, there being substantial testimony in support of its finding, the judgment will not be disturbed on appeal. *Harris* v. *Bush,* 129 Ark. 269, 196 S. W. 471.

Appellee had the right to bring the suit against Connor in Pulaski County, where he was found, this action being transitory, and also to maintain the suit against the appellant company, summoned in another county, upon its liability under its contract of sale and indorsement of the Connor note for the unpaid purchase money

and contract of purchase of the truck, having obtained judgment in the Pulaski Circuit Court against Connor. Section 1178, C. & M. Digest.

The appellant company, having answered after its demurrer was overruled, waived all the grounds thereof, except as to the jurisdiction of the court and the sufficiency of the complaint, and no error was committed in overruling the demurrer. We find no error in the record, and the judgment is affirmed.

SPECK *v.* DODSON.

Opinion delivered December 3, 1928.

Bruce Ivy and *J. T. Coston,* for appellant.

Aaron McMullin, R. H. Dudley and *J. F. Gautney,* for appellee.

KIRBY, J. Appellee brought this suit against appellant, administrator, and the unknown heirs of Tom Mor-

ris, deceased, claiming ownership of the real and personal property belonging to Morris at the time of his death; alleging that in 1901 Morris, who was growing old and feeble, and who was the husband of his aunt, induced the plaintiff to change his residence from Mississippi and come to Arkansas and live with him, under the promise and agreement that, if appellee would do this, and take care of and assist in supporting and caring for Morris and his wife, appellee's aunt, he, Morris, would give him all the property that he might own at the time of his death. That appellee accepted the proposition, and moved to Arkansas, and continued to reside with and care for Morris and his wife during their lives. In 1902 Morris bought the land in controversy, then wild and unimproved, and moved on it in 1903. Appellee moved with the family, cleared and hired the land cleared and put in cultivation, and, during the time, taught school, and used his earnings for paying for clearing and putting the land in cultivation. That Morris died September 6, 1926, without issue and without heirs, after the death of his wife in May, 1926. The land was mortgaged to the Southern Loan and Abstract Company for $750, and part of the mortgage remained unpaid. Prayed that appellee be decreed to be the owner of the real and personal property of the estate, subject to the mortgage indebtedness, and that his title thereto be quieted as against said administrator and the unknown heirs of Morris. Also prayed an injunction to prevent the administrator from interfering with appellee in his possession of the property. An attorney was appointed to represent the unknown heirs. Appellant, administrator, answered, denying the allegations of the complaint.

The testimony is rather voluminous, and it is unnecessary to review it at length, but we find, after careful consideration, that it clearly establishes the fact that appellee went to live with his uncle, Tom Morris, the husband of his aunt, under an agreement that he would give him, in consideration of his living with them and taking care of himself and wife during their lifetime, all the property

which he owned at the time of his death; that appellee moved from his home in Mississippi to Arkansas, and took up his residence with Morris, and continued to live with and care for him and his wife throughout the remainder of their lives; that the land in controversy was purchased by Morris in 1902, was wild and unimproved at the time; that he moved with Morris from where he had been taking care of them on to this land, in 1903, and cleared and hired the land put in cultivation, teaching school part of the time, and using his earnings in paying for the improvements. Appellee married in 1912, and Morris told him to put his house wherever he wanted it, and to clear the land on the other side of the bayou, which was his.

Appellee testified that he was 50 years old; had resided in Mississippi County for 25 years; that Ester Morris, Tom Morris' wife, was his mother's sister, and he had known them all his life. That he had, at the invitation of Morris, come to Arkansas, after the death of his mother, and that Morris said to him, "We are old folks," and, "Seems like you might come and stay with us and live with us—we got no children, no one to take care of us, and we want you to live with us"; and "If you will come, what is around us is yours; * * * we have no one else to have it." Morris had no kin people living. He stated that he married in 1912, and had lived with Morris and wife for eleven years before that. He taught school, attended to the stock, and did the cooking lots of times when they were ill. He looked after them, and after he was married his wife was with them every day, giving them care and attention, and during the latter part of their lives gave up his home and lived with them. He spent his own money in clearing the land, and after his marriage he paid rent to Morris, because that was all he had to live on. That he did not know that appellant was appointed administrator until after his appointment, and the personal property taken into possession by the administrator was worth four or five hundred dollars.

Many witnesses testified that Morris had told them that he had no heirs or kinfolks, and that Lewis Dodson, who had lived with and taken care of him and his wife, would get what property he had after his death. One witness said: "Dodson looked after Morris and wife as though they had been his father and mother, waited on them like they were children, and his wife was there all the time, and he was there before he went to school and after school was out."

From a decree for specific performance and quieting the title to the lands in appellee, this appeal is prosecuted.

Appellant insists that the decree is contrary to the weight of the evidence, but we cannot agree with this contention. The evidence is virtually undisputed that appellee came from another State to live with Tom Morris and his wife, aunt of appellee, at their invitation, and under an agreement that he should have what property they owned at the time of their death, and, pursuant to the contract and agreement, did live with, take care of and help support them throughout their lives. See *Williams* v. *Williams,* 128 Ark. 1, 193 S. W. 82.

It is true the witnesses for the defendant testified that Tom Morris had said to some of them that appellee was a relation of his wife, and, as he had no other heirs, he would inherit the property at his death, and one of the witnesses testified that when he asked "Uncle Tom," shortly before his death, what was going to become of his property, he replied "that Lewis thought he was going to get it, but he would show him about that;" and also that he had paid some rents on the land during the last years of Morris' life. He explained this fact, however, by saying that the rent was paid in order that Morris might have money enough to live on, as he had no means of support, except what was furnished by appellee under his agreement. There was nothing inconsistent in his payment of rent, under the circumstances, with appellee's claim of being entitled to the property under his oral contract for taking care of and supporting the decedent to

the time of his death. The property did not belong to appellee, nor was it agreed it should become his property until the death of Morris, the owner, whom he was bound to take care of during his life. The case is unlike *Walker* v. *Eller, ante,* p. 183.

Appellee, having performed his contract, was entitled, after decedent's death, to enforce the agreement, notwithstanding the same was orally made. *Hinkle* v. *Hinkle,* 55 Ark. 583, 18 S. W. 1049; *Fred* v. *Asbury,* 105 Ark. 494, 152 S. W. 155; *Williams* v. *Williams, supra.*

There being no error in the record, the decree is affirmed.

HENDERSON COMPANY *v.* WEBSTER.

Opinion delivered December 3, 1928.

W. J. Goodwin, for appellant.

T. O. Abbott, for appellee.

MEHAFFY, J. The Henderson Company is engaged in the manufacture of casinghead gasoline from natural gas, in Union County, Arkansas.

The appellee, N. L. Webster, is the executor of the estate of E. M. Telle, who was a broker, handling gasoline, oil and its by-products, purchasing the same in the

local field, and selling to various persons over the States. Telle committed suicide in Little Rock, on the 12th day of January, 1927. Prior to that time he had purchased large quantities of gasoline from appellant over a period of years, and at the time of his death he was indebted to appellant in the sum of approximately $12,000. Appellant was continuing to sell to him on credit, and, a day or two before Telle's death, the Henderson Company received an order for a certain lot of casinghead gasoline.

On the day of Telle's death, Webster, who operated Telle's office, ordered some gasoline from the Henderson Company. It was loaded out and delivered, and the Henderson Company gave the railroad company a stop order. The Telle Company had not only received the gasoline, but had unloaded a part of it, and, after receiving the order to stop the shipment, the railroad company went to get the car, and the Telle Company replaced a portion of the gasoline with a cheaper grade, and permitted the car to go back to the Henderson Company. The Henderson Company presented its account to the administrator for something more than $12,000, but the account presented did not include the price of the gasoline in the car delivered the day of Telle's death.

The administrator brought suit for the car on the ground that the gasoline had been delivered to the Telle Company, and retaken by the Henderson Company without authority. The case was tried in the circuit court, and a jury returned a verdict for $883.58 against the appellant. The case is here on appeal.

The undisputed proof shows that Telle died on January 12, 1927, but that the news of his death did not reach El Dorado until about 5 o'clock on that day. About 8 o'clock the agent of the Henderson Company went to Telle's refinery, and found the car in litigation on Telle's loading track, with approximately one-half of its contents unloaded. Henderson Company's agent instructed some of the men at the plant not to unload any more of the contents of the car. But, in order to blend another car of gasoline for which Telle's plant had an order, a

product from Telle's plant was run into the Henderson Company car, and the railroad company, acting under orders of the Henderson Company, removed the car with its contents from Telle's plant, and this suit is to recover from the appellant the value of the contents of said car. The railroad company went to Telle's track the next morning after Telle's death and removed the car back to the appellant company's track. The bill of lading had never been delivered.

The evidence does not show the exact date that the car was put on the Telle track. That is, does not show the hour; it was on the 12th day of January, probably about 4:30 o'clock. This was before news of Telle's death had been received.

After the evidence was introduced, appellant requested the court to instruct the jury to return a verdict for the defendant. This request was refused, and proper exceptions saved. The court, however, instructed the jury that the burden of proof was upon appellee, and that, if the jury found from a preponderance of the evidence that the appellant sold and delivered to Telle, during his lifetime, a carload of casinghead gasoline, and that it was delivered to Telle during his lifetime, and that the delivery had already been made before his death, and that he was due and indebted to the Henderson Company for said gasoline before his death, it should then find for the plaintiff, unless the jury found there had been an accord and satisfaction of the matter subsequent to the sale and delivery.

It will be seen from this instruction, the substance of which is set out above, that the jury could not find a verdict for appellee unless it found that the car had been delivered to Telle before his death. And the jury was further instructed, in substance, that, unless they did find from a preponderance of the evidence that the car was sold and delivered during Telle's lifetime, their verdict should be for appellant.

The court also instructed the jury specifically on the question of accord and satisfaction. It is true that the

court instructed the jury that a delivery to the carrier was a delivery to the consignee, but still they must find that this was done in the lifetime of Telle, and the jury could not find for appellee unless it found there was an actual delivery of the car during Telle's lifetime.

As we have already said, the proof shows that it was delivered to appellee, or to Telle, and about one-half of the contents removed before the railroad company notified the Telle Company about any order of stoppage *in transitu.*

The first contention of appellant is that a verdict should have been instructed for it, because of its right to stoppage *in transitu.*

"The right of stoppage *in transitu* may be exercised by a seller at any time because of the insolvency of the buyer before the goods came to the possession of the buyer. Any effort to stop after they came to the possession of the buyer would not be stoppage *in transitu,* and a retaking of the goods after they had been delivered to the buyer, of course, would not be the exercise of the right of stoppage *in transitu.* It has been said that the right of stoppage *in transitu* is an extension of the right to a lien for the price anterior to the actual delivery, which lien the seller can enforce by seizing the goods in the possession of a carrier at any time prior to actual delivery into the possession of the buyer." *Wills* v. *Glenwood Cotton Mills,* 200 Fed. 301.

"The death of the buyer during the transit, if his estate is insolvent, does not terminate the seller's right of stoppage, but, if the goods are delivered by the carrier to the administrator, the right is thereby terminated, because the transit is duly ended by such delivery. Where the goods sold on credit are in the custody of a warehouseman or wharfinger, such custody is looked on as of the nature of a transit, and the seller's right to stop delivery to the buyer has been upheld." 24 R. C. L. 131.

The proof in this case shows that the goods were delivered during the lifetime of the buyer, and the jury was directed to find against the appellee, unless the proof

showed that they were delivered during his lifetime. But, if the goods had been delivered to the administrator, the right would have been terminated, and could not thereafter be exercised by the seller, because, as the authorities say, the transit is duly ended by such delivery. These goods were not in the custody of a warehouseman or wharfinger. They were in the custody of the buyer himself, delivered to him, and the car partly unloaded. It is also true that, while insolvency gives the right of stoppage *in transitu,* the insolvency of the buyer must arise after the sale, or, if it existed at the time of the sale, it must appear that it was not discovered until afterwards by the seller.

The evidence in this case conclusively shows that the seller knew about the insolvency before the goods were purchased. We think it shows beyond any question that the goods were delivered prior to any attempt of the seller to exercise his right of stoppage *in transitu.* Of course it cannot be contended that goods are in transit after they have been delivered to the buyer, and the right of stoppage *in transitu* did not exist at the time that the appellant sought to exercise it, for the reason that the goods had already been delivered, and were not at the time in transit.

It is next contended by the appellant that, under § 1198 of Crawford & Moses' Digest, it had a right to offset any amount that it might owe as against the indebtedness existing on the part of the deceased to the appellant. The section referred to authorizes a set-off in suits by executors or administrators of debts against their testators or intestates and owing to the defendant at the time of his death. But it does not authorize one who has sold goods to a person to go to the place of business of the buyer and retake the property which has been delivered, and then, when sued for the value of the property so retaken, set-off debts due to the seller in an action of this kind. If that were true, any seller could go to the place of the business of a buyer, after the buyer's death, and repossess himself of property that had been sold, and

then, when sued for the value of the goods so taken, set-off a debt due from the deceased.

If the seller, after the death of the buyer, could retake property that had been delivered during the lifetime of the buyer on the same day, he could retake it the next day, or the next month, or any time thereafter before the statute of limitations prevented it.

These are the only questions raised by appellant in its brief, and the trial court properly submitted every question raised by appellant to the jury. The jury was fully instructed, not only on the question of stoppage *in transitu* or the time of delivery, but also with reference to accord and satisfaction.

The verdict of the jury is supported by substantial evidence; there is no error in the instructions of the court, and the judgment is therefore affirmed.

CHAMBLESS *v.* GENTRY.

Opinion delivered December 3, 1928.

O. A. Graves, for appellant.

Wm. S. Atkins, for appellee.

MEHAFFY, J. U. A. Gentry, as executor of the estate of J. E. Chambless, deceased, brought this suit against Ida Chambless, widow of J. E. Chambless, deceased, alleging that J. E. Chambless died on the 25th day of May, 1926, leaving surviving him his widow, Mrs. Ida Chambless, and no children or direct descendants.

The will of J. E. Chambless, omitting the formal parts, is as follows:

"(1) I direct that all of my just debts shall be paid. (2) I give and devise to my wife, Ida Chambless, my homestead, legally described as the west half of the east half (W½E½) of the northeast quarter of the northwest quarter (NE¼NW¼) of section thirty-four (34), township twelve (12) south, range twenty-four (24) west, Hempstead County, Arkansas, with all household goods and personal property of every description and kind or used in connection with said homestead, and all moneys, credits and effects belonging to me that may be on deposit or otherwise in the possession of the First National Bank of Hope, Arkansas. (3) The devise first above mentioned to my wife shall not be in lieu of her dower right, but in addition thereto, and I therefore direct that all the rest and residue of my property, whether real, personal or mixed, shall be divided, one-half to my widow, and, having no children or their descendants, the other one-half to be distributed to my collateral heirs, in accordance with the laws of descent and distribution of the State of Arkansas. (4) If any person entitled to share in my estate at my decease, should be indebted to the estate, it is my will that said sum be deducted from the share that he, or she, would inherit, so that all of my heirs would be treated the same. (5) I appoint and constitute U. A. Gentry sole executor of this my will, and direct that no bond shall be required of him, and that no other action shall be had in the county or probate court

in relation to the settlement of said estate than the probating and recording of this my will, and the return of an inventory, appraisement and list of claims of said estate."

The only question in the case is whether the widow, who is the appellant, was entitled to one-half of the property other than that specifically given to her after paying the debts, or whether she was entitled to one-half of said property free from debts. The chancellor held that she was entitled to the property mentioned in paragraph two of the will, and that she was entitled to one-half of the residue of the property after deducting the debts. Paragraph two gives to the appellant the homestead, describing it, with all household goods and personal property of every description and kind or used in connection with said homestead, and all moneys, credits and effects belonging to the testator that may be on deposit or otherwise in the possession of the First National Bank of Hope, Arkansas. About this paragraph of the will there is no controversy. It is conceded that she takes this property.

In construing a will, it is always the object of the courts to ascertain the intention of the testator, as expressed in the instrument. And the first and most general rule of construction is that the intention which the will itself, either expressly or by implication, declares, shall prevail and be given effect.

"The will therefore, and meaning of the testator, ought before all things to be sought for diligently, and, being found, ought to be observed faithfully. And as to the sacred anchor ought the judge to cleave unto it, pondering not the words but the meaning of the testator. For, although no man be presumed to think otherwise than he speaketh, yet cannot every man utter all that he thinketh, and therefore are his words subject to his meaning. And as the mind is before the voice (for we conceive before we speak), so is it of greater power; for the voice is to the mind as the servant is to the lord." Sizer's Pritchard, Law of Wills and Executors, 2 ed., § 384.

"The cardinal rule in construing a will is to ascertain and declare the intention of the testator. That intention is to be gained from reading the entire will and construing it so as to give effect to every clause and provision therein, if this can be done." *Kelly* v. *Kelly,* 176 Ark. 548, 3 S. W. (2d) 305.

Again, this court said: "The purpose of all rules for the construction of wills is to ascertain and effectuate the intention of the testator; but these rules are ordinarily resorted to only where there are ambiguous, inconsistent or repugnant clauses." *Cavanaugh* v. *Madden,* 175 Ark. 236, 209 S. W. 1; *Hughes* v. *Strickland,* 174 Ark. 554, 295 S. W. 722; *Hollowoa* v. *Buck,* 174 Ark. 497, 296 S. W. 74.

It will be seen that, under our own decisions, as well as under the general law, the object of the courts is to ascertain the intention of the testator.

The third paragraph of the will is the provision about which there is a dispute, and it is this paragraph that the court is asked to construe. This paragraph provides:

"The devise first above mentioned to my wife shall not be in lieu of her dower right, but in addition thereto, and I therefore direct that all the rest and residue of my property, whether real, personal or mixed, shall be divided one-half to my widow, and, having no children or their descendants, the other one-half to be distributed to my collateral heirs in accordance with the laws of descent and distribution of the State of Arkansas."

It is expressly stated that the property given above is not in lieu of dower, but that it is in addition thereto. The testator then directs that all the rest and residue of his property shall be divided, etc. In other words, we think that the testator necessarily meant that she should have the property described in paragraph two of the will, and that she was entitled to dower in the rest of his property.

Under the provisions of § 3536 of Crawford & Moses' Digest the widow is entitled, as dower, to one-half of the entire estate of the deceased as against collateral heirs.

Section 3538 of Crawford & Moses' Digest provides that, if a husband devise and bequeath to his wife any portion of his real estate of which he died seized, it shall be deemed and taken in lieu of dower out of such estate of deceased's husband, unless such testator shall in his will declare otherwise.

In this case the testator declared otherwise; declared that this was not in lieu of dower. If there had been no will, she would have been entitled to dower, which, in this instance, would be one-half of the entire estate, and she would also be entitled to the homestead and other allowances provided in the statute.

This court has said: "When the widow elects not to take under the will, but under the law, without regard thereto, she takes as though no will had been executed and the husband had died intestate, and is accordingly entitled to dower, homestead, and the other allowances as provided in said sections of the Digest." *Jameson* v. *Jameson,* 117 Ark. 142, 173 S. W. 851; *Bell* v. *Altheimer,* 99 Ark. 527, 138 S. W. 993.

In the instant case the widow took under the will, but the property bequeathed to her in paragraph two was not in lieu of dower, and was evidently not intended in any way to diminish her dower rights. We think therefore that she took a dower interest in the residue after taking the specific property bequeathed to her in paragraph two. This was, we think, the intention of the testator.

If a testator makes two or more gifts to a person, the question frequently arises whether the second gift is intended to be instead of the first gift or in addition thereto. But in the instant case we have the clear, positive statement of the testator that it was not to be in lieu of, but the property bequeathed in paragraph two was in addition to, dower. If property is given in lieu of dower, this simply means an offer to the widow to accept the property under the will or to take dower. She may do either. But, where a testator makes a specific gift and expressly states that it is not in lieu of but in

addition to dower, unless there are expressions in the will that indicate the contrary, it will be presumed that the testator intended that the widow should have dower in the residue of the property. But it is said that, since there was a provision in the will for the payment of the debts, it was the intention of the testator to provide for the payment of the debts out of the residue and give the widow one-half after the payment of the debts. This, however, is in conflict with the idea expressed in the statute, that, as against collateral heirs, the widow is entitled to one-half of the property, and that the debts must be paid out of that portion of the property bequeathed to collateral heirs.

It is insisted by appellees, however, that the only construction that can be placed on the will and giving any force to paragraph one is the construction placed on the will by the chancellor. Paragraph one provided for the payment of all just debts. There is no conflict between that clause and paragraph three of the will as herein construed. Of course, if there were not sufficient property to pay the debts without taking a portion of her one-half, the creditors would be permitted to resort to that property. But, if the testator had simply provided that the widow should take under the statute of descent and distribution, that is, take what she was entitled to under the law, the fact that the first paragraph provided for the payment of debts would not affect her interest in any way. In other words, she would take one-half of the property freed from the debts if there was sufficient other property to pay the debts. She would take one-half of the entire property as against collateral heirs.

"Over and over again we have said that the rule in the construction of wills is to give effect to what appears to be the intention of the testator, in view of all other provisions of the will." *Cook* v. *Worthington,* 116 Ark. 328, 173 S. W. 395. See *Campbell* v. *Campbell,* 13 Ark. 513; *Cockrill* v. *Armstrong,* 31 Ark. 580; *Bloom* v. *Strauss,* 73 Ark. 58, 84 S. W. 511; *Parker* v. *Wilson,* 98 Ark. 561, 136 S. W. 981; *Booe* v. *Vinson,* 104 Ark. 439, 149 S. W.

524; *Galloway* v. *Darby,* 105 Ark. 558, 151 S. W. 1014, 44 L. R. A. (N. S.) 782, Ann. Cas. 1914D, 712; *Webb* v. *Webb,* 111 Ark. 54, 163 S. W. 1167.

It has been said that, if a gift is made to the testator's wife for the interest which the law had given her, and, in addition thereto, a given house for a limited time, the latter gift is cumulative to the first. In this instance the testator evidently intended to give the widow one-half of all his property other than that mentioned in paragraph two of the will, and to give her this in addition thereto, because he expressly states that the property specified in paragraph two is in addition to dower. And it makes no difference whether he gave her dower first and then the specific gift, or gave it as he did in this will. There is no conflict between any of the clauses of the will, and our conclusion is that, when the will is construed as a whole, it was the intention of the testator to give the widow dower in all his property, except that mentioned in paragraph two, and to give her that property in addition to dower.

Testator cannot deprive his creditors of property out of which they may enforce payment of their debts by disposing of it by will in a manner inconsistent with the rights of the creditors. But it is said that there is a conflict of authority where the question is presented where the testator has bequeathed property to his wife in lieu of her dower, and she has elected to accept such provision. It is not important in this case as to creditors, but the intention of the testator is important as between the widow and the collateral heirs. The testator meant that his debts should be paid. He had a right to determine the property that should be used to pay his debts, as long as he set aside enough property for the purpose of paying the debts.

In this case the appellant is the widow. The other beneficiaries are collateral heirs, and the question to be determined is, did the testator intend to give the widow one-half of the property and that the debts should be paid out of the one-half that went to the collateral heirs, or

did he intend that the debts should be paid out of the entire residue of the property and the wife then take one-half?

The fact that the widow was entitled to one-half of the entire property as dower as against collateral heirs, and the fact that the testator expressly stated that the property mentioned in paragraph two was in addition to dower and not in lieu thereof, evidences an intention to give the widow the property free from debts and that the debts and expenses of administration should be paid out of that portion of the estate that goes to the collateral heirs. This is the most natural and reasonable thing for him to do, and, as gathered from the entire will, we think his intention was to give the widow her dower free from the debts.

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

HART, C. J., (dissenting). I think that the majority opinion construes the will contrary to the expressed intention of the testator. In § 3 of the will he had in mind to leave his property in accordance with the provisions of § 3536 of Crawford & Moses' Digest, relating to dower where there are no children, and in addition to give his widow the homestead in fee instead of for life, and to give her absolutely his household goods and personal property used in connection with the house, and all his moneys in bank, absolutely, under the provisions of § 2 of the will, instead of a dower interest therein under the law.

MCHANEY, J., concurs in dissent.

AMERICAN INSURANCE COMPANY *v.* AUSTIN.

Opinion delivered December 3, 1928.

Lewis R. Featherstone and *McRae & Tompkins,* for appellant.

U. A. Gentry, Randolph P. Hamby and *Coleman & Riddick,* for appellee.

McHANEY, J. This is an action upon a fire insurance policy issued by appellant to appellee, dated the 15th day of February, 1926, insuring appellee's residence in the sum of $1,500 and his personal property located therein in the sum of $500, for a period of five years from the 13th day of February, 1926, to the 13th day of February, 1931, for the total premium of $162, payable $32.40 cash with the application, and $32.40 payable on the first day of February each and every year thereafter, for which a note was executed in the total sum of $129.60.

Appellant's local agent at Prescott, Arkansas, took appellee's application for the policy on the 12th day of February, 1926, and received the first year's premium

therefor on said date, together with the note for the sum aforesaid, payable as stated, and forwarded same to appellant's general agent at Memphis, Tennessee. The policy issued contained the following provisions:

"In consideration of $32.40 paid and the payment of installments when due on an installment note of $129.60 due and payable as follows: $32.40 on the 1st day of each February, 1927, 1928, 1929 and 1930 respectively, does insure," etc. * * * "No agent or employee of this company, or other person or persons, except an officer, or the Southern Farm Department manager, in writing, shall have power or authority to waive or alter any of the terms and conditions of this policy. * * * It is understood and expressly agreed that the company shall not be liable for any loss or damage that may occur to any property herein mentioned while any installment of the installment note given for premiums on this policy remains past due and unpaid," etc.

The installment note contained this provision: "And it is hereby agreed that, in case of nonpayment of either of the installments herein mentioned at maturity, this company shall not be liable for loss during such default, and the policy for which this note is given shall lapse until payment is made to the company at Memphis, Tennessee."

The policy contained this further provision: "This policy shall not be valid until countersigned by the duly authorized agent." It was countersigned by the agent at Prescott, Arkansas, but the date thereof is not definitely established by the evidence. The counter-signature bore the date of February 15, 1926, but the proof showed that this date was put on the policy in the Memphis office. The agent at Prescott was not able to state the definite date it was countersigned. The uncontradicted proof shows that it was not received by appellee until February 22, the policy being mailed him from Prescott, to his postoffice address at Drab, Arkansas, about twelve miles from Prescott, and would, if delivered in ordinary course, have reached appellee the day following its mailing.

The first installment on the note became due, according to the terms of the note, on February 1, 1927, and was not paid when due, and on the 16th of said month a fire occurred which totally destroyed appellee's property. He then called upon appellant's agent in Prescott, and advised him of the loss, delivered him the policy, and the agent notified appellant's general agent at Memphis, who declined to recognize the claim and to pay the loss, for the reason that said installment on the note had not been paid. This was within the time allowed appellee in which to make proof of loss. The case was submitted to the jury, under instructions authorizing a recovery by appellee if they should find that appellant waived proof of loss by denying liability within the time, and that the loss occurred within one year from the date said policy was countersigned by the local agent at Prescott, Arkansas, and that appellee had paid one year's premium on said policy; otherwise they were to find for the defendant. There was a verdict and judgment for appellee in the sum of $2,000 at 6 per cent. interest from May 18, 1927, 12 per cent. penalty, and $250 attorney's fee.

Appellant seeks to reverse the judgment on two grounds: First, that the policy was suspended for failure to pay the installment due on premium note before the loss occurred; and second, that the failure to furnish proof of loss avoided the policy.

It will not become necessary to decide the second proposition above stated, in view of the disposition we make of the first. The question is, did the failure of appellee to pay the installment of $32.40 on February 1, 1927, suspend the operation of the policy until it was paid, and, not having been paid prior to the loss, relieve appellant of liability? It is true that there is a slight conflict between that provision in the policy providing that appellant insured the property of appellee "for the term of five years from the 13th day of February, 1926, to the 13th day of February, 1931," and the other provision in the policy that "this policy shall not be valid until countersigned by the duly authorized agent." The

application was taken on the 12th day of February, mailed to the general agent in Memphis, Tennessee, who issued the policy, dating it the 13th day of February, and also put in the date of the counter-signature as of the 15th, assuming, no doubt, that it would take until the 15th for it to reach the local agent in Prescott, and be countersigned in the ordinary course of business, as the 13th was on Saturday. While the local agent at Prescott did not remember the actual date of countersigning the policy, it is quite probable that it may have been countersigned on the 15th, and deposited in the mail on said date for delivery to appellee. But, regardless of whether it was countersigned on that date or at a later date, we are of the opinion that, by the plain provision of the policy and the note, the policy stood suspended from February 1, 1927, until the installment due on that date was paid. The cash payment made on the premium at the time the application was taken, although one-fifth of the premium on the policy for five years, did not constitute a payment of the premium for one year's insurance, but only a partial payment of a premium on a five-year policy of insurance.

The undertaking of appellant in this case was not to insure appellee's property from year to year, but for a period of five years, on the condition that he pay one-fifth of the premium for five years in cash, and the balance at stated intervals mentioned in the note. Fire insurance policies frequently contain provisions to this effect, and the courts have almost unanimously sustained that construction we are now placing on the policy, which suspends liability thereon in case of and during default in the payment of any installment of premium. This court has heretofore held that provisions of this kind are valid and enforceable, and that, under such conditions, failure to pay a premium note, or a note given for a part of the premium when it is due, constitutes a complete defense to an action upon a policy to recover for a loss occurring while such premium note is overdue and unpaid.

In *American Ins. Co.* v. *Hornbarger,* 85 Ark. 337, 108 S. W. 213, Mr. Justice BATTLE, speaking for the court, said: "The effect of so much of the policy and of the notes given for the premium as provides that the policy shall be void during the time the notes for the premium, or any part thereof, shall remain unpaid after they become due and payable until they are fully paid, was to suspend the operation of the policy during the time the notes or either of them remained overdue and unpaid, and to relieve the insurer from any liability for any loss which may occur during the continuance of the default." The cases of *Jefferson Mutual Ins. Co.* v. *Murry,* 74 Ark. 507, 86 S. W. 813, and *Fidelity Mutual Ins. Co.* v. *Bussell,* 75 Ark. 25, 86 S. W. 814, are cited in support of the above declaration.

In the Jefferson Mutual case cited by Mr. Justice BATTLE it was held, quoting the syllabus: "Where a policy of fire insurance stipulated that it should be void during the time the policy note, or any part thereof, should remain unpaid after becoming due, payment of such note after default revives the policy and makes it take effect from the time of payment, but the insurer is relieved from liability for any loss occurring during the continuance of the default."

In the Fidelity Mutual case, above cited, it was held that, under provisions in policy and note heretofore discussed, failure to pay the note as stipulated avoids the policy, and further holds that, if the application on which the policy is based or the policy contains a provision that a local agent cannot waive a forfeiture for nonpayment of the premium, such local agent has no power to extend the time of the payment of the premium note, nor to waive the forfeiture for failure to pay it.

McCullough v. *Home Insurance Co.,* 118 Tenn. 263, 100 S. W. 104, 12 Ann. Cas. 626, is a case directly in point with the case at bar. In that case it was held that "a policy of fire insurance, issued on March 19 for a period of five years, for a stated premium, one-fifth of which is paid in cash and the remainder of which, according to

stipulation, is to be paid in four annual installments, due upon the first day of January of each succeeding year, with a provision that the company shall not be liable for any loss that may occur while any installment of the premium remains past due and unpaid, cannot be construed as a yearly contract which the payment of each installment of the premium keeps in force for a full year ending March 19, but is for an entire term of five years, and becomes immediately suspended by failure to pay an installment of premium on January 1."

A great many cases are cited in support thereof in the note to the above case in 12 Ann. Cas., and among them is *Blackerby* v. *Continental Ins. Co.,* 83 Ky. 574, where the court said:

"It is well settled * * * that a condition like this one in a policy of insurance is valid, and that, in case of a breach of it by the insured, without a valid excuse, the obligation of the insurer is at an end, although the premium note of the insured remains binding upon him. The parties have the right to make their own contract, and to fix its terms and conditions; and, unless they are illegal or in violation of public policy, they will be upheld. In this instance they could have agreed upon a higher rate of premium; and they had an equal right to agree that the period of time to be covered by the insurance should become shorter upon some contingency, without altering the amount of the premium; especially would this be reasonable and just as to any contingency which the legal duty of the insured requires him to, and which he can, prevent. Any other rule would require the insurer to carry the risk, although the insured was at the same time violating the contract without excuse; and to require the company to waive its right to the premium, before it could insist upon a release from the risk, brought about by the failure of the insured to perform his part of a contract executory upon both sides, would establish a rule in favor of the latter resting upon his own default and a violation of his legal duty. If he pays the entire premium in advance, or fails to pay it *ad diem,* or at

maturity, as he has contracted, the law will not relieve him when the forfeiture of the policy arises from his own neglect. It is vital to the existence of fire insurance companies, and the interest of both the stockholders and policyholders, that the patrons should be prompt in the payment of their premiums; and, upon the other hand, the insurer should be held to a just performance of the contract; but if the insured, without sufficient excuse, has failed to comply with the conditions which constituted the consideration for the undertaking of the company, his complaint, in case of a subsequent loss, cannot be heard. If he neglects to pay his note without a valid excuse, it is a violation of his plain duty, and if a subsequent loss occurs, he has no right, upon any legal or equitable principle, to reimbursement."

Such was the effect of the holding in *Hartford Fire Ins. Co.* v. *Jones,* 215 Ala. 488, 110 So. 30, citing *Lett* v. *Liverpool & London & Globe Co.,* 213 Ala. 448, 105 So. 553; *Home Insurance Co. of New York* v. *McFarland,* 142 Miss. 558, 107 So. 754. The latter case cites *Robinson* v. *Insurance Co.,* 51 Ark. 441, 11 S. W. 686.

In 3rd Cooley's Briefs on Insurance, 2 ed., 2903, it is said: "Policies of insurance usually contain a condition that a failure to pay any premium or note given therefor when due, or within a specified time thereafter, shall render the policy void. Such condition is reasonable and valid, and consequently binding on the insured." Citing a large number of cases. The cases cited on this and subsequent pages of this work support the principle heretofore stated.

Appellee cites a number of life insurance cases to support the theory on which the case was submitted to the jury, but we do not think these life insurance cases are in point in a case of this kind, and we find a very substantial division of authorities, even in the life insurance cases, but no substantial division of authority on fire insurance cases. It is not contended by appellee, in his brief here, that the local agent at Prescott had authority to waive the payment of the premium when due, or to

waive a forfeiture of the policy for nonpayment. Indeed, we think he had no such power, and this too is supported by the authorities heretofore cited.

Having reached the conclusion that the policy was suspended by failure to pay the installment premium on February 1, 1927, according to the tenor of the note, it follows that there was no liability for a loss occurring on February 16, with the note still in default. The judgment will therefore be reversed, and the cause dismissed.

LESLIE LUMBER & SUPPLY COMPANY *v.* LAWRENCE.

Opinion delivered December 3, 1928.

Caraway, Baker & Gautney and *Cook & Trice*, for appellant.

E. P. Toney and *Owens & Ehrman*, for appellee.

Cockrill & Armistead, amici curiae.

McHaney, J. Appellant instituted this action in the Chicot Chancery Court to establish the partnership liability of appellees, Lawrence and Horton, in the performance of a contract with Chicot County Drainage District, upon a debt of $2,050.34, and to recover said sum against appellee, U. S. Fidelity & Guaranty Company, as surety on the contractor's bond.

We will not set out the facts nor discuss the law relative to the alleged partnership relation, nor determine whether that relationship existed between said appellees, for it becomes unnecessary, in view of the disposition we make of the liability on the bond. Lawrence was the principal contractor, so denominated in the contract with the district and in the bond. Horton, for a consideration, agreed to finance Lawrence, who, being unable to give the necessary bond without indemnity, procured Horton to indemnify the U. S. Fidelity & Guaranty Company, and it executed the bond, conditioned as follows:

"The condition of this obligation is such that, if the said contractor shall pay all persons, firms or corporations who perform labor or furnish equipment, supplies, and material for use in the work thereunder, shall satisfy all claims against the district for damages to life, limb or property, or any of his agents or employees, and shall satisfy all suits or claims brought against the district arising from the violation of any law, ordinance, regulation, order or decree on the part of the contractor or any of his agents or employees; or from any infringements or alleged infringements of patents in the work under said contract; or howsoever originating from any of the operations under said contract; and shall fully indemnify and save harmless the district from all cost and damage which it may suffer by reason of failure to do so, and shall fully reimburse and repay the district all outlay and expense which the district may incur in making good any

such default, and in all other particulars shall faithfully perform the contract on his part according to all the terms, covenants and conditions thereof and within the time specified therein, then this obligation shall be void; otherwise to remain in full force and effect."

The other pertinent provision of the bond is as follows:

"Third. No right of action shall accrue hereunder to or for the use or benefit of any one other than the district, and the district's rights hereunder may not be assigned without the written consent of the surety."

The court entered a decree denying liability against Horton, holding that he was not a partner, and that the bonding company was not liable under its bond. Judgment was rendered against Lawrence, and appellant's complaint was dismissed for want of equity as to Horton and the U. S. Fidelity & Guaranty Company.

We think the court erred in not holding the bonding company liable as surety for Lawrence. The condition of the bond is "that, if the said contractor shall pay all persons, firms or corporations who perform labor or furnish equipment, supplies and material *for use* in the work thereunder," etc. This condition is, in all material respects, the same as that in *Mansfield Lumber Co.* v. *National Surety Co.*, 176 Ark. 1035, 5 S. W. (2d) 294. In that case the condition in the bond was: "Now therefore, * * * if the principal * * * shall pay all persons who have contracts directly with the principal for labor or materials, then this obligation shall be null and void; otherwise it shall remain in full force and effect." It was there held that, even though the bond might be held not to be a statutory bond because not filed with and approved by the circuit clerk as provided by § 6916, C. & M. Digest, still, by reason of the language above quoted, "its provisions and conditions are broad enough to cover the liability imposed by the statute had it been executed as the statute requires." So here, the language used, "that, if the said contractor shall pay all persons, firms or corporations who perform labor or furnish equipment, supplies

and material for use in the work," is just as broad (if not broader) as that used in § 6913 of the Digest, which requires a bond conditioned that the contractor "shall pay all indebtedness for labor and material furnished in the construction of said public building, or in making said public improvements." The only reason this bond is not a statutory bond, if it is not, which we do not decide, is that it was not filed in the office of the circuit clerk, as provided by § 6914. We therefore hold that this case, in this respect, is ruled by *Mansfield Lbr. Co.* v. *National Surety Co., supra,* and that the bond executed by appellee, U. S. Fidelity & Guaranty Company, was not executed for the sole benefit of the drainage district, but for "all persons, firms or corporations who perform labor or furnish equipment, supplies and material for use in the work." Therefore such persons may sue on the bond, on that principle of law "that, when a promise is made to one, upon a sufficient consideration, for the benefit of another, the beneficiary may sue the promisor for a breach of his promise." *Mansfield Lumber Co.* v. *National Surety Co., supra; Stewart-McGehee Const. Co.* v. *Brewster,* 171 Ark. 197, 284 S. W. 53; unless the third clause in the bond heretofore quoted is a bar to such actions, to the effect that only the district may sue on the bond. This provision is plainly in conflict with the condition in the bond just discussed and with the law applicable thereto as stated. By the first condition the bond company has provided protection for a class of persons who, under the law, may sue, yet, by the last provision, it is provided they may not sue. Both cannot stand. Surety contracts of this character, with a paid surety, are regarded as in the nature of insurance contracts, and will be most strongly construed against the surety. *Union Indemnity Co.* v. *Forgey & Hanson,* 174 Ark. 1110, 1115, 298 S. W. 1032, and cases cited. Applying this rule to the contract in question, the third clause in the bond must give way to the first, and be given no force or effect.

The last proposition necessary for consideration is, whether the bond is liable only for material actually

entering into the work—such items as might be the basis of a mechanic's lien. We answer this question in the negative, as does the bond itself. It protected all persons who furnished supplies and material *"for use in the work,"* and not merely material actually entering into the work. Therefore all material and supplies furnished the contractor "for use in the work," or reasonably necessary to accomplish the purpose of the work, and which were delivered to the contractor for such use and purpose, are covered by the bond. There is no provision in the statute under which the work was being done giving laborers and materialmen a lien, and could not very well have been. For this reason the law requires the contractor to give a bond. The decisions of this court on bonds given to prevent liens on private property cannot be controlling here on this question, as this bond covers all labor and material done and furnished "for use in the work," and we are dealing with it on the assumption that it is not a statutory bond. Under this construction of the language of the bond, material furnished for bunk-houses, tent forms, cement sheds, a shop, and a commissary, would be covered by the bond if they were reasonably necessary for use in prosecuting the work, as would also cement and other material fabricated for this work and delivered to the contractor therefor, although not actually used therein because the work was stopped by the board, or for any other reason not due to the material furnisher.

By the plain provisions in the bond in suit appellees, Lawrence, the contractor, and his surety, the U. S. Fidelity & Guaranty Company, are bound to appellant as herein stated. The decree will therefore be reversed, and the cause remanded with directions to enter a decree in accordance with this opinion, and for such further proceedings according to law and the principles of equity as are not inconsistent herewith.

JEMELL *v.* ST. LOUIS SOUTHWESTERN RAILWAY COMPANY.

Opinion delivered December 10, 1928.

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Trimble & Trimble and *Bogle & Sharp,* for appellant.

A. H. Kiskaddon, Carter, Jones & Turney, Charles A. Walls and *N. F. Lamb,* for appellee.

HART, C. J., (after stating the facts). We need not consider the alleged errors of the plaintiff with regard to the giving and refusing of instructions, for the reason that the court should have directed a verdict in favor of the defendant.

Counsel for the plaintiff seek a reversal of the judgment on the authority of *Adler* v. *St. Louis Southwestern Ry. Co.,* 171 Ark. 419, 284 S. W. 729; *Kelley* v. *De Queen & Eastern Ry. Co.,* 174 Ark. 1000, 298 S. W. 347, and other cases of like character which have construed § 8575 of Crawford & Moses' Digest, which provides, in all suits against railroads for personal injury caused by the running of trains in this State, contributory negligence shall not prevent a recovery where the negligence of the person so injured is of less degree than the negligence of the employees of the railroad company. We do not think the cases referred to have any application under the facts in the present case. In all of them there was a disputed question of fact as to whether the proper lookout required by the statute was kept, and whether or not the lack of keeping a proper lookout was the proximate cause of the accident, and therefore constituted negligence on the part of the company which could not bar a recovery notwithstanding the jury might also find that the injured person was guilty of contributory negligence.

In the case at bar the fireman, who was keeping a lookout on the engine of the passenger train, testified that he saw the plaintiff drive up to the edge of the ties at the public crossing where the accident occurred, and then back down the grade again. He then supposed that the plaintiff would not attempt to run up the grade again until after the train had passed. The plaintiff admitted that he did not look for the approach of the passenger train, and admitted that he could have seen it if he had looked. The track was straight at that point,

and the reason that the plaintiff did not see the approaching train was that he did not look. When he admits that he did not look, when, if he had looked, he could have stopped his car in time to have avoided the accident, he cannot recover, because his own negligence directly contributed to the happening of the accident, and there was no negligence whatever on the part of the defendant, because the fireman was justified, under the circumstances, in believing that the defendant, when he backed his car down the grade just before the accident, would not drive up the grade again in front of a rapidly approaching train. It was the duty of the plaintiff to use his sense of sight to avoid injury to himself when he was about to go upon the public crossing, which is admittedly a place of danger, where he could have seen an approaching train if he had looked for it. The time to look for his own protection was just before going up the grade upon the crossing. His own failure to observe this precaution was the proximate cause of the accident. As we have already seen, the fireman saw him approaching the crossing and then back down the grade just before the accident occurred. The fireman, under the circumstances, was justified in believing that the plaintiff would not again attempt to go upon the public crossing until after the train had passed.

The facts bring the case within the rule announced in *St. Louis-San Francisco Ry. Co.* v. *McClinton, ante,* p. 73, 9 S. W. (2d) 1060. As said in that case, while there is a presumption of negligence arising out of the fact that the plaintiff was injured by the operation of the train, where the undisputed evidence is such that it must necessarily appear that the plaintiff's negligence was greater than that of the operator of the train, a recovery is not authorized by § 8575 of Crawford & Moses' Digest.

It follows that, if the court should have directed a verdict for the defendant, no error prejudicial to the rights of the plaintiff was committed in giving or refusing instructions. Therefore the judgment will be affirmed.

KIRK *v.* JONES.

Opinion delivered December 10, 1928.

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Culbert L. Pearce, for appellant.

L. A. Hardin, for appellee.

HART, C. J., (after stating the facts). Minors are the wards of chancery courts, and it is the duty of such courts to make any orders that would properly safeguard their rights. This is a habeas corpus proceeding, and the court had the authority to grant the custody of the child to the aunt, provided it finds that the father had forfeited his rights thereto. Three parties are interested in the custody of minor children, the State, the parents, and the child itself. While the right of the father to the custody of his child is paramount, this is denied in many cases, and, regard being had for the welfare of the child, its custody has been placed elsewhere. *Verser* v. *Ford,* 37 Ark. 30; *Washaw* v. *Gimble,* 50 Ark. 351, 7 S. W. 389; *Coulter* v. *Sypert,* 78 Ark. 193, 95 S. W. 457; and *Clark* v. *White,* 102 Ark. 93, 143 S. W. 587; Ann. Cas. 1914A, 739. Other cases from this court and from many other courts of last resort to the same effect will be found cited in a case-note to Ann. Cas. 1914A, p. 748.

The permanent wellbeing of the child more than its present enjoyment is to be considered as of prime importance. No hard and fast rule can be laid down on the subject, and each case must be governed to a large extent by its own particular facts.

Tested by this rule, we think that the facts bring the case within an exception to the general rule, and that it would be best for the permanent welfare of the child that it should be in the custody of the sister of the father. In reaching this conclusion we are not unmindful that the father is married again and that his present home is a fit and suitable place for the child. Undoubtedly, however, this is true at the home of his sister.

She kept the child for two years after the death of its mother, without any hope or expectation of reward. She loved and cared for it just as she did for her own children, and never asked its father to make any contribution to its support. It is true that he testified that he contributed more to its support than he received from the United States Government for the support of the child, but his testimony is not corroborated by the other testimony. He admitted that he could not make any statement of the expenses which he had incurred. The record of the Veterans' Bureau shows that, from the date of the death of the mother of the child, he was allowed and received $20 per month for the support of the child. His sister testified that he never contributed anything to the support of the child except about $12 in money and a few cheap suits of clothes, worth a dollar each. He testified that he visited the child every two weeks, and, if he did so, he must have known that his sister paid the expenses of the operation upon the child. He never offered to pay her back any of this money until after the present suit was instituted. The amount of money he received from the government was based upon the theory that he had the care and custody of the child. During all the time he was collecting this money, the child was in the care and custody of the sister, and he never contributed any substantial sum towards its support. He never lived with his first wife after the birth of the child, and never gave any material contribution to her support and the support of the child. As far as the record discloses, the only sum contributed by him was the apportionment allowed by the United States Government when the wife is living separate and apart from her husband and has the custody of their minor child. Thus it will be seen that this apportionment, made for the benefit of the wife and child, was kept by the father after the death of the mother, on the theory that he had regained the care and custody of the child. The probabilities are that, if he ceased to receive any compensation from the United States, he would cease to

provide for the child, and that he might leave it to others to take care of his child just as he did when it came into the world.

On the other hand, the sister has shown her interest in the welfare of the child and has demonstrated that she would care for it just as she would for her own, regardless of whether or not she received the compensation apportioned for it by the government.

Therefore the decree will be reversed, and the cause remanded with directions to the chancery court to award the custody of the child to Mrs. Laura Kirk, with a right of the father to visit it at all proper times. It is so ordered.

MARTIN *v.* STREET IMPROVEMENT DISTRICT No. 349.

Opinion delivered December 10, 1928.

June P. Wooten, for appellant.

P. L. Robinson and *Lewis Rhoton,* for appellee.

SMITH, J. Appellant brought suit at law against the Marshall Street Annex of Street Improvement District No. 349 of Little Rock to recover fees alleged to be due him as attorney for the annex district and for certain court costs which he alleged he had expended in its behalf.

The commissioners of the improvement district waived service of summons, and entered their appearance and confessed judgment for the amount sued for, and judgment was rendered by consent for $7,733. This judgment was rendered September 30, 1927. On October 3, 1927, Herman Heiden filed an intervention, in which he alleged that he was a property owner in the Marshall Street Annex improvement district, and that the judgment against the district had been obtained through collusion and fraud between the plaintiff attorney and the commissioners; that judgment had been rendered by consent on the day on which the complaint had been filed, and that the existence of the suit was concealed from all property owners in the district; that plaintiff had caused the original District No. 349 to be organized in 1923, and secured the appointment of defendants as commissioners, who became his agents, and allowed him grossly excessive fees, and that an audit of the original district and the annex thereto showed that the defendant commissioners had obligated the district to pay the plaintiff a fee of $12,288.84 and the annex to pay $7,733, and that intervener, on behalf of himself and other property owners, had a meritorious defense to said claims, in that they are grossly excessive.

The court granted the prayer of the intervener on the same day the intervention was filed, and set aside the judgment previously rendered.

It is insisted that this order was error, for the reason that no summons was served on appellant and no testimony was heard by the court, and therefore no good cause for setting aside the judgment was shown. It appears, however, that appellant appeared and resisted the prayer of the intervention, and that the order was made after argument of counsel. No answer or response was filed to the allegations of the intervention, and the matter was no doubt treated as having been heard by the court on demurrer. The allegations of the petition alleged sufficient grounds to warrant the court in setting aside a judgment which had been rendered

at the same term. In the case of *T. J. Moss Tie Co.* v. *Miller,* 169 Ark. 657, 276 S. W. 586, it was said that it was the settled policy of this State that, during their respective terms, courts of record have complete control over their judgments and decrees, and may review and correct any mistake or error into which they may have fallen during the term, but that this power will be exercised only when good cause so to do is shown. We conclude therefore that no error was committed in vacating the judgment.

After the judgment had been vacated, an answer and cross-complaint was filed. This pleading reviews the history of the original district and the annexes thereto; but we do not set out these recitals, as we consider them immaterial to a determination of the only issue in this case, which is the amount of fee to which appellant is entitled. It was alleged, however, in the answer and cross-complaint that appellant had been paid a fee by the original district of $1,580.30, and by the first annex of $4,628.56, and had received in addition from the annex a certificate of indebtedness of $5,000, which amounts were exorbitant; that two years after the organization of the original district and its first annex thereto the commissioners organized the Marshall Street Annex and issued to appellant the certificates of indebtedness upon which the original suit was based.

The allegations in regard to the fees paid appellant are somewhat confusing, but in the cross-complaint it was alleged that $2,770.68 had been paid appellant as fees in the original district, and that the same were excessive; that the commissioners had paid to appellant, as attorney for the Summit Avenue, or first, annex the sum of $6,273.06, which fee was alleged to be grossly excessive.

It thus appears, under the allegations of the answer and cross-complaint, that the fees of appellant in both the original district and the two annexes thereto are called into question, and it is insisted that it was error for the trial court to hear these issues in a single case.

It does not appear, however, that the question of the misjoinder of these causes of action was raised prior to the filing of the motion for a new trial, which was, of course, too late to complain of the alleged error; but, as the judgment must be reversed for another reason, and as the question may be raised in apt time upon the remand, we take occasion to say that there was no abuse of discretion on the part of the trial court in permitting the consolidation of these cases. While the districts were separate entities, two of them were organized as annexes to the original district, and the same commissioners served for all and the affairs of the three were intimately related.

Separate verdicts were returned as follows: In favor of appellant for $600 against the Marshall Street annex; in favor of the original district against appellant in the sum of $2,270.68; and in favor of the Summit Avenue Annex against appellant in the sum of $5,523.06, and judgments were rendered accordingly.

These judgments must be reversed because much incompetent testimony was admitted over the objection of appellant, most of this incompetent testimony being offered in the attempt to show collusion and fraud between appellant and the original commissioners in the organization of the districts.

We do not review the various assignments of error relating to this testimony, but content ourselves with an announcement of the principles of law under which the case should be tried upon the remand of the cause. We are of the opinion that the testimony is insufficient to support the charge of fraud between appellant and the commissioners of the original district; but we are also of the opinion that the testimony is sufficient to support the finding that the fees allowed were grossly excessive, and the cause will be submitted upon this issue upon the remand. We take occasion therefore to restate the applicable legal principles which will be applied in the determination of this question.

In the case of *Davis* v. *Cook,* 159 Ark. 91, 251 S. W. 693, we quoted from the case of *Bowman Engineering Co.* v. *Ark. & Mo. Highway Dist.,* 151 Ark. 56, 235 S. W. 402, as follows:

"The commissioners have power to make contracts, but they are trustees of the property owners, and can only make reasonable ones. The owners of the property have a right to challenge the validity of such contracts by showing that they are unreasonable. Of course, in testing the validity of such contracts, the court should not substitute its own judgment primarily for that of the commissioners, the authority to make the contract being lodged by the lawmakers in the commissioners, but the inquiry of the court is to determine whether or not the contract is so improvident as to demonstrate its unreasonableness."

As the commissioners had the right to contract with appellant in regard to his fee as attorney, their contract is binding unless it be found that the contract was so improvident as to demonstrate its unreasonableness, and unless and until its improvidence be first found as a fact, the question of its reasonableness does not arise. In other words, the contract between the attorney and the commissioners must be enforced unless it be found that it is so improvident as to demonstrate its unreasonableness. When this finding is made, the contract is treated as being void, as it would be in the case of actual fraud, and in such case the recovery would be on a *quantum meruit* basis.

There is some testimony to the effect that, as to a part, if not all, of the services performed by appellant, no contract had been previously made as to the amount of the compensation. As to any such services the jury will determine, as an original proposition, the value thereof. In other words, our cases appear to distinguish between the contracts of these *quasi*-public officials where an agreement was had as to the compensation before the service was performed, as in the Bowman Engineering Company case, *supra,* and those where the compensa-

tion was not fixed until after the service had been performed. The case of *Bayou Meto Drainage District* v. *Chapline,* 143 Ark. 452, 220 S. W. 807, is an example of the latter class. There was involved in the Chapline case the question of the fee of the attorney for a drainage district, it being asserted on the one hand, and denied on the other, that the fee had been fixed by contract before the professional services were rendered. It was there said:

"Moreover, under the undisputed evidence in this case the commissioners did not fix the fee of the appellees until after the services which they had been employed to render had all been performed. The compensation for their services was fixed by the board at the time they were discharged, not when they were employed. The preponderance of the evidence shows that the appellees were employed, and that the compensation to be paid for their services was not stipulated in advance. The appellees are therefore entitled to recover upon *quantum meruit.*"

Upon the remand and retrial the court should therefore instruct the jury that, if no fee was agreed upon before the service was rendered, the jury should, from the testimony, fix the fee at what appeared to be a fair and reasonable compensation for the service rendered. But if the fee was fixed by a contract before the service was rendered, the contract must be respected and enforced, unless the testimony shows the contract to be so improvident as to demonstrate its unreasonableness; but if that fact is found to exist, then the fee should be fixed as if there had been no contract.

The rule for determining what a proper attorney's fee should be where the recovery is fixed upon a *quantum meruit* basis was discussed and declared in the case of *Sain* v. *Bogle,* 122 Ark. 14, 182 S. W. 515, an improvement district case, and need not be repeated here.

In opposition to the allegation of the cross-complaint and the testimony offered in support of it, that appellant had been paid excessive fees, appellant pleaded the

three-year statute of limitations as to all payments which had been made more than three years prior to the filing of the cross-complaint. The court held that this was a valid defense, unless there was fraud in the contract, in which event the statute of limitations would not begin to run until the discovery of the fraud. But, as we have said, the testimony was not sufficient to warrant the submission of the question whether the execution of the contract was procured by fraud, so that the court should charge the jury that there could be no recovery of any sums of money paid appellant more than three years prior to the filing of the cross-complaint. The testimony in regard to these payments is competent, however, in determining whether or not appellant has received a fair and just compensation for his services.

The testimony is conflicting as to the sums paid appellant. This is a question of fact, and appellant should be charged with all sums of money paid or received by him, and if this amount, whatever it is, is found to exceed the fee to which appellant is entitled, a judgment should be rendered against him for the excess.

There is conflicting testimony as to an item of $1,500 in the fee claimed by appellant, there being some testimony that this item was intended to compensate appellant for procuring the enactment of legislation by the General Assembly favorable to one of the districts.

The cases of *Miller County Highway & Bridge Dist.* v. *Cook,* 134 Ark. 328, 204 S. W. 420, and *Gould* v. *Sanford,* 155 Ark. 304, 244 S. W. 443, declare the law applicable to contracts in regard to procuring legislation. In the first-mentioned case it was held that the board of improvement of an improvement district is without authority to pay money to persons by way of expenses in procuring the passage of a bill for the creation of the district. In the last-mentioned case it was held that the employment of an attorney by an improvement district to prepare a bill for legislative enactment does not contravene any rule of public policy. The court will apply these principles in regard to this item.

The cause will be remanded, with directions to submit to the jury the question of the fee to which appellant is entitled under instructions conforming to the law as herein declared, and the testimony will be confined to that issue.

MAGNOLIA PETROLEUM COMPANY *v.* MCFALL.

Opinion delivered December 10, 1928.

Cockrill & Armistead, for appellant.

Peyton D. Moncrief, A. G. Meehan and *John W. Moncrief,* for appellee.

HART, C. J., (after stating the facts). The circuit court erred in not directing a verdict for the defendant as requested by it.

In a case-note to L. R. A., at page 1060, it is said in the case of joint tort-feasors the essential unity of the injury and the fact that the injured party is entitled to but one compensation therefor make it impossible for the injured person to settle with one tort-feasor without discharging the other. Therefore it is held that a release of one tort-feasor releases all, for the reason that the cause of action is satisfied, and no longer exists. Numerous State and Federal decisions are cited, and among them the following: *Montgomery* v. *Erwin,* 24 Ark. 540; *Jones* v. *Chism,* 73 Ark. 14, 83 S. W. 315.

In the later case of *Coleman* v. *Gulf Refining Company of Louisiana,* 172 Ark. 428, 289 S. W. 2, it was held that, where the concurrent negligence of two persons was responsible for an injury to a third person, a settlement by the latter of an action for such injury with one of them will bar an action against the other, although the defendants in the respective actions were not joint tort-feasors. That this holding is in accord with the general

rule on the subject will be seen by reference to the case-note in 50 A. L. R., at page 1099.

It is sought by counsel for the plaintiff to uphold the judgment on the ground that the execution of the release was procured by fraud. There are two reasons why this view cannot be accepted. In the first place, the railway company is not made a party to this action, and no attempt has been made by the plaintiff to rescind the contract for a release of damages which he executed in favor of that company. In the second place, the evidence fails to establish any fraud on the part of the railway company whereby the plaintiff was induced to sign the release of damages. The plaintiff was thirty-nine years old, and had been employed by the railway company for eighteen years. He was not an illiterate person, and gave no reason why he did not read over the contract for the release of damages, except that the agent told him that it was only payment for his expenses and loss of time. He was not induced to sign the release without reading it by false representations on the part of the claim agent of the railway company, as was the case in *St. Louis, Iron Mountain & Southern Railway Company* v. *Reilly,* 110 Ark. 182, 161 S. W. 1052, and in *St. Louis, Iron Mountain & Southern Railway Company* v. *Morgan,* 115 Ark. 529, 171 S. W. 1187. Plaintiff does state that the claim agent of the railway company told him that signing the release contract in favor of the railway company would not prevent him from suing the defendant in this action. This was merely an expression of opinion on the part of the claim agent, and was not made as a matter of inducement to the plaintiff to sign the release contract. A mistake of law, in the absence of fraud or undue influence, does not afford ground for the abrogation or reformation of a contract. *Security Life Ins. Co.* v. *Leeper,* 171 Ark. 77, 284 S. W. 12.

It follows that the court erred in not directing a verdict for the defendant, as requested by it, and for that error the judgment must be reversed; and, inasmuch as the cause of action seems to be fully developed, it will be dismissed here.

RICELAND PETROLEUM COMPANY *v.* MOORE.

Opinion delivered December 10, 1928.

J. A. Sherrill, for appellant.

George M. Chapline, for appellee.

SMITH, J. Appellee was engaged in selling dental supplies, and he drove a small automobile over the State in calling on his customers. On November 11, 1927, as he was driving from Stuttgart to Pine Bluff, he had a collision with a truck which was being driven in the opposite direction, belonging to appellant, and driven

by Joe Campbell, as a result of which he sustained a very serious injury, and from the judgment awarding him damages to compensate his injury is this appeal.

As is usual in cases of this character, each party excused himself and blamed the other. The testimony is in hopeless conflict, but that offered on behalf of appellee was to the effect that, as he drove along the road, a colored man named Childs, who was walking in the same direction, and on the same side of the road, crossed over to the opposite side of the road, and, as the truck approached, being driven rapidly, Childs started back across the road, and Campbell turned his truck to his left and ran over on that side of the road, and in doing so ran into appellee's car. It was appellee's theory that, if Campbell had had his truck under control, or had remained on the right-hand side of the road, the collision would not have occurred, and that the collision did not occur until after the truck had been driven past the colored man.

Campbell denied that he was driving rapidly or that his truck was out of control. He testified that he saw Childs, and that no collision would have occurred had Childs not attempted to cross over to the opposite side of the road, which put him on Campbell's side, and, as Childs did this, witness turned his truck to the right, but, fearing that he would drive into the ditch and on top of Childs, he turned the truck back to the left, and, as he did so, Childs also started back across the road. Witness, seeing that he was about to strike Childs, turned further to the left to avoid striking Childs, and witness admitted that he knew, when he did this, he would collide with appellee's car, but, in the emergency thus created, he had to run over the man or run into the car, and he thought it better to strike the car than to run over the man. That, at the time of the collision, he was going very slow, having applied his brakes, and the colored man was not over three feet from his radiator when he bumped into appellee's car.

Oscar Sellig, who was riding in the truck, testified that when Childs came back across the road he was not over ten or twenty feet from the truck, and that Campbell turned first to the right and then to the left to dodge Childs, who also turned in the same directions, and that, if Campbell had not struck appellee's car, he would have struck the colored man.

Childs testified that he was walking on the right-hand side of the road, and saw the truck approach on the opposite side of the road, and that he did not know about the car behind him (appellee's car) until it was within about ten feet of him; that appellee's car frightened him, and he jumped over to the other side of the road, and, as he did so, Campbell turned the truck towards the ditch, and witness then turned back the other way, and so did Campbell; that neither car was running at an excessive speed; that he was frightened when he discovered the car behind him, and tried to get out of the way.

Over appellee's objection the court gave instructions numbered 3 and 4, reading as follows:

"No. 3. For the mutual protection of travelers upon a public highway, certain rules have grown up by custom through long continued use and practice, and are crystallized into law under which is designated in the books as 'the law of the road.' One of these rules is that travelers in meeting shall each bear or keep to the right. Travelers owe to each other the reciprocal duty of observing these rules, and a failure to exercise ordinary care to observe them, resulting in injury to another, will constitute actionable negligence.

"No. 4. You are instructed that, if you find from the evidence in this case that the plaintiff, L. C. Moore, on the 11th day of November, 1927, was traveling in his automobile on the highway going from Stuttgart to Pine Bluff, and that he met Joe Campbell, an agent of the Riceland Petroleum Company, in a car of said company, and on business of said company, going from Pine Bluff to Stuttgart, and that the plaintiff was on the right-hand

side of said road, and that defendant left the side of the road traveled by him, being the right-hand side, and negligently, carelessly, recklessly *or purposely* ran into the automobile occupied by the plaintiff, then he would be guilty of negligence, and the plaintiff would be entitled to judgment for all damages sustained to his car and by him personally."

It is earnestly insisted that these instructions were erroneous and that the court erred in giving them.

Instruction numbered 3 is based upon the case of *Carter* v. *Brown,* 136 Ark. 31, 206 S. W. 73, where the court declared the law of the road to be "that travelers in meeting shall each bear or keep to the right," but the court there said that this rule is not an inflexible one, and that "emergencies may arise where, in order to escape from danger to one's self or to prevent injury to others, it will be not only excusable but perfectly proper to temporarily violate the general rule."

Appellant insists that instruction numbered 3 ignores this exception, and permits a recovery upon the mere finding that the collision occurred while Campbell was over on the left side of the road, and we think the instruction is open to this objection, and that it is erroneous in this respect.

According to appellee, there was no emergency except that arising from Campbell's negligence in driving rapidly and in not putting his truck under control after he saw or should have seen that Childs was in a position of danger, and appellee insists that there would even then have been no collision had Campbell stayed upon his own side of the road.

It is the law, as was said in the case of *Wells* v. *Shepard,* 135 Ark. 466, 205 S. W. 806, that "one cannot shield himself behind an emergency created by his own negligence;" but the testimony presents the question whether Campbell's negligence created the emergency which prompted him to violate the abstract general rule of the road requiring him to keep to the right. If Campbell's negligence produced the emergency under

which he acted, he is liable for the consequences of his act, for at last it would be his negligence which caused the injury. But, if Campbell's negligence did not cause the emergency, the jury should be permitted to say whether, under the circumstances, Campbell was negligent in driving on the left side of the road.

In this connection it should be said that, if appellee was guilty of negligence causing or contributing to his injury, he cannot recover.

Instruction numbered 4 told the jury that if Campbell, "being on the right-hand side, negligently, carelessly, recklessly or *purposely* ran into the automobile occupied by the plaintiff, then he would be guilty of negligence, and the plaintiff would be entitled to judgment for all damages sustained to his car and by him personally."

Specific objection was made to the portion of this instruction which told the jury that plaintiff should recover if defendant purposely ran into appellee's automobile, there being no testimony to show that Campbell had acted maliciously, and it being admitted by him that he drove into the car to avoid striking the man.

What was said about instruction numbered 3 is applicable here. If Campbell was not otherwise negligent, negligence cannot be predicated upon the fact that Campbell chose to strike the car rather than the man when one collision or the other was unavoidable. If Campbell's negligence rendered it necessary for him to make this choice, he is liable for the damages resulting from his choice, for the reason that "one cannot shield himself behind an emergency created by his own negligence;" but, if Campbell was not guilty of negligence producing the emergency, he would not be liable for the consequences of his choice, unless there was negligence in making his choice, a contention which is not here made.

For the error in giving instructions numbered 3 and 4 the judgment must be reversed, and it is so ordered.

GIPSON *v.* NO FENCE DISTRICT NO. 2, LINCOLN COUNTY.

Opinion delivered December 10, 1928.

[redacted]

N. W. Shelton, for appellant.

A. J. Johnson, for appellee.

HUMPHREYS, J. This suit was brought by appellants against appellees, in the chancery court of Lincoln County, to obtain a new trial in an action tried in the circuit court of said county between the same parties at the May term, 1927. The judgment rendered at the May term of the circuit court appears to have been a consent judgment affirming a county court judgment creating and establishing No Fence District No. 2 in Lincoln County, Arkansas, and appointing E. P. Ladd, T. S. Lovett and A. J. Moore commissioners thereof.

The complaint alleged, in substance, that the consent judgment in the circuit court was obtained through fraud, without the knowledge of appellants, and that, immediately upon the discovery that such judgment had been rendered, they notified appellees that they would file a motion at the September, 1927, term of said court to vacate same; that, pursuant to the notice, they filed the motion on September 8, 1927, to which a demurrer was sustained on September 15, 1927; that on September 19, 1927, they filed a motion for a new trial, but the circuit court adjourned without disposing of same.

In addition, the record reflects that the September, 1927, term of the circuit court convened on September 12 and finally adjourned December 1, 1927.

The chancery court refused to hear proof offered by appellants responsive to the allegations of the complaint, and dismissed same, over their objection and exception. The allegation in the complaint relative to the adjournment of the circuit court without disposing of their motion for a new trial is as follows:

"That within three days after the rendition of said judgment at said September term of 1927, the appellants filed their motion for a new trial, and, without disposing of said motion, the court lapsed and dispersed. Appellants allege that the failure of the court to dispose of their motion for a new trial at the September term, 1927, was an accident over which they had no control, but that by reason thereof appellants were deprived of their constitutional right of appeal, and were without remedy in the premises, except by the intervention of a court of chancery."

We think the complaint was properly dismissed by the chancery court. According to the final adjourning order of the September, 1927, term of the circuit court of Lincoln County, the adjournment did not occur for over two months after appellants filed their motion for a new trial. Courts of equity will not interpose and grant new trials in courts of law under its inherent and ancient power for relief against fraud, accident or mistake, if the party asking relief was guilty of negligence. This is the substance of the rule announced and adhered to by this court, as may be seen by reference to the cases of *Leigh* v. *Armond,* 25 Ark. 123, and *Jackson* v. *Woodruff,* 57 Ark. 599, 22 S. W. 566. Appellants allege that the court adjourned through no fault of theirs, without ruling on their motion for a new trial, but they had ample time to procure a ruling thereon had they been diligent. Diligence on their part was not alleged.

The judgment is therefore affirmed.

WOODRUFF COUNTY *v.* WHITE.

Opinion delivered December 10, 1928.

[redacted]

Roy D. Campbell, for appellant.

Ross Mathis, for appellee.

HUMPHREYS, J. Appellee is a duly elected road overseer of Cotton Plant Township, in Woodruff County. He presented five accounts to the county court for allowance, covering items for teams, labor and overseer's *per diem.* The accounts specified the dates on which the teams were worked and the amounts charged for each, but did not designate whose teams they were. They also specified the dates the overseer supervised the work. The several amounts were as follows: $87, $357.50, $6, $102, and $50. Each claim was disallowed on the ground that the work was not authorized by the county court and that the overseer was notified by the county judge not to do the work.

An appeal from each disallowance was taken to the circuit court of said county, Southern District, and was consolidated and tried as one cause before the court

sitting as a jury, upon the testimony adduced by the parties, resulting in a general finding that the work had been done, and the rendition of a judgment against appellant for the total amount claimed, from which is this appeal.

Appellant contends for a reversal of the judgment because the work was not done under the authority and direction of the county court. The record reveals by undisputed testimony that the county court never authorized nor directed appellee to do the work for which he presented accounts. Jurisdiction of all matters relating to county taxes and roads was conferred on county courts by § 28, article 7, of the Constitution of Arkansas. In addition to the constitutional authority conferred upon county courts relative to roads and taxes, the Legislature of 1915 imposed the duties of road commissioner of Woodruff County upon the county judge. If allowable for road overseers to work the roads in their respective districts without direction from the county court, then the court's constitutional authority over the road tax, which necessarily means the expenditure thereof, would not only be abridged but, for all practical purposes, would be absolutely nullified.

Again, it was improper to render a judgment on the accounts in the form in which they were presented. According to the undisputed testimony, many of the teams used by the overseer to perform the road work belonged to third parties. The account did not specify how many of the teams belonged to the road overseer himself. There is no authority in the law for an overseer to hire, pay for teams and labor and to file an individual claim against the county for the amounts expended. Section 5263 is mandatory, and provides as follows:

"All persons employed by the road commissioner, or the overseer of any road district, to work on the roads and bridges of any road district, or who have furnished any teams or tools to such overseer or road commissioner under the provisions of this act, shall make out, verify and present his account to the county court, which account shall be indorsed by the overseer of the district in which

said work was done, or the road commissioner, as correct; and if the same be so indorsed, the county court shall allow such claim, to be paid out of the county treasury to the credit of such road district."

Again, the judgment rendered upon the accounts was improper because the undisputed testimony revealed that the quarterly reports filed by appellee as road overseer failed to meet the requirements of §§ 5227, 5264, 5342, 5351, 5352, 5500 and 6282 of Crawford & Moses' Digest. Section 5264 specifically prohibits the payment for any service performed by a road overseer until he has filed with the county clerk all reports and statements required of him by law.

On account of the errors indicated the judgment is reversed, and the cause is remanded for further proceedings not inconsistent with this opinion.

MESSINA *v.* GALUTZA.

Opinion delivered December 10, 1928.

Sheffield & Coates and *Peter A. Deisch,* for appellant.

HUMPHREYS, J. This is an appeal from the decree of the chancery court of Phillips County dismissing appellant's complaint seeking to enjoin appellees from carrying on a general bus business over State Highway No. 44 between Helena and Ferguson, in Phillips County, Arkansas.

The complaint alleged, in substance, that appellant had a license certificate or permit from the Arkansas Railroad Commission to operate a bus line for the purpose of transporting persons for hire over said highway and between the city and town mentioned; that appellees and each of them were carrying on a general bus business in ordinary motor vehicles and automobiles, over said highway, without a permit from the Arkansas Railroad Commission, and by doing so were encroaching upon the franchise granted appellant.

Appellees filed an answer, denying the material allegations of the complaint, and interposing the further defense that appellant did not have an exclusive franchise to operate a bus line over said Highway No. 44, hence had no right to an injunction to protect his non-exclusive franchise.

On preliminary hearing a temporary restraining order was issued by the chancery court, prohibiting appellee from interference with appellant in the operation of his busses over said highway without having made previous contracts with the passengers for transportation. On a final hearing of the cause the court dissolved the temporary restraining order, and dismissed appellant's complaint for the want of equity. The decree was rendered upon the theory that the act in question is not broad enough in its provisions or implications to justify interference by injunction.

The act in broadest terms conferred power upon the Arkansas Railroad Commission to manage and control motor transportation in the State over its highways, and, as a method for doing so, authorized it to issue

licenses and permits to persons, firms and corporations to transport passengers and freight over its improved highways, under certain conditions specified in the act.

The record reflects that appellant obtained a license certificate or permit from the Arkansas Railroad Commission, under act 99 of the General Assembly of 1927, to operate a general bus line over said Highway No. 44, in Phillips County, between Helena and Ferguson and through intermediate towns, for the purpose of transporting persons for hire. Also that appellees obtained a license certificate or permit from the Railroad Commission under said act to operate taxicabs over the highways of Phillips, Desha, Monroe and Lee Counties for the purpose of transporting persons for hire. Neither certificate nor permit purported to grant an exclusive franchise, and the act forbids that exclusive franchises be granted by said commission. According to the weight of the evidence, appellees have not confined and did not confine their business to carrying passengers from a given point along Highway No. 44 at any time, by private agreement, at varying prices and to varying distances. They ran their cars a short distance in front of the busses operated by appellant, and picked up, hauled and discharged passengers on said route wherever they desired to debark.

The licenses or permits obtained by appellant and appellees from the Railroad Commission to carry persons were not intended to allow an interference with the business of each other. Although authorizing both to carry persons for pay, appellant was granted permission to operate a regular bus line between Helena and Ferguson and upon a fixed schedule, at a rate of fare common to all, and to take and discharge passengers at any point on the route. Appellees were granted permission to operate taxi service to carry persons at any time, by private agreement, at varying prices and at varying distances. Although neither had or could obtain an exclusive franchise to perform the particular services authorized by his license, yet neither was authorized, under the

act or his license, to encroach upon or interfere with the business of the other. The act under which appellant and appellees obtained their respective licenses contains the following provisions:

"The commission shall have the right to employ one or more inspectors, as may be needed, for the purpose of making the inspection of licenses from time to time, and if any person, firm or corporation is operating without complying with provisions of this act, then the Attorney General of the State of Arkansas, or any interested party, may institute suit in any chancery court where service on the defendant may be had, restraining the further operation of motor vehicles by such person, firm or corporation, until the provisions of this act are complied with."

We think this provision broad enough to allow either party to bring a suit in a court of equity to prevent interference by the other with the privilege acquired under the permit or license granted to each. The trial court should have made the temporary restraining order granted appellants perpetual.

On account of the error indicated the decree is reversed, and the cause is remanded with directions to render a decree in accordance with this opinion.

RELIANCE LIFE INSURANCE COMPANY OF PITTSBURGH *v.* PEARSON.

Opinion delivered December 10, 1928.

[redacted]

[redacted]

Cockrill & Armistead, S. M. Casey and *Shields M. Goodwin,* for appellant.

John E. Miller, for appellee.

KIRBY, J., (after stating the facts). It is insisted that the court erred in holding that the giving of the note by the insured to the agent of the company, who delivered the policy to him, constituted a payment of the yearly premium and continued the policy in force at the time of the death of the insured.

Appellant concedes that the taking of such a note by a general agent of the company would have constituted a payment of the premium, so far as the company was concerned, but contends that the soliciting agent was without authority to accept such note, and that the policy lapsed and was void because of the nonpayment of the premium in cash when it became due. It is undisputed, however, that the first premium for the short term insurance was duly paid to the company, and that the policy was issued and delivered by the insurance company through its soliciting agent, who was authorized to collect the premium, and who took the note payable to himself for the first premium due after the end of the short term, or that any action was taken by the insurance company to ascertain how the premium had been paid upon the delivery of the policy, or any steps to claim lapse of the policy for failure to pay the premium before the death of the insured.

The policy itself does not provide it shall be void until the payment of the first premium note is made in cash, and, if it had done so, the first premium due for the short term was conceded to have been paid, and does provide for the payment of the amount of the policy, "less any indebtedness herein to the company or any unpaid portion of the premium for the current policy year."

It is true the letter of instructions provided that the policy must not be delivered until the first premium is fully settled for and the insured has done "all the acts the company requires of him, and has settled the premium in full, then, and not until then, the agent may deliver the policy to the applicant;" provided 60 days have not expired after the medical examination. It is not

disputed that these instructions were for the agent, and not communicated to the insured, nor that the policy was actually delivered to him while he was in good health, within the time provided therefor, upon the settlement of the premium in full by the execution of the note therefor to the agent.

It was the duty of the agent to report his action, of course, to his principal, and no steps were taken by the principal to ascertain whether the policy had been delivered to the insured in accordance with its instructions, nor any effort made to demand the return of the policy or give information to the insured of its alleged lapse and invalidity before insured's death occurred. The insured necessarily rested secure in the belief that the agent's prior instructions, of which insured had no information whatever, were complied with in the delivery of the policy, and, not having had any information from the company to the contrary, before the time of his death, it is now estopped to deny that delivery was made of a valid policy or contract of insurance.

Under the rule of our decisions, the insured is allowed a reasonable time only for examination of the policy, after its delivery to him, to ascertain whether it is the policy applied for, and is held, as a matter of law, to have accepted it and become bound to pay the premium, unless he shall notify the insurer, without unreasonable delay, of his rejection of or refusal to accept such policy. *Remmel* v. *Griffin,* 81 Ark. 268, 99 S. W. 70; *Carrigan* v. *Nichols,* 148 Ark. 336, 230 S. W. 9; *People's Savings Bank* v. *Raines,* 175 Ark. 1155, 2 S. W. (2d) 20.

A note given for the premium on insurance is required by statute to state the purpose of it, and declared not negotiable until the policy for which the note was given as payment of premium shall have been issued and delivered to the maker of the note, and presented to him in the form applied for and its acceptance refused. The purpose of the statute, as held in *People's Savings Bank* v. *Raines, supra,* evidently being to prevent irresponsible insurance companies and irresponsible agents

of insurance companies from realizing on the obligations given for insurance by applicants before the delivery of the policy, and without affording them the protection applied or contracted for; and so also should the insurer be held bound by its contract of insurance, in accordance with its terms, by the delivery of its policy, upon his application to the insured through an agent, general or special, unless it shall notify the insured, within a reasonable time after he receives such policy from such agent, that it was delivered without authority and contrary to instructions to the agent, and did not become effective or a valid contract.

It is true the circumstances indicate that the agent was not greatly experienced in soliciting applications for insurance, the policy being dated upon the day of the date of his agency contract, but there is no indication whatever that the insured had any intimation that the agent had not complied with his instructions, if such was the fact, in the delivery of the policy to him. Under the circumstances we hold that the agent had authority to make settlement of the premium with the insured, and, having done so by the acceptance of the note and delivery of the policy upon its execution, that the note amounted to a settlement of the premium within the terms of the instructions, and that the policy so delivered was not invalid because cash was not collected instead of the note taken in settlement of the premium.

No complaint is made of the instructions. The majority of the court holds that the record is free from error, and that the judgment must be affirmed, in which holding the writer does not concur. It is so ordered.

PARAGOULD LAND COMPANY *v.* TAYLOR.

Opinion delivered December 10, 1928.

M. P. Huddleston, for appellant.

C. M. Buck, for appellee.

KIRBY, J., (after stating the facts). It is insisted that the court erred in sustaining the demurrer to the intervention of Shannon and others, and also in sustaining a demurrer to the answer of B. M. Kitchens and dismissing it for want of equity. The attorney for interveners insists that but one issue is presented, and that an issue of law, by the appeal as to whether a common unsecured

creditor has the right to intervene in a foreclosure suit and dispute the title of the Bank Commissioner, having in charge the affairs of the pledgee, to the property pledged. The Bank Commissioner, in charge of the Paragould Trust Company, insolvent, sought by this suit to foreclose a written pledge agreement or assignment executed to the insolvent trust company by A. Bertig, S. Bertig and Joe R. Bertig, on September 18, 1926, and to sell the stock certificates of the Richards Land Company, described in the pledge agreement, it being alleged that 667 shares were owned by A. Bertig, 667 by S. Bertig, and 666 shares by Joe R. Bertig, and pledged to secure an aggregate indebtedness of approximately $160,000 due by the Bertigs individually and by various mercantile, gin and land corporations composing the Bertigs' interests, including an indebtedness of $15,500 due the Paragould Trust Company by the Bertig Realty and Investment Corporation, and a note of B. M. Kitchens for $5,000 indorsed by Joe Bertig.

The Richards Land Company, a corporation, was organized in 1906, before the organization of the Bertig Realty and Investment Corporation and the other corporations designated in the intervention. There is no contention that it was fraudulently organized or that it was insolvent. The interveners alleged that its assets were worth $75,000 or $80,000 more than its indebtedness.

At the time of the execution of the pledge agreement in the suit, the stock in the Richards Land Company was held by the Bertigs, and the old stock certificates were surrendered and new certificates issued for the same amount of stock held by each of the said Bertigs to the Paragould Trust Company as trustees. The interveners alleged that they were creditors of the various corporations, which they allege were owned and controlled by Bertig Brothers, a partnership, which in its dealings ignored the separate corporate entities and treated the various corporations as Bertig Brothers, a partnership. They alleged further that the corporations of which they were creditors, designating them, had been

adjudged bankrupt, that petitions in bankruptcy had been filed against Bertig Realty and Investment Company, a corporation, and Bertig Brothers, a partnership. These allegations were true, and the realty company and the Bertig Brothers partnership were each adjudged bankrupts before the hearing. There is no allegation in the intervention that either Bertig Brothers, a partnership, or Bertig Realty and Investment Company, a corporation, or any of the trustees of the corporations adjudged bankrupt, had been requested to intervene in the suit and had refused to do so. Certainly the interveners, creditors of the corporations already adjudged bankrupt and for whom trustees had been appointed, could not intervene in this suit to protect the assets and enforce the collection of the debts of the bankrupt corporations without alleging the failure or refusal of the trustees, after request so to do, to take the required action; and although Bertig Brothers, partnership, and the Bertig Realty and Investment Company, a corporation, had not been adjudged bankrupt at the commencement of the suit by the Bank Commissioner, the interveners alleged that they had been either adjudged bankrupts or that petitions in bankruptcy had been filed against them, and their adjudication in bankruptcy related back to the filing of the petition, which was subsequent to the filing of the Bank Commissioner's complaint and prior to the filing of the intervention.

The creditors of an insolvent corporation in the hands of a receiver or trustee in bankruptcy cannot maintain an action for property belonging to the bankrupt or insolvent corporation without allegations showing the failure or refusal of the trustee or receiver to protect the assets and their interests. *Creamery Pkg. Mfg. Co.* v. *Wilhite,* 149 Ark. 576, 233 S. W. 710; 8 Fletcher on Corporations, pp. 9250-9251.

The interveners alleged that the stock pledged was the property of Bertig Brothers, a partnership, composed of A. Bertig, S. Bertig and Joe Bertig, and that each of said persons who composed the partnership had

pledged his shares of the corporation. It was also alleged that the stock so pledged was the property of Bertig Realty & Investment Company, but the allegation of the complaint is undisputed that the original certificates were issued to A. Bertig, S. Bertig and Joe Bertig, and that it was pledged to the bank by each of said Bertigs, and the stock certificates were duly reissued by the corporation to the pledgee as trustee to secure the indebtedness specified in the pledge agreement, which was exhibited with the complaint of the Bank Commissioner for foreclosure.

It is true Kitchens, the maker of the note, was sued by the Bank Commissioner along with the other debtors of the Paragould Trust Company, in order to foreclose the lien of the pledge given as collateral security for payment of his note specified in the agreement, but no judgment was prayed against him, nor could have been rendered under the allegations of the complaint upon the indebtedness and his answer, admitting that, although he had executed the note for securing the payment of which the pledge of the stock had been made by the Bertigs individually; the note in fact evidenced an indebtedness of Bertig Brothers, the amount of the loss incurred by them in the operation of a subsidiary partnership, and that he was not indebted thereon at all. If the allegations of the answer were true, it would not have prevented the granting of the relief to the Bank Commissioner foreclosing the lien against the stock pledged and applying it to the note specified, for security of the payment of the note for which it was pledged, even though the note was found to represent in fact an indebtedness of the Bertigs instead of the maker, since, so long as it was not a simulated claim, the Bank Commissioner would have had the right to apply the proceeds realized from the sale of the stock pledged to its payment.

The judgment of dismissal under the circumstances did not preclude the maker of the note from interposing the defense set up in his answer herein to a suit for col-

lection of the note from him, which was not attempted to be made in this proceeding.

The answer and intervention not having stated a cause of action nor defense, the demurrer thereto was rightfully sustained, and the decree is accordingly affirmed.

CAMERON *v.* WESTBROOK.

Opinion delivered December 10, 1928.

[redacted]

Jones & Hooker and *R. S. Cameron,* for appellant.

Bruce H. Shaw and *J. M. Shaw,* for appellee.

KIRBY, J., (after stating the facts). The chancellor held that appellee and her grantors had held possession of the strip of land in controversy for more than seven years, "with a mistaken idea that it constituted lot 6 in said addition," and acquired title by adverse possession.

Appellee's grantor, her husband, lived on premises belonging to his father, the common source of title, at the time of his father's death, and was a tenant in common of the undisposed-of lands of the estate. He recognized in his petition for partition of the lands that the homestead devised to the widow, etc., was situated on lot 7 of the addition, and only prayed the sale of lot 6 adjoining the homestead in the partition, and purchased same as lot 6 at the commissioner's sale. He later mortgaged it as such lot 6, and particularly described it as 104 8/10 feet wide, which did not include any of the strip of land in controversy, which was in fact a part of lot 7 as platted, and so recognized by him in his suit for partition. There was no act or thing done by him in the way of a change of possession after his purchase of the lot at the partition sale, nor was there any act shown to have been done that should charge the other owners of lot 7 with notice of any adverse claim of possession by him or his grantees. The chancellor in fact found that appellee held possession of the strip of land in controversy under the "mistaken idea" that it constituted a part of lot 6.

There is no testimony in this record showing when any knowledge of appellee's adverse claim or of her intention or that any of her grantors to so hold was brought home to the other tenants, and, under such circumstances, the holding could not be adverse to them. *Singer* v. *Naron,* 99 Ark. 446, 138 S. W. 958. It was there said:

"In order for the possession of the tenant in common to be adverse to that of his cotenants, knowledge

of his adverse claim must be brought home to them directly, or by such notorious acts of an unequivocal character that notice may be presumed; the reason being that the possession of one tenant in common is the possession of all the tenants in common."

Appellee argues that at no time did she or Howell L. Westbrook, her grantor, acknowledge the right or title of appellants or those under whom they hold, and says that, in the suit for partition of all real estate of W. H. Westbrook, deceased, in which Howell L. Westbrook was plaintiff and Cora N. Troxel and Franklin Westbrook were defendants, they were then put on notice that it was to be a final disposition of all the estate; that they then had opportunity to set up any claim they might have had to the strip of land in controversy, the east 6 feet and 2 inches of lot 7, and, having failed to do so, acquiesced in the disposition made of it. It must be remembered, however, that it was alleged in that suit that the homestead, consisting of lot 7, was given by the will to the widow for life, and to Howell L. Westbrook, plaintiff, and Franklin Westbrook, one of the defendants, in remainder, and not subject to partition or sale, and it was so adjudged that the said parties were tenants in common in the remainder.

The undisputed testimony shows no act of possession or claim of ownership of part of said lot 6 by occupancy of lot 6 after the purchase by Howell at the partition sale different from his holding as tenant of his father, nor any act on his part calculated to bring home to his cotenants knowledge of his adverse claim to any part of said lot 7, and the chancellor erred in holding otherwise.

The chancellor likewise erred in holding appellee acquired title by adverse possession against the remainderman, and canceling his conveyance of the property in any event, before the death of the life tenant, his mother, Cora N. Troxel, with whom he joined in the deed conveying his remainder. He had no right of action to protect his interest in the part of the lot in controversy,

and title then could not therefore, as against him, be acquired by adverse possession of the other remainderman or his grantees. *Gallagher* v. *Johnson,* 65 Ark. 90, 44 S. W. 1041. See also *Collins* v. *Paepcke-Leicht Lumber Co.,* 74 Ark. 81, 84 S. W. 1044.

The decree will be reversed accordingly, and the cause remanded, with directions to dismiss the complaint for want of equity. It is so ordered.

BARRETT *v.* HARREL.

Opinion delivered December 10, 1928.

A. F. Triplett, for appellant.

Thos. W. Raines, for appellee.

KIRBY, J. This appeal is prosecuted from a judgment for damages for personal injury suffered by appellee on account of the failure of appellant to erect a screen over the saw at which he was working when the injury occurred. The suit was brought against appellant and A. B. Fisher, alleged to compose a partnership, operating the sawmill under the partnership name of A. B. Fisher. Judgment was rendered against both Fisher and Barrett. Only Barrett has appealed.

Only two questions are presented for consideration here: the insufficiency of the evidence to establish a

partnership between appellant and A. B. Fisher in the operation of the mill, and the admission of certain testimony alleged to be incompetent. No objection is made to the declarations of law defining a partnership to the jury.

Appellee testified that he understood A. B. Fisher and Moody Barrett were the owners of the mill and partners in its operation; that he knew Moody Barrett was a partner, because Barrett had told him so numerous times in his store, and showed him the written contract between himself and Fisher for operation of the mill. Said he knew all about it. After stating Barrett had shown him the written contract and told him out of his own mouth that they were partners, witness stated, in reply to the question, "Is that the only reason you knew they were partners?" Answer: "No sir. I know anything I got in the mill I had to get Barrett to get it; I could not get anything from Fisher; he would tell me to go to Barrett and get it."

Lev Goodrich was permitted to testify, over objection, that E. T. Harrel, the appellee, brought an order to him for mill supplies signed, "J. M. Barrett, by J. M. B. Jr.," which reads:

"11-4-1926 5.80 Pd. Dc. 14.

"Arkansas Mill Supply Co.:

Please let Mr. E. T. Harrel have
1 box packing ¼ inch and 3/5 inch
1 strip lace leather about 6 inches
1 belt punch.

"J. M. Barrett,
"By J. M. B. Jr."

Martin testified that he sold some material to the sawmill at Sherrill, but did not know to whom the mill belonged. The order was from J. M. Barrett by J. M. B. Jr., he believed. The objection was sustained to this testimony, the order not being produced. Witness was allowed to state, however, that the order was brought by Harrel, and the supplies were furnished for a sawmill. He supposed Harrel worked over there, but did know

he brought the order. Witness, on cross-examination by appellant's attorney, said he did not remember what stuff was furnished, but answered the question, "You say it was an order from J. M. Barrett, by J. M. B. Jr.?" "I am positive that was the way it was signed."

Appellant and Fisher filed separate answers, denying that any partnership existed between them in the operation of the mill, and appellant testified that he had no interest of any kind in the mill or its operation. Denied having told Harrel that he was a partner or shown him the written contract, which he said was one relating to the purchase of timber, but did not produce it in evidence. He also explained the orders, saying J. M. Barrett, his father, supplied many materials to Fisher, the owner of the mill, and to whom they were charged, and that he kept the store of his father, and when orders came for stuff they did not have on hand he gave orders to other merchants for his father for the supplies, which were charged to Fisher, the owner and operator of the mill, on the books of the Barrett store. He also stated that all the lumber bought from the mill was purchased by J. M. Barrett and credited on the account of A. B. Fisher, owner of the mill, for supplies furnished him by J. M. Barrett, who owned and operated the store. Fisher did not testify in the case.

The jury might well have believed the testimony of appellant, whose explanation of the orders for mill supplies bought from J. M. Barrett appeared reasonable and conclusive, and also his denial of his having any interest whatever in any way in the ownership or operation of the mill, and his denial of having told appellee that he was a partner in the operation of the mill, or having shown him any written contract relating to the ownership and operation of same They credited appellee's statement, however, and found against appellant, and there is substantial testimony supporting their verdict.

Neither was error committed in the introduction of the testimony of the two witnesses complained of. The court only permitted the introduction of the testimony

relating to such orders as were presented by appellee Harrel and signed by appellant. One of the orders was introduced in evidence, and the court refused to allow the other witness to testify to the method of signature of the order that he said was presented by Harrel for mill supplies. The appellant himself brought out on cross-examination of this witness the method of signature of the order, and, as already said, his explanation of the giving of the orders was entirely consistent with his contention that he had no interest whatever in the ownership or operation of the mill, but the jury found otherwise upon testimony sufficient to support the verdict.

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

McIver Abstract Company *v.* Slaton.

Opinion delivered December 10, 1928.

E. Newt Spivey and *Dulaney & Steel,* for appellant.

KIRBY, J., (after stating the facts). It is insisted that the court erred in holding act 346 of 1925 invalid, and this contention must be sustained.

The land was sold for taxes, under order of the court, on the 20th day of September, 1924, and purchased by the district, and, under the law existing at the time, subject to redemption within two years. Not being redeemed, the commissioner, on October 25, 1926, conveyed it by deed to Road Improvement District No. 7.

Said act 346 of the Acts of 1925 became effective on the 10th day of June, 1925, before the two years allowed by the existing law for redemption of the land had expired, and by § 1 thereof the time for redemption was extended for a period of three years, making a total of five years allowed for redemption from the date of the sale, the land having been purchased by the road improvement district. *Walker* v. *Ferguson,* 176 Ark. 625, 3 S. W. (2d) 694.

It was held there, *Walker* v. *Ferguson, supra,* that a different rule of law was applicable in cases of this kind, where the land was purchased by the State or one of its instrumentalities, at the tax sale, from the rule applied where such land was struck off to a private purchaser, and that it was competent for the Legislature to extend the time for redemption of property sold for the nonpayment of road taxes so far as the rights of the State or its instrumentalities are concerned.

The purchaser of the land from the road improvement district, before the time allowed by law for its redemption had expired, acquired only such title as the road improvement district had when its deed of conveyance was executed.

The chancellor erred in declaring the statute extending the time of redemption invalid and holding the appellant not entitled to redeem from the district or

its grantee and to a foreclosure of its mortgage against the land.

The decree will accordingly be reversed, and the cause remanded with directions to make all necessary orders for redemption of the land and foreclosure of the mortgage thereon, and all other necessary relief in accordance with the principles of equity and not inconsistent with this opinion. It is so ordered.

CHALKLEY *v.* HENLEY.

Opinion delivered December 10, 1928.

Golden Blount and *Brundidge & Neelly,* for appellant.

Bogle & Sharp, for appellee.

MEHAFFY, J. On the 11th day of December, 1927, J. G. Howard sold to the appellee 160 acres of land in Monroe County for the sum of $6,400, payable in annual installments, $1,000 to be paid on or before December 1, 1918, $1,000 one year thereafter, another $1,000 one year after that, $1,700 in 1921, and $1,700 in 1922. The land purchased is described as follows: the northeast quarter of section 7, township 3 north, range 2 west, in Monroe County, Arkansas.

The parties entered into an agreement in writing, showing the sale of the land, the execution of the notes, which were to bear interest at the rate of 7 per cent. per annum from date, interest payable annually, and from maturity at the rate of 10 per cent. per annum. The contract provided: "It is agreed that, when the buyer has paid $1,000 of the principal on the contract and the interest due up to that date, he has the option to have this contract annulled, and the seller agrees to make a warranty deed to said property, retaining a vendor's lien for the balance of the unpaid purchase price."

It was also agreed that time was of the essence of the contract, and after the buyer failed to pay, the seller had the option either to declare the entire balance of the purchase price due or rescind the contract. And, in case of rescission, all moneys paid by the buyer were to be taken and retained as rent.

The contract also provided for a lien on one-half of all the crops grown on the land each year during the life of the agreement.

The appellee paid the first $1,000 note and the interest due up to that time, but did not make any further payments. This contract was made in December, 1917, and, so far as the record shows, no effort was made to collect until February, 1927, when suit was filed by appellant to

foreclose the lien for the purchase money. This was nearly ten years, and, according to the contract, the last payment was due in 1922.

Appellee filed answer and cross-complaint, alleging that appellee was entitled to a deed when he paid the first $1,000 and interest, but that the seller failed and refused to execute a deed as provided in the contract. Appellee alleged that because of this failure he was damaged in the sum of $5,600, because he had contracted to sell the land for $75 per acre, and in his cross-complaint he asked judgment for the $5,600. He further alleged that the seller agreed to give an abstract showing a good title to said lands, and failed to comply with this part of the contract, in that no abstract was furnished. He further alleged that he had made valuable improvements on the land; had expended $2,609.25, and asked that, if the court should hold that he was not entitled to the profits, he was entitled to recover the $1,448 which he had paid on the lands, together with the amount or value of the improvements put on the land.

Appellee asked that he have judgment against the appellant, and that the same be declared a lien on the land, and that the land be sold to pay said judgment.

This cross-complaint was filed on the 25th day of April, 1927. The appellant never filed any answer to the cross-complaint, and no steps were taken to bring the case to trial by either party, and on February 6, 1928, one year after the suit was filed, the court dismissed the cause for want of prosecution. The clerk, soon thereafter, wrote to Mr. Blount at Searcy, Arkansas, attorney for appellant, that the cause was dismissed, and he also inclosed a copy of the cross-complaint. There is nothing appearing in the record to show that the cross-complaint was dismissed, except appellee's attorney asked that the order dismissing the cause be set aside, so that he could go to trial on his counterclaim. This occurred on the 2d day of April, 1928. He asked that the court vacate and set aside the order made at the February term dismissing said cause, and stated as his reasons

that he had filed a cross-complaint and had his witnesses present at court to substantiate the merit of same. The court had overlooked the filing of the cross-complaint, and found that he had filed a cross-complaint in February, 1928, and that the cause should not have been dismissed until defendant's cross-complaint was disposed of. The court thereupon vacated and set aside the order dismissing the cause, and gave the defendant an opportunity to prosecute his cause of action upon his cross-complaint, and the defendant announced ready to go to trial on his cross-complaint, and the court thereupon proceeded to trial.

The court found that complaint was filed in February, 1927, cross-complaint in April, 1927, and that since that time the court had held both regular and adjourned terms of court as follows: February, 1927, regular term; April 4, 1927, adjourned term; April 5, 1927, adjourned term; June 6, 1927, regular term; July 27, 1927, adjourned term; October 3, 1927, regular term; December 12, 1927, adjourned term; and February 6, 1928, regular term; and that neither the plaintiff nor any attorney representing him had appeared at either of said terms, and that the cause was dismissed at the February term of court for failure to prosecute. That the plaintiff had failed to plead, answer or demur to the cross-complaint, and that his time for so doing had long since passed.

The court further found that they entered into the contract, and gave judgment against the appellant for $1,448, the amount appellee had paid him, and for the sum of $2,925 for repairs, and found that said repairs were completed February 1, 1928.

The court further found that defendants had expended $600 in clearing in August, 1918, and paid taxes on the land for 1918 and 1919, amounting to $352.98, and gave judgment for the above amount, with 6 per cent. interest, less the rental value of said land for 1918 to date, which he found to be $3,160, leaving a balance due, according to the finding of the court, of $3,849.12.

The court canceled the notes of Hensley, and, after the evidence had been heard and the cause submitted to the court on defendant's cross-complaint, counsel for plaintiff appeared in court and asked the court to set aside the orders it had made and permit him to file an answer and continue the cause to a future date, which motion the court denied, and the plaintiff saved his exceptions.

The motion to set aside the judgment, entered on the 2d day of April, 1928, stated, among other things, that plaintiff had never been advised that defendant was ready to try said cause upon the cross-complaint; never been notified to taken any depositions; and that on the 14th day of February, 1928, his attorneys were advised by the clerk of the court that the cause had been dismissed for want of prosecution, and advised that the next term of court would be the first Monday of April, 1928. That plaintiff's attorney left Searcy for Clarendon on the 2d of April, but had car trouble and did not reach there until about 10 A. M., and then asked to be permitted to put the matter over and to introduce proof to rebut the testimony of the defendant. He further stated that he had a good defense to the cross-complaint; that he had at no time failed or refused to deliver deed; that appellee could not have been damaged by the loss of a sale of property, and that he had not made the improvements he claimed, and, if he was given an opportunity, he could show that appellee was not entitled to any damages. He further stated that he is a nonresident of the State, and his attorney resided at Searcy.

The appellant contends that the court erred in setting aside the judgment dismissing the cause for want of prosecution and in proceeding to hear it upon the cross-complaint of defendant without notice to appellant or his attorney; that the attorney had received a letter from the clerk notifying him that the cause had been dismissed, and that, if he desired to do so, he could appear there on the 2d day of April, when court would meet, and ask the court to set aside the judgment.

The undisputed proof shows that no action whatever was taken by the appellant or his attorney for about a year after he filed his complaint. While it is true that the attorney that originally filed the complaint moved to California, yet his partner remained at Searcy, and no steps were taken and no communication had with the clerk of the court or any one else, in order to ascertain what pleadings, if any, had been filed by the opposite party, and it was within the power and discretion of the court to dismiss the cause for failure to prosecute. It was also within the discretion of the court to permit a trial on the counterclaim without continuing the cause to give plaintiff an opportunity to get witnesses. He had a copy of the cross-complaint on the 14th of February. He not only did not make any effort to take any testimony, but did nothing with reference to the suit, according to his own proof, until the second day of April, and then got to court after the case had already been tried and submitted to the court. We think the conduct of the parties was such as justified the court, in the exercise of its discretion, to dismiss the cause.

"As a court may dismiss an action for want of prosecution, so it may in its discretion vacate or refuse to vacate an order of dismissal, and such order will not be reversed by the Supreme Court on appeal, unless there has been a manifest abuse of discretion." 9 R. C. L., 210.

Courts are bound to have some rules and to regulate the procedure. The disposing of the business in the courts would be impossible unless the trial courts had some power to regulate the procedure and to fix the time of the trial of cases. An order dimissing a case for want of prosecution, granting or refusing a continuance, setting aside an order dismissing a case for want of prosecution, will not be reversed by the Supreme Court unless there is a manifest abuse of discretion.

In this case we do not think there was any abuse of discretion. There are many things the trial court may do, such as we have suggested above and others, that will not be reversed by this court unless there is an abuse of

discretion. See *Richards* v. *Howell,* 129 Ark. 390, 196 S. W. 483; *C. H. Robinson Co.* v. *Hudgins Produce Co.,* 138 Ark. 500, 212 S. W. 305; *Johnson* v. *Mo. Pac. Ry. Co.,* 149 Ark. 418, 233 S. W. 699; *Franklin* v. *State,* 85 Ark. 534, 109 S. W. 298; *Central Coal & Coke Co.* v. *Graham,* 129 Ark. 550, 196 S. W. 940; *Holub* v. *State,* 130 Ark. 245, 197 S. W. 277.

This court has also held that one may lose his right by the negligence of his attorney, and it is said, in the absence of fraud or unfairness, one is concluded by the acts or omissions of his attorneys. He is entitled to no equitable relief. *Scroggin* v. *Hammett Grocery Co.,* 66 Ark. 183, 49 S. W. 820; *Blackstad Mercantile Co.* v. *Bond,* 104 Ark. 45, 148 S. W. 262.

After a careful consideration of the entire record, we are of opinion that the court did not abuse its discretion in refusing to continue the case and permit appellant to file answer to the counterclaim and take proof

Learned counsel for appellant have called our attention to quite a number of authorities, but most of them are cases where there was a misunderstanding without negligence, or where there was an unavoidable casualty. Neither of these questions is in this case.

It is next contended that appellees were not entitled to any damages at any time, and if they had had a cause of action any time, it was barred by laches. The claim for damages is based on an alleged violation of the contract by appellant refusing to execute a deed. In the first place, the evidence does not show that there was any refusal on the part of the appellant or that demand was made of him. In the next place, if all that appellee claims is true, he could not have been damaged thereby. If he had a purchaser, a person who wished to buy the land, appellee had the contract and receipt showing that he had made one payment, and could have transferred that contract, which would have been as binding as a deed retaining a lien would have been; or he could have compelled the appellant to make him a deed. But, even if he should have done none of these things, that alleged

breach of contract occurred, according to the proof and the finding of the court, in 1918. Nothing was said about it to appellant or any one else. No claim of damages was made by appellees until the filing of their cross-complaint in April, 1927, about nine years, and his claim therefore for damages because of his breach of contract was barred long before suit was begun.

The appellees also claim, and the court allowed, $2,009.25 for repairs, and it is expressly stated that these repairs were completed prior to February 1, 1918. Certainly it was too late to bring a suit on this claim after nine years, when no claim had been made, no effort to collect it, and nothing whatever said about it. The same is true about the $600 item.

Appellees also claimed and were given judgment for $352.98 for taxes paid in 1918 and 1919. This item is likewise barred, but, if it were not barred, if the contract is canceled, appellees would not be entitled to recover this item, because they were at the time in possession, receiving the rents and profits from the land on which they claimed to have paid taxes.

We are therefore of opinion that the appellees are not entitled to any of the items allowed by the chancellor, not having made any claim for any of them until after suit was filed to foreclose the lien for the purchase money.

The chancellor allowed the $1,440 which appellee had paid, and gave judgment for that amount, and found that the rental value of the property was $3,160, leaving a balance of $3,849.12 against the appellant. The appellant is not entitled to rent, and the appellee is not entitled to any of the items allowed him. The appellee is not claiming the land. In fact, he asks that he have judgment against the appellant, and that it be declared a lien on appellant's land.

We have reached the conclusion that the chancellor's finding as to the dismissal of the complaint and to refusal to permit appellant to file an answer to the cross-complaint and continue the case, was within the discretion of the chancery court, and should be affirmed.

The decree of the chancery court dismissing plaintiff's case for want of prosecution and finding against him on that being affirmed, it follows that his order canceling the notes should be affirmed, and that the case should be reversed as to his finding any amount in favor of the appellees, and finding rent in favor of the appellants.

The decree of the chancery court is therefore reversed, and remanded with directions to enter a decree in accordance with this opinion, and that he should not only cancel the notes, but the contract of sale, so that the appellant may have his land. Appellees are not required to pay rent, because it appears that the claim for improvements and expenditures is approximately equal to the rental value for the place at the time it was held by appellees, and appellant could at any time, after default of the payment of any installment, have brought suit to foreclose.

FIRST NATIONAL BANK OF CLARKSVILLE *v.* SCRANTON COAL COMPANY.

Opinion delivered December 10, 1928.

[redacted]

Evans & Evans, for appellant.

I. S. Simmons and *Cochran & Arnett,* for appellee.

MEHAFFY, J. On the 6th day of January, 1927, the First National Bank of Clarksville filed suit in the chancery court of Logan County, Arkansas, against the defendant, Scranton Coal Company, to foreclose a second mortgage upon the property of the coal company and to obtain an order appointing a receiver to take charge of the coal company's property, covered by the bank's mortgage. The American Bank & Trust Company of Paris, Arkansas, held first mortgage on the property.

The appellant alleged that the coal company was indebted to it, and that said indebtedness was secured by a mortgage, a copy of which was attached to the complaint; that said mortgage of appellant was subject to a prior mortgage securing the sum of $3,200 to the American Bank & Trust Company of Paris, Arkansas. It asked that the American Bank & Trust Company be made a party and required to appear and answer. Appellant also stated in its complaint that the defendant coal company was indebted to various parties in considerable

sums, all of which was due and payable, and that numerous creditors of defendant were impatient and demanding settlements, and would commence litigation unless a receiver was appointed. That the payroll for labor, due the 31st of December, was unpaid; that certain laborers had already begun suits for the amounts due them and attached certain property, and that other laborers would sue, and that the defendant would be greatly harassed, its operations obstructed, and its property dissipated in cost and expenses unless a receiver was appointed. It stated that the coal company was not insolvent; that its assets greatly exceeded its liabilities, and, with proper management of its affairs, it could be so handled as to enable it to pay fully all its obligations and preserve and protect its property. It alleged that it sued on its own behalf and for the benefit of all creditors of defendant, and asked, upon a final hearing, that it have judgment against the defendant for the amount due it and a foreclosure of its mortgage and sale of the property to pay said indebtedness. The complaint was verified by the president of the bank. The notes and mortgages were filed as exhibits to plaintiff's complaint.

On the same day that the suit was filed, the Scranton Coal Company entered its appearance, and consented to the appointment of a receiver, and the chancellor on the same day appointed a receiver, as prayed for in plaintiff's complaint.

The American Bank & Trust Company filed answer, intervention and cross-complaint, setting forth the indebtedness of the Scranton Coal Company to it, and filed with its answer the note and mortgage, and asked judgment and foreclosure, and that the property be sold.

Numerous other interventions of creditors of the Scranton Coal Company were filed. The receiver then filed a petition, showing that the company owed sums approximating $25,000, including payroll due laborers, and that there were no funds immediately available, and stated that it would be to the interest of all parties to

sell the property, after giving the usual notice, and asked for an order of sale of said property.

The receiver also filed a statement showing a number of cars of coal of the total value of $11,518.94, showing also that a number of the cars had been assigned to the First National Bank, and that, when the cars were sold, the proceeds should be applied to the payment of moneys advanced by the plaintiff. The itemized statement filed by the receiver of the assets and property of the coal company showed an estimated value of $89,450, and to this there was added the stationery, supplies and office fixtures, the value of which was estimated at $500, making a total of the estimated value of the property of $89,955. It is alleged that the statement of the estimated value does not include 19 cars of coal, amounting to $11,518.94, which had been assigned to the appellant bank.

The property was ordered sold, as prayed for by the receiver, and was sold to R. D. Dunlap, as trustee, for $5,500, this being the only bid. R. D. Dunlap was president of the appellant bank.

Thereafter the receiver filed his report, and exceptions were filed to said report, were heard by the court and overruled, and the report of the receiver was approved by the court.

The court found the amount of indebtedness due the appellant and interveners, and held that the laborers intervening were entitled to a first lien on the property. The cost of the receivership amounted to approximately $8,000, as shown by the receiver's report. The court decreed that this should be paid by the First National Bank of Clarksville, the appellant herein.

As far as necessary to do so, attention will be called to the facts in the opinion, and it is unnecessary to set them out further here.

It is contended by the appellant that it should not be required to pay the costs and expenses of receivership, and it quotes § 1838 of Crawford & Moses' Digest in support of that contention. That section reads as fol-

lows: "When a suit is brought in the name of one person to the use of another, the person to whose use the suit is brought shall be liable for the payment of all costs which the plaintiff may be adjudged to pay." And it is contended that the suit in the instant case was commenced by the First National Bank, who held a second mortgage, and sought to foreclose, subject to the prior rights of the American Bank & Trust Company and all other claimants whose rights upon intervention might be made to appear as prior to the rights of the First National Bank. Appellant states that the suit was brought not only in the interest of the bank, but in the interest and for the use of all creditors and claimants who might desire to intervene, and all other claimants did intervene.

It may be said in answer to this contention that the suit was not brought by appellant in its name to the use of another. The suit was brought by appellant for its own use, to collect its own debts, and the section of the Digest above quoted has no application to a suit of this kind.

Appellant argues that the question of costs seems not to have been considered, the court taking the view that the liability of the bank for the excess costs had been conceded. But it says this attitude on the part of the counsel was due solely to the fact that the counsel who represented the bank in the last stages of the receivership had the impression that the counsel had not contested this feature.

The appellant correctly argues that giving costs in equity is within the discretion of the chancellor, and cites *Mt. Nebo Anthracite Co.* v. *Martin,* 86 Ark. 608, 111 S. W. 1002, 112 S. W. 802, and *Lackey* v. *Waterworks,* 80 Ark. 108, 96 S. W. 622. Many other cases decided by this court might be cited. There is, however, no dispute about this proposition of law. A court of equity may, in proper cases, apportion the costs, although in law cases the losing party must pay the costs.

Attention is next called by appellant to the rule as stated in 34 Cyc. 366. It quotes from this at length, but the latter part of the quotation is as follows:

"So the general rule that such expenses are to be taken out of the fund or property in the receiver's hands, is held not to contemplate that they shall be taxed as costs or charged against the party at whose instance the receiver was appointed, merely because he was ultimately unsuccessful on the merits of his suit, and when the validity or propriety of the appointment itself is not attacked."

Appellant also calls attention to the case of *Ferguson* v. *Dent,* 46 Fed. 88; *Farmers' Loan Co.* v. *Pacific Railroad Co.,* 31 Ore. 237, 48 P. 706, 38 L. R. A. 424, 63 Am. St. Rep. 822, and cases cited there. Also *Atlantic Trust Co.* v. *Chapman,* 208 U. S. 360, 28 S. Ct. 406, 52 Law ed. 528. And appellant cites and quotes from other cases relied on to support its contention.

The court in its decree stated: "As to the cost of the receivership, amounting approximately to $8,000, as shown by the report of J. W. Houston, the receiver herein, the attorneys for the plaintiff concede that all over and above the amount received from the sale of the property should be paid by the plaintiff, the First National Bank of Clarksville, Arkansas."

Whether the text quoted in appellant's original brief is supported by the cases cited or not is, we think, immaterial, because it is conceded by appellant now that the giving costs in equity is within the discretion of the chancellor. And, without deciding the question as to whether, in all cases where the property sold is not sufficient to pay the costs, the person procuring the appointment of the receiver should pay it, we think that the chancellor's ruling as to costs in this case is correct. The estimated value of the property was more than $89,000. This was purchased by the bank, or by its president as trustee, for $5,500, and this $5,500 for which the property sold is to be used in the payment of the costs, and the appellant required to pay the balance. So it will be seen

that the proceeds of the property itself pay $5,500 of the costs, and the appellant has all the property, and the court in its decree stated, "and it is considered, adjudged and decreed that the plaintiff, First National Bank of Clarksville, pay the amount of all costs in excess of the sum of $5,500, the sale price of the property sold by the receiver, and that it be allowed to retain said sum of $5,500, the purchase price of said property, as part payment of the costs of the receivership, as the same appears from the report of the receiver this day approved."

The court trying the case knew all the facts and circumstances, and evidently adjudged the costs as it thought proper. Moreover, there was no denial of the fact that it was conceded by the attorneys that it was proper in this case for the person who brought the suit and obtained the appointment of the receiver to pay whatever costs there was in excess of the value of the property.

This court has many times held that the chancellor might, in the exercise of a sound discretion, apportion the costs according to equitable principles; that equity will apportion the costs according to what the court regards as the applicable equitable principle. The court evidently did that in this case.

This court, discussing the rule as to costs in chancery cases, said:

"Learned counsel for appellee have cited numerous authorities in support of the position that costs are not necessarily adjudged against the losing party in chancery cases, but that the chancellor may, in the exercise of a sound discretion, apportion the costs according to equitable principles when the facts justify. The rule contended for is sound, but is only applied when equities between the various parties warrant it. For example, if one party is at fault more than another, it is proper to distribute the costs according to the fault of each; or, if equally at fault, to divide the costs; or to adjudge the entire costs against the party wholly at fault." *Fry* v. *White,* 132 Ark. 608, 201 S. W. 1105; *Paving District No.*

5 *City of Ft. Smith* v. *Fernandez,* 144 Ark. 550, 223 S. W. 24; *Hayes* v. *Bankers' & Planters' Life Association of Ft. Smith,* 164 Ark. 202, 261 S. W. 296.

This court has also held that § 1833 of Crawford & Moses' Digest, referred to by appellant, does not apply to equity cases, but that in equity cases the taxing of costs and expenses of a suit is entirely discretionary. *Jones* v. *Adkins,* 170 Ark. 298, 280 S. W. 389.

The appellant in its brief states: "The Colorado court has gone so far as to say that when the appointment is improper, if the fund seized is inadequate, the plaintiff who secures the appointment of a receiver, and not the defendant whose property is wrongfully taken from him, is liable for the legitimate expenses of such receivership. Many authorities are cited for the foregoing statement of the law. Among them is that of Judge Taft, in *Mercantile T. Co.* v. *Kanawha,* 58 Fed. 6; *Bank* v. *Central C. & C. Co.,* 115 Fed. 878, 879; *Tome* v. *King,* 64 Md. 166, 184, 21 Atl. 279; *Knickerbocker* v. *McKinley, etc.,* 67 Ill. App. 295; *Ephraim* v. *Pacific Bank,* 129 Cal. 589, 592, 62 Pac. 177; *Welch* v. *Renshaw,* 14 Colo. App. 526, 59 Pac. Rep. 967; *Hendrie* v. *Parry,* 37 Colo. 365, 86 Pac. 113, and cases cited."

But, whether the principles announced in cases cited by appellant entirely support the text or not, is immaterial here, because, under our decisions, the taxing of the costs was within the discretion of the chancery court, and in the instant case there was no abuse of discretion. We think it properly taxed the costs.

It is next contended that the lienholders were not entitled to a lien, because they had not complied with the requirements of the statute. They filed their intervention in the receivership case, claiming liens, and the appellant itself stated in its complaint that the laborers unpaid for their labor aggregated about 70 in number, and that some of them had begun suit and already attached the machinery and equipment, and that others of said laborers would sue and would greatly harass and obstruct the operations of the plant unless a receiver was

appointed. Mr. Dunlap, president of appellant bank, stated that he made these statements; that Mr. Patterson was his lawyer, and he talked it over with him, and that he swore to these statements.

When the appellant took the cars of coal in controversy it knew, according to its own statements, that the laborers had liens for unpaid labor. It knew that the only possible way in which the laborers could be paid was from the proceeds of this property which it took and sold. It therefore took the property and sold it with a knowledge that it was subject to a laborer's lien, and therefore, in the contest in chancery court, the court properly decided that these liens were superior to the lien of the bank. And we think the contention therefore that the interveners, Pete Barto and his associates, failed to make out their claim of a lien on the cars of coal is without merit. Moreover, on the 18th day of March the court entered a decree which, among other things, stated that it was agreed by and between the attorneys for the interveners and the defendant that the intervener, T. H. McCann, is entitled to a judgment for $180.32 for labor performed. And it was further agreed that said intervener had a lien on the coal produced out of said mine, and also on mine machinery, tools, implements, etc. The court further said: "But the question of priority of lien as between the intervener and other creditors of the defendant Scranton Coal Company is reserved for further consideration."

The attorneys then signed this agreement: "It is hereby agreed between attorneys for intervener and defendant that the above shall be recorded upon the judgment record of the chancery court as a precedent in this case." Signed by the attorneys for the intervener and attorneys for defendant; but the attorney for the defendant was also the attorney for the appellant, and there does not seem to be any controversy about these laborers being entitled to enforce their liens in the manner in which they did when the amounts were fixed by the court. In the first place, it was not necessary in a proceeding

of this sort, where property had been taken and sold by the appellant, to do more than file an intervention, as the laborers did in this case. But, even if it had been necessary to comply with all the statutes, we think the record shows conclusively that this requirement was waived, and that the laborers are entitled to their liens as found by the chancellor.

The chancellor found that as to a number of cars there was no evidence of the value at all, and necessarily found against the interveners, or rather declined to find against the appellant, as to these cars. The interveners contend that they were entitled to judgment for the value of these cars.

We are of opinion that the chancellor was correct; that there was no evidence as to the value of these cars, and the burden was upon the parties claiming a lien to show the value of the property converted by appellant. Having failed to do this, they were not entitled to any judgment for the value of these cars.

The decree of the chancery court will therefore be affirmed, both on appeal and cross-appeal. It is so ordered.

ANDERSON *v.* AMERICAN STATE BANK.

Opinion delivered December 10, 1928.

R. S. Wilson, G. C. Carter and *Linus A. Williams,* for appellant

A. N. Hill and *T. A. Pettigrew,* for appellee.

MEHAFFY, J. The appellee filed its petition in the Franklin Circuit Court for a writ of mandamus to compel the appellant, as treasurer of Franklin County, to pay out of the highway improvement funds of said county one thousand dollars to cover a warrant held by said bank, dated April 19, 1926, said warrant being as follows:

"No. 388 $1,000.00

"The Treasurer of County of Franklin, State of Arkansas:

"Pay to Central City Coal Company or bearer one thousand and no/100 dollars, out any money in the treasury for county highway improvement fund.

"Given at Ozark this 19th day of April, A. D. 1926.

"By order of county court.

"Record Book V, page 78.

"Troy Trotter, Clerk."

It is alleged that the county court entered into a contract with the Central City Coal Company to purchase a five-ton Holt tractor, and agreed to pay therefor the sum of $2,675 as follows, to-wit: $675 to be paid July 19, 1926, $1,000 to be paid July 10, 1927, $1,000 to be paid July 10, 1928.

It was alleged by appellee that the Central City Coal Company presented its claim in the manner required by law, and, after due examination, the court rendered its judgment that the said claim, $2,675, be allowed, and that warrants be issued therefor, payable out of the Franklin County highway fund. It was also alleged that the $2,675, together with the other contracts made during the year 1926, would not exceed the revenues of said

year; that the warrants were issued, and that in due course of business the appellee became the owner and holder of warrant No. 388 for $1,000, and that the appellant treasurer refused to pay said warrant when presented.

The appellant answered, alleging that the contract was void because at the time of making the contract the revenues for the year 1926 had been expended, and that there were outstanding contracts and obligations created in that year which, if applied to their payment, would have exhausted the revenue for that year. Second, that the county court was without jurisdiction to enter into a contract for the purchase of road machinery in which payments were to be taken from the highway fund for the year 1927 or the succeeding year. Third, that the county court was without authority to make a contract, because there had been no appropriation made by the quorum court. Fourth, that act 145 of the Acts of 1925 prohibits the expenditure of highway funds for any purpose other than building and maintaining highways within the county.

The court heard the testimony, and gave judgment for the appellee, directing the treasurer to pay the warrant.

The evidence shows that there was no appropriation made by the quorum court, and it also shows that this was to be paid out of the highway fund, and that there was sufficient funds on hand with the treasurer belonging to this fund to pay for the tractor, and sufficient funds on hand belonging to said highway fund to pay this warrant at the time it was presented to the treasurer, and at the time the case was tried.

Appellant's first contention is that the contract was void because it exceeded the 1926 revenue, and cites and quotes at length from the case of *Dixie Culvert Co.* v. *Perry County,* 174 Ark. 407, 294 S. W. 381. If this contract had been made by the county court, payable out of county funds, appellant's contention would be correct, because, as said in the Perry County case: "A county

cannot incur any obligation in any year exceeding 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."

The cases involving this question decided prior to the Perry County case are cited in that case, and it is useless to refer to them here. We might repeat, however, that any order of a county court or any contract made by the county court, which exceeds the revenue for that year, is void. That, however, means a contract to be paid out of the revenues of the county; and, as this court has construed Amendment No. 11, any contract made that is in excess of the revenue for that year, and a contract of the kind involved in this case, if payable out of the revenues, could not be made payable out of the revenues of the succeeding years. This fund which the treasurer had on hand and out of which this warrant should have been paid was a part of the State revenue, a part of the State highway fund.

Section 6 of act 5 of the extraordinary session of the Legislature of 1923 provides:

"There is hereby created a special fund in the State Treasury, to be known as the State highway fund, and hereafter all fees collected in the State Land Office, the State's portion of all automobile fees, licenses and privilege taxes, gasoline tax, motor oil tax, and other moneys received by the State from owners of motor vehicles in connection with the use of public roads, shall be paid into this fund. All funds now in the treasury in the highway improvement fund and any other funds which have been derived by the State from fees in the State Land Office from licenses on motor vehicles and from gasoline tax shall be and the same are hereby transferred into the State Treasury and made a part of said fund."

Section 21 of said act, as amended by act No. 147 of the Acts of 1925, provides that the State Highway Commission shall of this fund allot each year the sum of three million dollars, or so much thereof as is available, to the respective counties on the basis that the popula-

tion of each county bears to the population of the State of Arkansas, as shown by the last official census, and provides that each county's portion thus set aside shall be paid by the Treasurer of the State in the manner and for the purpose specified for each county. Under that act 75 per cent. of that received by Franklin County was for the county highway improvement fund.

The same section provides that, in those counties where all of the county's apportionment is paid into the county highway fund, the quorum court shall have authority to set aside such part of the county's apportionment as may be necessary to be applied as a part payment of bonds, etc. That section, however, has no application here, because Franklin County is not one of the counties where all of the county's apportionment was paid into the county highway fund.

Section 1 of act No. 147 also provides, in speaking of the fund allotted to the county:

"The funds thus paid into the county highway improvement fund shall be by the county court expended upon the public highways of said county, and it shall be the duty of the county court to fairly and equitably apportion the funds so paid into the county highway improvement fund, at the option of said court, among the various road districts and road improvement districts, or road districts only, in said county, for the purpose of constructing and maintaining a road, whether hard surfaced or earth road, and such apportionment shall be made by the county court, after taking into consideration the relative importance of the roads in said county."

It will be seen by a reading of these acts that the fund out of which this claim was to be paid was not county revenue, but State revenue, and that the State turned this over to the county with the provision in the law that it was the duty of the county court to apportion the funds for the purpose of constructing and maintaining roads. And it expressly states that such apportionment shall be made by the county court after taking into

consideration the relative importance of the roads in said county. Certainly the quorum court would have nothing to do with this. In making contracts for constructing or maintaining a road, or to pay for such material as was necessary to use in constructing and maintaining the road, to be paid out of this fund derived from the State revenue, the county court alone, and not the quorum court, must make the apportionment, so that the making of the contract in this case, whether it exceeded the revenue or not, is not controlled by the case of *Dixie Culvert Co.* v. *Perry County, supra,* nor is it controlled by any of the decisions of this court construing Amendment No. 11.

The warrant itself shows that this claim was to be paid out of the highway fund derived from the State revenue, and it could not be paid out of the general revenues of the county. It was not the intention that it should be so paid, and, for that reason, the revenue of the county derived from taxation and the expenditures of the county are immaterial here. The county court would have had a right to make this contract if it required all of this fund to make the first payment, and have provided for the deferred payments to be made in the following years out of this fund. The seller, of course, would take the chance of getting it out of this fund, the risk of whether there would be any fund on hand to pay it, but it certainly could not affect the general revenues of the county.

It is next contended that the county court was without authority to order the issuance of county warrants, or to make contracts creating obligations of the county without there first having been an appropriation properly made by the quorum court. As we have already shown, the quorum court had nothing to do with it. The appropriation was made by law. The law itself provides that 75 per cent. of the highway fund turned over to Franklin County is to be expended on the highways, and the county court is prohibited from spending said fund for any other purpose. The quorum court would have

no authority to make an appropriation. The law itself provides that this revenue, derived from State taxation and turned over to the county, shall be expended on the highways. That is an appropriation made by law of the 75 per cent. of Franklin County's apportionment, and this warrant could not be paid out of any other fund.

This court said, in construing the act fixing a stenographer's salary:

"That this salary was to be paid out of a fund provided by the act for its payment; that it cannot be paid out of any other fund. It follows necessarily that, where there are not sufficient funds in the treasury of a county accumulated and set apart, as provided by the act, to meet the *pro rata* for that county as adjusted by the presiding judge, the salary of the stenographer is lessened *pro rata*. In other words, the stenographer must look alone for his salary to the fund set apart for that purpose." *Franklin County* v. *McRaven*, 67 Ark. 562, 55 S. W. 930.

So in this case the owner of the warrant must look alone to the highway fund in Franklin County for its payment. The holder of the warrant could not look to any other fund, and it could not be paid out of any other fund, and the quorum court could not appropriate the highway fund for any purpose other than the construction and maintenance of a highway.

But it is contended by the appellant that the act itself forbids the use of the highway fund for any purpose except building and maintaining county highways, and that the purchase of machinery would be in violation of the act. The act provides that the fund is for the purpose of constructing and maintaining the roads, and that the court shall take into consideration the relative importance of the roads in the county. It would be impossible to construct and maintain highways without machinery. And the evident purpose of the act appropriating funds to roads and highways in the county was that the roads and highways might be constructed

and maintained, and this could not be done without the purchase of certain machinery. If this fund could not be used in buying machinery, it could not be used in buying material nor employing labor. It therefore appears to us that it was the intention of the Legislature to authorize the expenditure of this fund in the construction and maintenance of roads in the county, and that to do this they might purchase whatever material or machinery was necessary to accomplish the purpose.

It is next contended by the appellant that the proof fails to establish that the revenues had not been expended or that the contract did not exceed the revenues of the year in which the contract was made. As we have already said, this applies to county revenues, and not to the expenditure of the highway fund which comes from State revenue, and it is therefore immaterial as to who had the burden of proof. The undisputed proof shows that the treasurer had on hand, belonging to the highway fund, a sufficient amount to pay this warrant, and the circuit court correctly held that it should be paid out of this fund.

The judgment is therefore affirmed.

MITCHELL *v.* STATE.

Opinion delivered December 10, 1928.

Fred M. Pickens, for appellant.

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

McHaney, J. Appellant was convicted on an information charging, in the language of the statute, a violation of § 6171, C. & M. Digest, which is as follows: "It shall be unlawful for any person, firm, corporation or association to receive for storage, distribution, or on consignment, for another, the liquors mentioned in § 6165 of this act, or any of them, or any other liquors, bitters or drinks prohibited by the laws of this State to be sold, bartered or otherwise disposed of in this State." He was sentenced to pay a fine of $100.

The evidence shows that the officers found about four gallons of liquor in appellant's barn, in Ball Brand fruit jars, and some in a tin can. The evidence wholly fails to establish where the liquor came from, who brought it there, if anybody, or that the appellant was engaged in the liquor business. We find it necessary therefore to construe the above statute, and to determine whether, under the evidence in this case, there is sufficient proof to sustain a conviction under said act.

Counsel for appellant contends, and we agree with him in this contention, "that it must be shown by the evidence that the liquor was received for one or all of the purposes set forth in the above act, that is, to constitute a violation of this act the liquor must be received for storage for another, distribution for another, or on consignment for another."

The above statute is § 7 of act 13 of the Acts of 1917, page 41. It will be noticed that there is a comma following the word "consignment" and a comma after the word "another," both in the Digest and in the act as printed in the Acts of 1917. By all rules of grammar or punctuation, this phrase, "for another," modifies and limits the three words preceding it, designating the purposes for which it is unlawful to receive the liquor, and means the

same thing as if the act had read "that it shall be unlawful for any person * * * to receive for storage for another, distribution for another, or on consignment for another, the liquors mentioned," etc. In other words, it was the purpose of this section of the act to make it unlawful to do any of these things as the agent or bailee for another. By § 5 of the same act it was made unlawful "to store, keep, possess or have in possession * * * any of the liquors" in certain places, such as fruit stands, restaurants, stores, drugstores, clubs, etc. It was not made unlawful by that section for a person to store, keep, possess or have in possession any liquor in his barn, unless it be a livery stable or public place. Another section of the statute makes it unlawful to possess liquor for sale or to sell it, or to transport it, but the clear purpose of this statute, as we view it, was to prohibit the receiving of liquor in the capacity of bailee or agent for another for storage, distribution, or on consignment.

We do not think this court held to the contrary in the case of *Rogers* v. *State,* 133 Ark. 85, 201 S. W. 845, or *Sheridan* v. *State,* 159 Ark. 604, 252 S. W. 579.

In the Rogers case it was contended that the indictment was void for duplicity and uncertainty, and that the evidence was insufficient, but this court held that it only charged one offense. It was there said:

"The indictment followed the language of the statute, and, inasmuch as it charged only one offense, to-wit, the unlawful receiving of the prohibited liquors, it was sufficient. Nor was the offense one that might be committed in three different ways, as contended by counsel for the appellant. The offense could be committed in only one way, to-wit, by the act of unlawfully receiving the liquors. The words 'storage, distribution, or on consignment' only indicated the different purposes for which the liquor might be received. The offense is complete when the liquor is received for any or all of these purposes. It was not error to charge the purpose for which the liquor was received in the disjunctive instead of the conjunctive, as the proof of any or all would not change

the nature of the offense. As above stated, there is but a single offense under this indictment, and it is wholly immaterial whether the purpose be for storage, distribution or consignment; the penalty is the same, regardless of which one of the purposes the receiver of the liquor may have in mind."

In that case, in addition to finding a quantity of liquor, they found a number of containers that had been cleaned as though they were ready to be filled, a funnel, and some empty jugs. Other witnesses testified to taking several gallons of whiskey to appellant's house in jugs and cans. The court there held this testimony sufficient to sustain a conviction under the above statute. But the exact question now presented was not raised in that case, that is, whether the unlawful receiving of the liquors for storage, distribution or on consignment must be for another. Hence there is a total lack of evidence that appellant received the liquor from any other person for storage, distribution or on consignment for another. The proof, so far as this record discloses, shows only possession by the appellant, and that not in a prohibited place. There is no law in this State against the mere possession of alcoholic liquors, except in certain prohibited places, and we therefore concur with counsel for appellant in the view that the evidence is wholly insufficient to sustain the verdict. For this reason the cause will be reversed, and remanded for a new trial.

Justices HUMPHREYS, KIRBY and MEHAFFY dissent.

WILLEY *v.* STATE EX REL. ATTORNEY GENERAL.

Opinion delivered December 10, 1928.

R. W. Wilson and *J. S. Utley,* for appellant.

H. W. Applegate, Attorney General, and *Rowell & Alexander,* for appellee.

McHaney, J. Appellants, who are partners in the farming business, entered into a contract with the State Board of Charities and Correction on February 12, 1926, to furnish appellants thirty-two convicts to be used in cultivating their land from that date until December 31, 1926, at a price of $1.75 each per day, in which appellants agreed to build a modern type stockade to house and care for said men, satisfactory to the superintendent of the penitentiary, and to furnish suitable quarters for the warden or guards, and to pay the warden a salary of $75 per month, including maintenance, the State to furnish all necessary bedding, cooking utensils and maintenance. Thereafter, on May 10, that contract was modified by reducing the contract price of each convict from $1.75 to $1.50 per day. On October 28 the parties entered into another contract for the year 1927, by which the State agreed to furnish forty convicts to cultivate 500 acres of land for appellants on the shares, that is,

for one-half the crops grown on said land. In January, 1927, a new Board of Charities and Correction supplanted the old board. This board, acting through its chairman, demanded of appellants payment for the convicts used for the year 1926, which they had failed to pay, and which, it is agreed in this record, is the sum of $4,807.26, with interest from February 1, 1927, at 6 per cent. per annum. Appellants refused to pay this amount, or any other sum, on the ground that they first wanted to determine whether the State was going to perform its contract of October 28, for the cultivation of 500 acres of land on the shares, and if not, then they would refuse to pay, and attempt to offset their damages for breach of that contract against the State's claim for the undisputed amount.

Shortly after the first of February, 1927, the State, acting through its board, withdrew all its convicts from appellants and instituted this action to recover the above amount. Appellants defended on the ground that they had built a stockade at an expense of $3,100 and an electric light line at an expense of $500, expecting to keep the convicts two years, and had lost the rental of 350 acres of land at $10 per acre. They sought to offset these amounts against the State's claim to the amount thereof, but sought no judgment over against the State. At the conclusion of the evidence the court directed a verdict for the State.

Under the contract above mentioned, appellants agreed to pay on the first of each month the amount due for the previous month. They did not do this, and were not required to do so by the old Board of Charities and Correction. When the new board came in and demand was made for payment, appellants had no right to withhold payment for fear that the State might breach the second contract. *John A. Gauger & Co.* v. *Sawyer & Austin Co.*, 88 Ark. 422, 115 S. W. 157, and cases cited therein; *Famous Store Co.* v. *Lund-Mauldin* Co., 149 Ark. 663, 233 S. W. 767.

Moreover, the contract of October 28, 1926, was void for the reason that the State Board of Charities and Correction was without power to make it, as being in violation of § 1, act 152, Acts of 1925, page 446, which reads as follows:

"The Board of Charities and Correction is hereby authorized to hire any convicts in the State Penitentiary to work upon the public highways in this State or to do any other useful agricultural work; provided, that said convicts, while so employed, shall at all times be under the management and custody of said board and the regular penitentiary superintendent and wardens, and shall be humanely treated, and worked only a reasonable number of hours each day; and provided further, that said convicts shall not be leased for any definite period, but shall be worked by the day for reasonable wages, to be paid by the State Highway Commission or person for whom said work shall be done, into the State Treasury, to the credit of the penitentiary fund; provided said wages shall not be less than $1.50 a day."

By that section of the act it will be seen that the board was only authorized to lease the convicts to be worked by the day at not less than $1.50 per day. Therefore the board had no right to lease them to go into the share-cropping business, but only to hire them out from day to day at a price not less than that fixed by the statute.

But it is said that, if the second contract is void, the first is likewise, for the reason that it leased the convicts for a definite period of time, from February 12 to December 31, 1926, and that the act prohibits the board from leasing them for any definite period of time. While the act prohibits the leasing of convicts for a definite period of time, we construe this provision to mean that the board is without power to bind the State for any fixed period so that they may not be withdrawn by the State for its uses and purposes whenever, in the judgment of the board, they may be required for any work of the State. Therefore any contract the board might make for the

leasing of the convicts to the Highway Commission or to any other person for agricultural work must be considered amended by the terms of this act. In other words, the provisions of the act will be read into the contract, and, when this is done, appellants knew, or were bound to know, that the State might withdraw its convicts so leased to them at any time during the year 1926 they might be required by the State for other purposes. When this is done, appellants must be held to have taken the risk of having on their hands a stockade which they might not need, and they cannot therefore recoup any part of the cost thereof against the suit of the State to collect the amount due for the time the convicts worked for appellants at the rate of $1.50 per day. The court was therefore correct in instructing a verdict for the appellee, and the demurrer to the answer and cross-complaint should have been sustained, as it stated no defense to the complaint, and no ground for affirmative relief against the State.

We find no error, and the judgment is affirmed.

MEHAFFY, J., dissents.

FRANKLIN COUNTY *v.* SMITH.

Opinion delivered December 10, 1928.

R. S. Wilson and *Linus A. Williams,* for appellant.

J. C. Benson, for appellee.

McHaney, J. On October 3, 1927, appellee presented his claim to the county court of Franklin County for coal furnished the courthouse and jail in the sum of $145.25. On the 17th day of October the claim was allowed by the court in the sum of $81.25, being the claim for coal furnished the courthouse, and disallowed that for the jail. Not being willing to furnish the jail free coal, and being dissatisfied with the action of the court in disallowing that part of his claim, on March 10, 1928, during a regular term of the circuit court, he took an appeal to the circuit court, by filing a transcript and affidavit for appeal with the clerk of the circuit court. The county court moved to dismiss the appeal on the grounds (1), that the affidavit for appeal was made by appellee's attorney; (2) that no appeal bond was filed; and (3) that no notice of appeal was given. This motion was overruled, and, no defense to the claim being offered, judgment was rendered against the county for the full amount of the claim. These same grounds are urged here.

1. Section 2287, C. & M. Digest, is authority for "the party aggrieved, his agent or attorney," to make the affidavit for appeal.

2. No appeal bond was necessary. Section 2288, C. & M. Digest, requires a bond "where an appeal is taken by any person in cases of allowance made for or against counties." No allowance was made "for or against" Franklin County in this case. True, that part of the claim covering coal for use in the courthouse was allowed, but no appeal was taken from that part of the order.

3. No notice was necessary. The county entered its appearance by special counsel, and filed a motion to dismiss the appeal.

4. It is further argued here that no order was made either by the county court or the circuit clerk granting the appeal. This question was not raised or presented in the court below, and is raised here for the first time. This would be a sufficient answer to this argument, but another answer is that this court has held, in the recent case of *Tuggle* v. *Tribble,* 173 Ark. 392, 292 S. W. 1020, that where an appeal from the county court to the circuit court is taken by filing with the clerk of the circuit court an affidavit and transcript of the proceedings, it is error to dismiss the appeal, as filing the transcript with the clerk was tantamount to an order for appeal by the clerk.

5. Lastly, it is said that appellee failed to establish his claim. The judgment recites that the case was heard on the record and on oral testimony. This testimony has not been brought into the record by bill of exceptions, and in its absence there is a conclusive presumption that it was sufficient to sustain the judgment.

Affirmed.

PARK *v.* BANK OF LOCKESBURG.

Opinion delivered December 17, 1928.

Lake, Lake & Carlton, for appellant.

Steel & Edwards, for appellee.

HART, C. J., (after stating the facts). The decree of the chancery court was wrong. It seems to have proceeded upon the theory that the note given for the certificate of stock and the certificate of stock itself were absolutely void under article 12, § 8, of our Constitution, which reads as follows:

"No private corporation shall issue stocks or bonds except for money or property actually received or labor done, and all fictitious increase of stock or indebtedness shall be void; nor shall the stock or bonded indebtedness of any private corporation be increased, except in pursuance of general laws, nor until the consent of the persons holding the larger amount in value of stock shall be obtained, at a meeting held after notice given for a period not less than sixty days, in pursuance of law."

In construing this clause of our Constitution, this court has held that a note given for the purchase price of corporate stock is neither money nor property actually received within the meaning of the Constitution, and that the note itself is void. *Bank of Dermott* v. *Measel,* 172 Ark. 193, 287 S. W. 1017. It was also held in that case that the same defenses which the maker of the note might have made to an action by the holder might be made on a renewal note. The reason given was that the renewal note was not a payment of the original note, but was merely an extension of the time of payment of it. The court did not mean to hold, however, that the note was absolutely void.

In the later case of *Bank of Manila* v. *Wallace,* 177 Ark. 190, 5 S. W. (2d) 937, the court again held that a note given to a representative of a corporation in selling its stock, for stock in such corporation, was void under the provisions of the Constitution above referred to, and the fact that the note was negotiated at a bank and that the corporation received the money therefor did not render the note valid. The court held, however, that there

could be an innocent purchaser of such a note, and, if that is true, it could not be said that the note was absolutely void.

This same view has been taken by the Supreme Court of Texas, under a similar section of the Constitution of that State. *Washer* v. *Smyer,* 109 Texas 398, 211 S. W. 985, 4 A. L. R. 1320. The reason for so holding was stated in a clear and comprehensive manner as follows:

"There is no declaration in the constitutional provision that a transaction in which something other than money, property, or labor is received in payment for the corporation's stock shall be utterly void. It prohibits such a transaction, and therefore makes it unlawful, but that is the extent to which it goes. If a security be accepted in payment for the stock, such, for instance, as a subscriber's note, which is not property for such a purpose, the Constitution does not say either that it or the stock issued for it shall be void. The acceptance of the note in payment for the stock and the issuance of the stock are only interdicted. The word 'void' is used but once in the constitutional provision, and that, it is to be noted, is not in the clause which prohibits the issuance of stock for other than money, property or labor. It is in the distinct clause which says that all fictitious increases of stock or indebtedness shall be void. While the term is found in that clause of the section, the framers of the Constitution avoided its use in the other. It must be assumed that they did so deliberately. There is an essential difference between prohibiting a certain form of transaction—making it unlawful—and declaring that it, with all securities issuing out of it, shall be utterly void. It is a distinction familiar in the law. In order to hold a negotiable note unenforceable in the hands of a *bona fide* holder, it is not enough that it be founded upon an illegal consideration. It is not sufficient that it issue from a transaction prohibited by law, or one even denounced as criminal. To avoid it in the *bona fide* holder's hands there must be a constitu-

tional or statutory provision which expressly, or by unavoidable implication, declared it or the transaction of which it is a part to be void. Such is the rule announced by Chitty, Story and Daniel. It is the rule followed by this court, and generally by courts elsewhere."

The distinction made by the learned Chief Justice in that case has been recognized by this court in the construction of article 19, § 13, of our Constitution, which provides, in effect, that all contracts for a greater rate of interest than ten per centum per annum shall be void as to principal and interest, and that the General Assembly shall prohibit the same by law. The court said that, where a statute or Constitution declares a contract void, it gathers no validity by its circulation in respect to the parties executing it, but that it and the instrument evidencing it are void in the hands of every holder. *German Bank* v. *Deshon,* 41 Ark. 331.

By reference to the section of the Constitution under consideration in the case at bar, it will be seen that the contract was not declared void, as was the case under our provision relating to usury. Hence it may be said to be the law of this State that, there being no constitutional declaration to that effect, the contract under consideration in this case is not absolutely void, and the note given by T. W. Park to the Bank of Lockesburg for the forty shares of stock would be valid in the hands of an innocent purchaser for value. If the note would have been valid in the hands of an innocent purchaser for value, it would seem that this rule would likewise be applied to the holder of stock in payment for which the note was given.

In *Bankers' Trust* v. *McCloy,* 109 Ark. 160, 159 S. W. 205, 47 L. R. A. (N. S.) 333, it was held that the purchaser of shares of stock is chargeable with notice of liens created under statutes or charters, but not those arising under the by-laws of the corporation or under the custom of dealing between the corporation and its shareholders. It was further held that shares of stock in a corporation do not constitute negotiable paper within the law merchant,

but are treated as *prima facie* evidence of unincumbered ownership of the holder thereof named in the certificate and upon the books of the company, and that a purchaser of stock under such circumstances is entitled to have the shares recorded upon the books of the company in his name. In discussing the question the court said:

"Shares of stock in a corporation do not constitute negotiable paper within the law merchant, but in some of the authorities such instruments are spoken of as possessing elements of *quasi*-negotiability, and the modern authorities lay down the rule that necessities of business require the shares of stock should be treated *prima facie* as evidence of unincumbered ownership of the holder thereof named in the certificate and upon the books of the company."

At the time that decision was rendered, § 1720 of Crawford & Moses' Digest was in force. That section provides that every certificate of stock shall be deemed personal property, and shall be transferable on the books of the corporation in such form as the directors shall prescribe; and such corporation shall at all times have a lien upon the stock of its members for debts due from them to the corporation. This section of the statute, however, has been repealed as to corporations generally by act 387 of the Legislature of 1923, which was entitled "An act to regulate the transfer of corporate stock." General Acts of 1923, p. 358. Section 15 of that act provides that there shall be no lien in favor of a corporation upon the shares represented by a certificate issued by such corporation, and that there shall be no restriction upon the transfer of shares so represented by virtue of any by-law of such corporation or otherwise, unless the right of the corporation to such lien or the restriction is stated upon the certificate. No such right was stated upon the certificate of stock in the case at bar.

Again, § 1720 was expressly amended with regard to banks by act 627 of the same Legislature, General Acts of 1923, p. 515. Section 16 of that act expressly provides that § 1720 of the Digest shall be amended so

as to read as follows: "The stock of every such corporation shall be deemed personal property, and be transferred only on the books of such corporation in such form as the directors may prescribe."

Thus it will be seen that the lien given to the corporation under § 1720 of the Digest has been repealed.

Now, the undisputed facts show that T. W. Park borrowed from S. P. Park $800 and agreed to pay him ten per cent. interest from the date of the note given for the debt until payment thereof. The forty shares issued by the Bank of Lockesburg to T. W. Park were transferred and delivered by him to S. P. Park as collateral security for the repayment of said loan. There is nothing whatever that tends to impair the good faith of this transaction or to show that S. P. Park had any knowledge whatever that the certificate of stock had been issued to T. W. Park by the bank and his note taken in payment for it. The stock certificate was regular in form, and carried no notice whatever of any infirmity upon its face. There is no testimony in the record whatever to impugn the good faith of S. P. Park in making the loan and taking the transfer of the stock certificate as collateral security therefor. Therefore he was an innocent purchaser for value of the stock certificate, and was entitled to have the same sold in satisfaction of his lien.

It appears from the record that a sale had been made, and that S. P. Park became the purchaser at the sale ordered by the chancery court. The court then should have ordered a transfer of the stock upon the records of the bank in the name of S. P. Park, instead of canceling the certificate of stock as being absolutely void. For that error the decree must be reversed, and the cause will be remanded with directions to the chancery court to direct a transfer of the stock upon the records of the bank in the name of S. P. Park, and for such further proceedings as may be necessary according to the principles of equity and not inconsistent with this opinion. It is so ordered.

FIDELITY & DEPOSIT COMPANY OF MARYLAND *v.* CRANE COMPANY.

Opinion delivered December 17, 1928.

[redacted]

Pryor, Miles & Pryor, for appellant.

Daily & Woods, for appellee.

HART, C. J., (after stating the facts). Appellant seeks to reverse the judgment on the ground that it had inserted a provision in the bond expressly providing that it should not, as surety, be liable, directly or indirectly, to any one except the owner, which was the board of trustees of the University of Arkansas. The language used in the bond is plain and unambiguous. By incorporating this provision into the bond, nothing is left to interpretation. All doubt as to the intention of the parties is removed.

It is conceded that bonds of this character are contracts, and it is sought to uphold the judgment of the circuit court on the ground that our statute relating to the subject must be read into the bond as a part of the obligation of the surety. Section 6913 provides, in effect, that whenever any public officer shall, under the laws of this State, enter into a contract in any sum exceeding

one hundred dollars with any person for the purpose of constructing any public building, such officer shall take from the party contracted with a bond with sureties as provided in the statute, and that the bond shall be conditioned that such contractor shall pay all indebtedness for labor and materials furnished in the construction of said public building.

Counsel for appellant seek to reverse the judgment upon the authority of *Union Indemnity Co.* v. *Covington, ante*, p. 533. In that case the court had under consideration the construction to be placed upon §§ 6915 and 6916, providing for similar conditions in the contracts for the construction of churches or charitable institutions, and for the giving of a bond containing a similar condition, and for the filing of the bond in the office of the circuit clerk. It was there contended, as here, that any bond given by the contractor must necessarily contain the provisions of the statute and be construed as a statutory bond. In that case the bond sued on contained a condition that in no event shall the surety be liable to any other person than the obligee or for a greater sum than the penalty of the bond. The court held that the obligations contained in the bond expressly negative the claim that the bond sued on was a statutory bond. The effect of that decision was to hold that, notwithstanding the language of the statute, a surety company might limit its obligation under the bond to the obligee, and that the terms of the statute should not be construed as a part of the contractual obligation of the bond. The court held that the language of the statute was not definite enough to prohibit the parties from agreeing to the execution of a bond which should not embody the provisions of the statute.

Counsel for the plaintiff recognized the force of this decision by contending that a different rule obtains in the case of a public contractor's bond executed pursuant to the statute. They insist that the Legislature, in passing the statute requiring a public contractor's bond to contain certain conditions, has declared such to be the

public policy of the State, and that all bonds executed shall be conclusively presumed to be statutory bonds, and any provision therein contrary to the statutory law is null and void. In support of their contention they cite *Philip Carey Co.* v. *Maryland Casualty Co.*, 201 Ia. 1063, 206 N. W. 808, 47 A. L. R. 495. In that case the court held (quoting syllabus):

"Where the situation is such as to require a statutory contractor's bond, and the bond given conforms in material and essential respects to the requirements of the statute, the parties will be held to have intended to make a statutory bond, notwithstanding the omission from the bond of conditions required by statute, or the inclusion of stipulations contrary to the statute, if the statute provides that the requirements of the statute shall not be annulled by contrary provisions in the bond."

In that case, however, the statute provided that no contract coming within the provisions of the act shall be of any validity until the bond required has been executed. The court held that the situation of the parties and the circumstances showed that the parties intended to execute a bond under the statute, and, for that reason, the conditions of the bond contrary to the provisions of the statute should not modify or annul the requirements of the statute, because in this way the purpose of the act would be defeated and it would fail to accomplish the end intended.

Again, in *Southern Surety Co.* v. *Klein* (Texas), 278 S. W. 527, a similar contention was made. The court held (quoting syllabus):

"Though city refused to accept a bond containing provisions required by Vernon Sayles' Ann. Civ. St. 1914, arts. 6394f, 6394g, and furnished bond without such provisions, the statutory provisions making bond payable to, or for use and benefit of, laborers and materialmen are nevertheless read into the bond, regardless of the intention of the parties, and parol evidence is not ad-

missible to establish intention of the parties to exclude provisions of statute."

In that case the statute provided that in contracts for the construction of public works the contractor should be required to execute a bond with sureties before commencing the work. Hence it was held that, where the contractor commenced the work and executed a bond, he did so in obedience to the statute and with the intention of complying with its terms. It was held to be a statutory bond, and, in addition, that terms contrary to the provisions of the statute were null and void, because, if enforced, they would tend to nullify the statute.

The Supreme Court of North Carolina has adopted a construction similar to our own in the Covington case above cited. In the case of *Ingold* v. *City of Hickory,* 178 N. C. 614, 101 S. E. 521, the statute expressly provided that every county or municipal corporation which should let a contract for a public building should require the contractor, before beginning work under the contract, to execute a bond containing certain conditions. The court said the surety company had substantially incorporated the statute in the bond by reference to it, and to permit it to insert stipulations which would destroy its legal effect would put it in the power of cities and surety companies to defeat the purpose of the statute by contract. The provision was held to be contrary to the public policy of the State as declared by the Legislature.

In the later case of *Ideal Brick Co.* v. *Gentry,* 191 N. C. 636, 132 S. E. 800, the contract contained a stipulation that the contractor should pay for all materials, labor, etc., necessary for the execution of the work, but the obligation of the bond was not for the faithful performance of the contract as it related to the materialmen, but the surety agreed to indemnify the obligee, and no one else, against all loss that the obligee might sustain by reason of the principal's failure to comply with the provisions of the contract, and all other persons were

expressly excepted from the protective provisions of the bond.

Reliance was had by the plaintiffs on the Ingold case just cited. The court pointed out that the bond in that case contained a direct stipulation for the payment of laborers and materialmen and expressly referred to the requirements of the statute in explanation of its true meaning and intent. Continuing, the court said:

"It was held in Ingold's case, and rightly so, we think, that, where a bond was given in compliance with the requirements of the statute, the surety might not, in such case, restrict its liability to suit contrary to the statutory provision, for this would be to uphold a stipulation directly opposed to the public policy of the State, and thus enable the parties, by private agreement, to set the statute at naught, in direct violation of its terms. And here, if it did not clearly appear, from the terms of the bond, that it was not given in view of the requirements of the statute for the protection of the plaintiffs and to insure the faithful performance of the contract as it relates to them, we should be disposed to hold the stipulation restricting the surety's liability to suit void, as being contrary to the public policy of the State as expressed in the statute." See also *Warner* v. *Halyburton,* 187 N. C. 414, 21 S. E. 756.

The decision of the court in that case is in accord with our holding in the Covington case above cited. It is also in accord with the spirit of the decision in *Rieff* v. *Redfield School Board,* 126 Ark. 474, 191 S. W. 16. In that case the court held that, in the case of a bond given by a contractor to secure school directors, who were held to be public officers, the bond was executed pursuant to the statute and in obedience to it, and with the intention of complying with its terms, it was a statutory bond, although it did not strictly follow the provisions of the statute. If the court had meant to hold that our statute impliedly prohibits the execution of any bond by public contractors except in obedience to the

terms of the statute, the court should have declared such to be the legislative public policy in that case and have rested its decision on the ground that any bond executed by public contractors should be deemed to have been executed in obedience to the statute, and that the parties should have been conclusively presumed to have intended the bond to be a bond executed in obedience to the statute.

Section 6913 of the Digest provides that, whenever any public officer shall enter into a contract in any sum exceeding one hundred dollars, with any person, for the purpose of constructing any public building, such officer shall take from the party contracted with a bond conditioned as required by statute. It will be noted that the statute does not provide that stipulations of the bond contrary to its provisions shall not modify or annul the requirements of the statute. In other words, the statute does not contain any restrictive covenants such as were contained in the Texas, Iowa and North Carolina statutes. In all of these States the statute required the contractor to enter into a bond containing certain covenants before he commenced the construction of the public building under his contract. Here the statute simply makes it the duty of the public officers to take a bond of a certain character, and does not impose any regulations whatever upon the contractor, and does not provide, expressly or impliedly, that the parties shall not enter into any bond except pursuant to the statute, or which would in any way modify or annul any of the provisions of the statute.

Therefore we think it is more in accord with our previous decisions on the subject to hold that the statute does not prohibit the surety from executing a bond expressly restricting its liability to the obligee of the bond, where, as in this case, the bond does not contain any covenant showing that it was intended to be executed in obedience to the provisions of the statute, but, on the other hand, expressly negatives that idea.

The result of our views is that the judgment will be reversed, and the cause of action will be dismissed here. It is so ordered.

CONTINENTAL CASUALTY COMPANY *v.* BRUDEN.

Opinion delivered December 17, 1928.

J. Mitchell Cockrill, for appellant.

Wm. J. Houghney, Sam T. Poe, Tom Poe and *McDonald Poe,* for appellee.

SMITH, J. This is a suit by appellee, as administrator of the estate of Columbus Joel, deceased, to recover under an accident policy issued by appellant insurance company for the accidental death of Joel, the insured, which was alleged to have been caused by heat prostration.

The policy provides that "the insurance given by this policy is against loss of life (suicide or self-destruction while sane or insane not included), limb, limbs,

sight or time resulting from a personal bodily injury which is effected solely and independently of all other causes by the happening of an external, violent and purely accidental event * * *."

The testimony on the part of appellee was to the effect that, while Joel was engaged in the performance of his duties as a machinist helper in putting grease in a cellar of an engine, while in a pit under the engine, he became overheated, and died about ten minutes after coming out from under the engine. The testimony was conflicting on this question.

On this issue the court charged the jury as follows:

"You are instructed that, before plaintiff is entitled to recover in this case, he must show by a preponderance or greater weight of the evidence that death resulted solely from heat prostration as alleged, and independently of any other cause. If he has failed to show by a preponderance of the evidence that death resulted solely from such injury, and independently of any other cause, then he cannot recover, and your verdict will be for defendant."

As the jury returned a verdict in favor of the plaintiff, we must assume that the finding was made that the insured died from heat prostration, and, without setting out the conflicting testimony on this question of fact, we announce our conclusion to be that the testimony was amply sufficient to support this finding.

It is earnestly insisted, however, that, even though the insured came to his death as a result of heat prostration, or sunstroke, this was not a risk covered by the policy under the language quoted above, and the correctness of this contention is the real and the difficult question in the case.

The authorities are united in treating heat prostration and sunstroke as meaning the same thing, but they are in direct conflict as to whether death therefrom is an accidental death.

The case of *Caldwell* v. *Travelers' Ins. Co.*, 305 Mo. 619, 267 S. W. 907, 39 A. L. R. 56, decided by the Supreme

Court of Missouri, November 25, 1924, reviews all the cases on the subject up to that time, and reference is made to it for a citation to these cases, and we will not again review them. The learned justice who wrote the opinion above referred to there said:

"There are two clearly defined lines of cases on this question. One holds that, where an unusual or unexpected result occurs by reason of the doing by insured of an intentional act, where no mischance, slip, or mishap occurs in doing the act itself, the ensuing injury or death is not caused through accidental means; that it must appear that the means used was accidental, and it is not enough that the result may be unusual, unexpected, or unforeseen. The other line of cases holds that, where injury or death is the unusual, unexpected, or unforeseen result of an intentional act, such injury or death is by accidental means, even though there is no proof of mishap, mischance, slip, or anything out of the ordinary in the act or event which caused such injury or death."

Among the numerous cases there reviewed is that of *Standard Life & Acc. Ins. Co.* v. *Schmaltz*, 66 Ark. 588, 53 S. W. 49, 74 Am. St. Rep. 1121, in which the facts were that a railroad machinist, who held an accident policy in the appellant insurance company, was engaged in removing the cylinder head of an engine. The deceased was a strong man, and had frequently removed cylinder heads without injury. On the occasion when his fatal injuries were received the cylinder head stuck, and the insured picked up a steel bar and removed it, and, as he did so, he dropped the bar and caught the cylinder head to prevent it from falling. Insured was immediately taken sick, and began vomiting blood, and continued to do so until his death. The attending physician testified that the insured had ruptured a blood vessel, and the court held that this evidence was sufficient to sustain the finding by the jury that the death of the insured was accidental, and that the injury was caused solely by external,

violent and accidental means, against which the policy sued on had insured the deceased.

The case of *Ætna Life Ins. Co.* v. *Little,* 146 Ark. 70, 225 S. W. 298, was a suit on an accident policy very similar to the one here sued on. The insured in that case was killed by a man who mistook him for a burglar, and we held that this testimony warranted the jury in finding that the death of the insured was accidental. We there said:

"This court has had frequent occasion to define the words 'accidental injury' and 'accidental death.' In the case of *Standard Life & Accident Ins. Co.* v. *Schmaltz,* 66 Ark. 595, 53 S. W. 49, the court approved an instruction given by the trial court, in a suit on an accident policy, that the term 'accidental' was used in the policy in its ordinary, popular sense, as meaning 'happening by chance; unexpectedly taking place; not according to the usual course of things; or not as expected:' that, if a result is such as follows from ordinary means, voluntarily employed, in a not unusual or unexpected way, it cannot be called a result effected by accidental means; but that if, in the act which precedes the injury, something unforeseen, unexpected, unusual, occurs, which produces the injury, then the injury has resulted through accidental means." (Citing cases).

The case of *Richards* v. *Standard Acc. Ins. Co.,* 58 Utah 622, 200 Pac. 1017, 17 A. L. R. 1183, was a suit on a policy insuring against "bodily injuries effected directly, exclusively, and independently of all other causes, through accidental means." Insured sustained sunstroke, and died therefrom, and the court considered the question whether sunstroke was a bodily injury, and, after an extended review of the authorities, both medical and legal, held that it was.

Many cases are cited in the note to this case by the annotator, who says in his note that "it is held by the weight of authority, and apparently the better reasoned cases, that a sunstroke, suffered by one unexpectedly, is within the protection of an accident policy insuring

against bodily injuries sustained through external, violent, and accidental means." After a consideration of many of these cases, we have accepted and adopted that view.

The policy here sued on provided, as a condition precedent to the assertion of liability under it, that proof of loss under it be made within ninety days after the appointment of the administrator, and it is insisted that this proof was not made as required, and the court charged the jury that, if this proof was not furnished as required by the policy, there could be no recovery, and it is earnestly insisted that the undisputed testimony shows that the proof was not made.

Upon this question appellee testified that, a few days after burying the insured, he qualified as his administrator, and wrote the appellant company to furnish papers for proof of death, and, when they were furnished him, he sent the papers to the undertaker in Van Buren, where the insured had died, and that the undertaker turned the papers over to the doctor who was called to the insured when he was stricken, but who did not arrive until after the insured was dead. The doctor filled in the blanks and returned them to witness, who gave them to an agent of the company in Little Rock, who promised to forward the papers to the home office of the insurance company. Witness himself sent to the home office of the company his letters of administration, as he had been requested to do in a letter from the home office.

The officers of the insurance company having in charge for the company the matter of passing upon the claim, testified that they had not received the proof of death from the local agent in Little Rock, or from any one else, and that the local agent in Little Rock, to whom the plaintiff administrator delivered the papers for transmission to the company, was an ordinary soliciting agent for the industrial department of the company, and had nothing whatever to do with the railroad department, under which Joel's claim came. The local agent did not testify, but one of the company's officers testified that he

was a vice president in charge of the accident and health claims, and he made the following answer to one of the interrogatories propounded to him: "I might state that absolutely no proof of accident has been received by the company in regard to the death of Columbus Joel. On the contrary, we did receive a death certificate stating that the death was due to heart disease, which was not covered by the policy."

In view of the testimony above stated, and this admission, we think the jury was warranted in finding that proof of the death was made and furnished to the insurance company.

As we have said, the testimony was conflicting as to whether deceased was ever under the engine, and, over the objection of appellant, Oscar Coleman was permitted to testify that Joel said, as he emerged from under the engine, "Brother Coley, I got it." It is insisted that this testimony was hearsay, and was not a part of the *res gestae,* because it was too remote, and was simply a narrative of a past event, to-wit, that Joel had got something from under the engine.

The important issue of fact was whether Joel had been in a pit under the engine in proximity to the firebox, and the witness Coleman was introduced to show that Joel had been under the engine, in the pit. Coleman testified that he was a coppersmith helper and an extra cellar packer, and that Joel was also a cellar packer, and was put to work on a rush job, that is, an engine which had just come in and was to be sent out at once, and that witness and Joel worked on the engine at the same time, and that Joel, in packing the driving cellar, had his head within a few inches of the firebox, which was very hot, and, as he came from under the engine, he made the remark, "Brother Coley, I got it," and wiped his face, and, as Joel walked over to a work-bench, he threw up his hands, and fell dead.

There is some dispute as to what was meant by the remark, "I got it," but we think it was competent as tending to show that Joel had been under the engine, and

it was admitted for that purpose. The remark was not a narrative of a past event, but was an exclamation or statement forming a part of the deceased's conduct in coming out from under the engine, and we think was admissible as such. *Payne* v. *Thurston,* 148 Ark. 456, 230 S. W. 561.

Objection was made to the instructions given, but the essence of these objections appears to be that there was no case for the jury, and that a verdict should have been directed in appellant's favor; but, as appears from what has been said, we do not concur in this view.

Upon a consideration of the whole record we find no error, and the judgment must be affirmed. It is so ordered.

FRANKLIN COUNTY *v.* JACKSON.

Opinion delivered December 17, 1928.

R. S. Wilson and *Linus A. Williams,* for appellant.

G. C. Carter, for appellee.

SMITH, J. Appellees presented a claim to the county court of Franklin County for allowance against the county, based upon §§ 9838, 9839, 9840 and 9840A, C. &

M. Digest, as amended by act 219 of the Acts of 1925, page 647. The claim was disallowed by the county court, but was allowed by the circuit court on appeal. The cause was tried in the circuit court on an agreed statement of facts as follows:

Appellees owned four mules, of the value of $125 each, which were, on or about May 1, 1926, bitten by the dog of an unknown owner. The dog was affected with rabies or hydrophobia, and its bite communicated this disease to each of these mules, and caused their death about two or three weeks later. On February 15, 1927, appellees made an affidavit of loss before a justice of the peace of the township in which the mules died. The justice appointed three appraisers, who, on the same day, appraised the mules at $150 each.

The sections of the statute referred to and the amendatory act of 1925 were intended to provide a fund "to indemnify losses sustained from killing or injuring of sheep or other live stock by dogs, where the owner thereof is unknown * * *."

Section 9840, C. & M. Digest, provides for the appraisement of the stock, and reads in part as follows: "Whenever any sheep or any other live stock are killed or injured by dogs, the owner or person having custody of same shall, within forty-eight hours after such killing or injury is made known to him, notify the justice of the peace in whose township the sheep or other live stock are, or were, and make affidavit setting forth the number of sheep or other live stock killed or injured, the kind, grade or quality thereof, and the amount and nature of injury thereto, and that he does not know whose dog caused the damages, if such be the fact * * *."

It thus appears that the statute does not require the owner to make the affidavit within forty-eight hours after the stock are killed or injured by a dog, but to do so "within forty-eight hours after such killing or injury is made known to him," and, according to the agreed statement of facts, the affidavit was not made until more than nine months after the death of the animals. Appellees

admit therefore that the affidavit was not filed within the time required by the statute; but they say this requirement was merely directory, and it was upon this theory that the judgment was rendered from which this appeal comes.

We do not concur in this view. Appellees' right to compensation for the damage done by the dog of an unknown owner is of statutory creation, and the statute which creates the right prescribes the time and manner within which one must proceed to obtain its benefits. It is a general rule that, where a cause of action does not exist at common law, but is created by statute, the right conferred by the statute must be enforced within the time and in the manner and form prescribed by the statute which created it. *Earnest* v. *St. Louis, M. & S. E. Ry. Co.*, 87 Ark. 69, 112 S. W. 141; *Smith* v. *Mo. Pac. Ry. Co.*, 175 Ark. 626, 1 S. W. (2d) 48.

The forty-eight hours given the owner after he is apprised of the killing or injury of his stock to notify the justice of the peace is in the nature of a statute of limitations, and, while it does appear to be unusually short, this was a question which was addressed to and was decided by the Legislature. We might surmise why the time was made so short, but we are neither required nor permitted to do so, as the Legislature, in creating the cause of action, had the right and power to prescribe the time and manner within which it should be enforced. This it did, and, as appellees failed to comply with this statute in the creation of their cause of action, they have no cause of action under the statute.

The judgment of the court below must therefore be reversed, and, as the case has been fully developed, it will be dismissed.

STATE *v.* DAVIS.

Opinion delivered December 17, 1928.

John L. McClellan and *Isaac McClellan,* for appellant.

T. Nathan Nall and *Rowell & Alexander,* for appellee.

SMITH, J. Opal Woolems made complaint on October 22, 1927, to the county court of Grant County, that Vernon Davis was the father of her bastard child, and she prayed judgment against him for the statutory allowances. There was an appeal to the circuit court from the judgment of the county court, and, upon the appeal, a jury found that Davis was the father of the child. Upon this verdict the court rendered judgment requiring Davis to pay the mother of the child the sum of $25 as lying-in expenses and the sum of $10 per month from the date of the birth of the child until it arrived at the age of fourteen years.

At a later day of the same term the court made an order reciting that act No. 111 of the 1927 session of the General Assembly (Acts 1927, page 310), was not in force at the time the child was born, and that the judgment was for that reason reduced to conform to § 777,

C. & M. Digest, which section was amended by the 1927 act, and the plaintiff has appealed from that judgment.

The act of 1927, which increased the allowances to the mother of a bastard child over those allowed by § 777, C. & M. Digest, was approved by the Governor March 4, 1927, and, as there was no emergency clause to the act, it became effective and operative as a law ninety days after March 10, 1927, the date of the adjournment of the General Assembly. *Gaster* v. *Dermott-Collins Road Imp. Dist.*, 156 Ark. 507, 248 S. W. 2.

The child was born April 17, 1927, which was after the passage of the act of 1927, but before it became a law, and appellee insists that his liability for the support of the child cannot be increased beyond the amount provided by law at the time the child was born, as he has a vested right in the law declaring his liability. The circuit court accepted this view, and, on appellee's motion, reduced his liability to conform to the original law.

We think the court was in error, and that judgment should have been rendered in accordance with the law as it existed at the time of the trial, which was the act of 1927.

Although a bastardy proceeding is in the name of the State, it is of a civil nature (*Scott* v. *State*, 173 Ark. 625, 292 S. W. 979), and, as was said in this Scott case: "Section 772 *et seq.*, C. & M. Digest, gives 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."

The act of 1927 is not therefore an *ex post facto* law, for the reason that it is not a criminal statute. It was held in the Scott case, *supra*, that "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."

In the case of *Willetts* v. *Jeffries*, 5 Kan. 470, the contention was made by the father of a bastard child, as

it is here, that he had the vested right to have his liability for begetting the child determined by the law as it existed when the child was born. This argument was answered very effectively by Justice Valentine for the Supreme Court of Kansas, who, after saying that the bastardy law of that State was not an *ex post facto* law, for the reason that such laws relate to criminal, and not to civil, proceedings, said also that no one has a vested right to do wrong, and that no case could be found giving one a vested right to ignore the fundamental principles of morality and natural justice. The learned justice proceeded to say that the purpose of the bastardy laws was not to punish the father for his illicit intercourse with the mother of the bastard child, but that the object of the laws was to enforce, by a stringent remedy, that moral obligation resting upon every father to support his own offspring.

In support of the argument that a parent has no vested right to have his obligation to his offspring determined by the law as it existed at the time the child was born, the learned justice said that, if this were sound doctrine, the law that was in force at the time the child is begotten must forever remain the law that shall govern the relations between that child and its parents, and that a parent might sustain a very different relation towards his own children dependent on the state of the law at the time of their birth. It was pointed out that, if this were the law, courts could not administer the same equity and justice to all fathers alike and to all children alike, but that it would be necessary to know the state of the law at the time of the birth of the children to determine the mutual duties and liabilities of parent and child.

In upholding a statute making the father of an illegitimate child "liable to all the penalties and all the orders for the support for the child provided in the case of a parent who is found guilty of unreasonably neglecting to provide for the support and maintenance of a minor child," which was passed after the birth of a child, the Supreme Judicial Court of Massachusetts, in the case of

Commonwealth v. *Callaghan,* 111 N. E. 773, 223 Mass. 150, said:

"If it is *ex post facto* legislation to compel the father to provide for the support of a child not born in wedlock, because born before the statute was enacted, it might be argued that it is contrary to the Constitution to punish a husband, under St. 1911, c. 456, for refusing to support his wife and children, because he was married and the children born before the statute took effect, or to insist on a son of sufficient means supporting his parents under St. 1915, c. 163. We are of opinion that St. 1913, c. 563, is not *ex post facto* legislation."

See also *Wamsley* v. *People,* 64 Colo. 521, 173 Pac. 425; *McLain* v. *Meadows,* 44 Cal. App. 402, 186 Pac. 411; *Bradfield* v. *State,* 92 Atl. 988; 7 C. J., chapter "Bastards," § 38, page 957; 12 C. J., chapter "Constitutional Law," § 803, page 1098, note 5.

We conclude therefore that the circuit court was in error in setting aside the original judgment rendered in this cause and modifying it to conform to § 777, C. & M. Digest, and the cause will be remanded, with directions to re-enter the original judgment conforming to the act of 1927.

COMMERCIAL INVESTMENT TRUST *v.* FORMAN.

Opinion delivered December 17, 1928.

Saxon, Wade & Warren, for appellant.

SMITH, J. Appellee, Forman, bought from O'Connor an automobile, and the sale was evidenced by a note and contract, which provided that the title to the car should not pass to the purchaser until the full purchase price had been paid in cash, and that the balance of $771 due as purchase money should be paid in monthly installments of $64.25 each, and that, upon default in payment of any installment when due, the full amount, at the option of the seller, should immediately become due and payable, and that the seller might repossess the property without demand, and sell the same at public or private sale, with or without notice to the purchaser, and that the assignee of the contract should have all the rights of the seller. O'Connor sold the note and contract to the appellant, Commercial Investment Trust. Forman made default in a payment, and, refusing to surrender the car, this, a suit in replevin, was brought to recover its possession under the contract of sale.

Forman filed an answer, in which he alleged that the purchase price of the car was $1,271, on which he had made certain payments, and that he owed a balance of $449.75. He alleged that the car was then worth much more than the balance due on it, and that he was entitled in equity to have the balance due the plaintiff declared to be a lien, and to have the car sold to protect his equity. He alleged other set-offs, and prayed that the cause be transferred to the chancery court in order that he might have equitable relief. On appellee's motion the cause was transferred to equity.

Appellee gave a retaining bond, under which he retained possession of the car for sixteen months. He

then brought the car to O'Connor's garage, and left it there. The car could not then run under its own power, but was hauled in, and the highest estimate of its then or present value was $100.

The court found that a written contract evidenced the sale of the car, and that one of the conditions of the sale was that, upon default by the purchaser, the seller, or his assigns, had the right to take possession of the car and sell it, and that at the time of the institution of this suit there was a balance due on the contract, and that the plaintiff was entitled to the possession of the car, and was so entitled at the time of the institution of this suit, and that the car had been returned to O'Connor.

The court thereupon decreed "that the plaintiff is entitled to the possession of said automobile, and that he retain the possession of the same, to be dealt with according to the terms of said contract of sale," and this appeal is from that decree. The cross-complaint filed by defendant was dismissed as being without equity, and there is no appeal from that part of the decree.

The present litigation arises out of a contract very similar to and in some respects identical with the contract out of which the case of *Passwater-Chevrolet Co.* v. *Whitten, ante,* p. 136, arose. Whitten, the purchaser of the car in that case, made default in his payments, and voluntarily surrendered the car. The seller then resold the car, and, a few days later, Whitten tendered to the seller the balance due on the car and demanded its possession, and, when told that the car had been sold, Whitten brought replevin to recover its possession. Whitten contended that he had the right to maintain the replevin suit under § 8654a, C. & M. Digest, which reads as follows:

"In any action in a justice court or circuit court of this State, where it is attempted to foreclose any mortgage, deed of trust, or to replevy, under such mortgage, deed of trust or other instrument, any personal property, the defendant or defendants in said action shall have the right to prove or show any payment or payments or

set-off under such said mortgage, deed of trust or other instrument, and judgment shall be rendered for the property or the balance due thereon, and the defendant may pay the judgment for the balance due and costs within ten days, and satisfy the judgment and retain the property.''

In response to the contention of Whitten it was there said: ''Clearly this section (§ 8654a, C. & M. Digest) has no application to this controversy. The plaintiff in the court below was not attempting 'to foreclose any mortgage, deed of trust, or to replevy, under such mortgage, deed of trust or other instrument, any personal property.' He brought replevin, it is true, but not under 'any mortgage, deed of trust or other instrument.' He brought it on a complaint and affidavit alleging that he was the owner of the car and entitled to the immediate possession thereof under a conditional sales contract, which he admits he had breached, and had voluntarily surrendered the possession of the car to the rightful owner. Had he kept possession of the car and refused to surrender it to appellant company, and it had brought replevin, then this section would be applicable. (Citing cases).''

In the instant case the purchaser did what Whitten did not do. He kept possession of the car, and refused to surrender it, and the replevin suit was brought against the purchaser, and not by him. Section 8654a, C. & M. Digest, is therefore applicable in the instant case.

The answer and cross-complaint of appellee, Forman, was clearly an election to claim the benefit of § 8654a, C. & M. Digest, by having the balance due on the car adjudged, with the privilege of paying that balance within ten days, or of receiving the excess over the debt upon the sale of the car under the judgment, and his bond in the replevin suit gave him the additional right to retain the car while the litigation progressed to its conclusion. Having made this election, appellee is bound by it. But for the retaining bond, the car would have been sold when its value exceeded the balance due on it.

Through the bond appellee retained the car until it was worn out, when he voluntarily abandoned it by hauling it into O'Connor's garage.

The case of *Trice* v. *People's Loan & Inv. Co.*, 173 Ark. 1160, 293 S. W. 1037, is applicable here, as it was there held (to quote a syllabus) that: "Where plaintiff, in a replevin action, obtained possession of property sold under a conditional sales 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."

Appellant is therefore entitled to judgment against the sureties on the bond as well as against appellee himself for the balance due on the sales contract, against which the present value of the car should be credited. The testimony shows this value does not now exceed $100, and the judgment will be credited with that amount, unless appellee and the sureties on his bond shall, within ten days after the decree of this court becomes final, pay the entire balance due on the car, in which event they may retake possession of it.

BARTEL *v.* INGRAM.

Opinion delivered December 17, 1928.

Arnold & Arnold, for appellant.

Patterson & Rector and *Powell, Smead & Knox,* for appellee.

HUMPHREYS, J. Appellant brought this suit on February 10, 1926, against appellees, in the chancery court

of Union County, seeking to foreclose a trust deed executed on the 16th day of February, 1916, to secure an $8,000 note of even date, upon the following described real estate, to-wit: "One hundred and sixty-four and 94/100, more or less, acres, and being further described as the twenty-six, more or less, acres of fractional southwest quarter of the southwest quarter of section 19, township 17, range 15, and the 138.94, more or less, acres of fractional northwest quarter of section 30, township 17, range 15, known as the C. A. Ingram Farm, in Union County, Arkansas."

The note was executed by Finis S. Ingram to his own order, due five years after date, and bearing interest from date until paid at the rate of 7 per cent. per annum. The deed of trust was executed to Frank D. Ayers, as trustee, to secure the payment of the note. Upon a trial of the cause the court found that there was due upon the note $13,600, including interest, after allowing credit for the payments which had been made, and rendered a judgment against Finis S. Ingram for the amount, with interest thereon at 7 per cent. per annum until paid, from and after February 16, 1928; and also found that, at the time of the execution of the deed of trust, Finis S. Ingram had no title to the land described therein, but that he subsequently acquired by inheritance from his mother an undivided one-seventh interest, which had been conveyed by him to third parties, some of whom had not been made parties to the foreclosure suit, and against whom, on that account, a decree of foreclosure could not be rendered; and also found that the Standard Oil Company, C. H. Murphy, Mrs. Anna Cordell, A. C. Steere, George W. James, James Kinnebrough and Andrew McAnsh, some of whom had acquired fee rights and other mineral rights in Finis S. Ingram's one-seventh interest in said land, had not been served with process in accordance with law. Based upon these findings, the court rendered a decree of foreclosure and order of sale of the J. R. Ingram one-fourth interest in fee and the I. Felsenthal 1/32 interest in the oil, gas and mineral

rights in the Finis S. Ingram one-seventh interest in said land, on the ground that John R. Ingram and I. Felsenthal were the only persons claiming an interest therein who had been brought into court on legal process. In short, a 1/28 interest in the fee and 1/224 in the oil, gas and mineral rights owned by I. Felsenthal in the land described in the deed of trust were foreclosed and ordered sold to satisfy the amount of $13,600 adjudged to be due appellant by Finis S. Ingram.

Appellant has appealed, and contends for a reversal of the decree because the trial court refused to foreclose and order a sale of the entire fee interest in the real estate described in the deed of trust to satisfy the amount due him by Finis S. Ingram.

Appellees, John R. Ingram and I. Felsenthal, have procured a cross-appeal, and contend for a reversal of the decree on the grounds that the indebtedness was fictitious and the deed of trust executed as a cover against the creditors of Finis S. Ingram; that the purchase of the land under the tax forfeiture of 1912 by Finis S. Ingram, under which he claimed title to the land described in the mortgage, was in effect a redemption thereof for his mother, who was the owner at the time of the forfeiture, else ineffective to vest title in him, as he was at the time a mortgagee and assignee of a $4,000 note and deed of trust executed for the benefit of his brother and himself by his mother; that the tax deed obtained by him under the forfeiture was void on account of the insufficiency of the description of the land, and that the deed of trust was void for the same reason, and for the further reason that it was not given for a present consideration, and did not provide for future advances.

Appellant's main contention for a reversal of the decree is that the court erred in refusing to foreclose the entire fee simple title to the lands described in the deed of trust, instead of foreclosing limited portions of a one-seventh interest therein owned by those personally served with process. This contention is based upon the alleged erroneous finding of the trial court that the tax

deed to the land procured by Finis S. Ingram, which constituted his only title thereto at the time he executed the trust deed to Ayers for $8,000, was void on account of defects in description, or on account of him being a mortgagee in the $4,000 deed of trust executed by his mother in trust for the benefit of himself and his brother in 1909, and which was assigned to C. D. Bosbury in 1910, and by Bosbury to Kuhlmey in 1918, and which has never been paid.

The land in question was owned by the mother of Finis S. Ingram, Mrs. Carrie Ingram, in 1904. It was wild land at that time. She sold the land to Finis S. Ingram, in the year 1904, for $....., the consideration for same to be paid in monthly installments. Finis was her main support, and, after paying her for the land, he conveyed it back to her in 1907 as a gift. The $4,000 deed of trust was executed by her for the benefit of her two sons, in 1909, from whom she obtained money with which to make improvements and establish a home. Her son Fred paid her $1,000 and Finis advanced the balance from time to time to build the house and make other improvements. Mrs. Carrie Ingram owned other property adjoining and near this land, a part of which she sold to other parties, and a part she kept. The land in question forfeited for taxes in 1912, and was bought in at the tax sale by J. D. Faulkner, and on the 20th day of June, 1913, he assigned his certificate of purchase to Finis S. Ingram, who presented same to the county clerk two years after the sale of delinquent lands, and procured a tax deed to each tract on November 8, 1915. The twenty-six-acre tract was described in the tax deed as "fractional southwest quarter of the southwest quarter section 19, township 17, range 15—26 acres." The 138.94-acre tract was described in the tax deed as "fractional northwest quarter section 30, township 17, range 16—138.94 acres."

Finis S. Ingram testified that he never told his mother that he purchased the land at tax sale, or that he had taken a tax deed to it; that she was residing upon

it at the time of the forfeiture, and continued to reside upon it until her death, on the 16th day of March, 1916; that she told him that she wanted him to have the place, in conversation and by letter, after he purchased the tax certificate; that he was residing in Chicago, and went to El Dorado, near which the land was located, in September, 1915, and, after procuring the tax deed, remained upon the land until December, 1915; that during the time he was there he made extensive improvements upon the property, preparatory to marrying and returning with his wife to make his home upon it; that he built several tenant houses, and left them occupied by his employees and tenants when he returned to Chicago; that he returned to El Dorado the March following, to attend his mother's funeral, and that, after her death, he put his brother John in possession of the place, to look after it for him.

John testified that he went into possession of the place as representative of all his mother's heirs, and under an agreement with them to that effect. There is a sharp conflict in the testimony as to whether John was in possession of the property for himself and the other heirs, or as the agent of Finis S. Ingram, and there are many circumstances appearing in the record corroborating the statement of each.

The record is voluminous, and it would extend this opinion to an unusual length to set out the substance of the testimony of each witness. There is one circumstance in the record, however, tending so strongly to support the theory that Finis S. Ingram was acting as the agent of his mother when he purchased the tax certificate, that special mention should be made of it. In March, 1919, Finis S. Ingram joined in a trust deed with his brothers and sisters conveying this particular land and other lands to W. S. Sloan, with power to sell same to pay the $4,000 deed of trust held by Kuhlmey, amounting at that time to $4,980, in which the grantors recited that they were the sole heirs of Mrs. Carrie Ingram, and which trust deed also recited that Finis S. Ingram, for

$500, should reconvey by quitclaim deed to the other heirs all of his right, title and interest held by him in any of said lands above their respective one-seventh interest, owned as heir of Mrs. Carrie Ingram, and reserving only an undivided one-seventh interest, in order that the title to said lands should be altogether in all the heirs alike. This act on his part harks back and reflects that, at the time of purchasing the tax certificate, his intention was to redeem the land for his mother and for the benefit of his father-in-law, who had acquired the $4,000 note from Bosbury, to whom Finis S. Ingram had transferred it. We have read the testimony carefully, and have concluded that the weight thereof supports the finding of the trial court to the effect that Finis S. Ingram acquired nothing under the tax deed, but was acting as agent for his mother when he purchased the tax certificate. We think a fair interpretation of the testimony is that he was her main support, and was looking after her interest at the time he purchased the tax certificate, and had no intention whatever of acquiring her fee simple title to the land by the purchase thereof.

Again, he was not in a position to acquire a tax title to the land adversely to his mother, because she had executed a deed of trust thereof to a trustee for the benefit of Finis S. Ingram and his brother for $4,000. It is true that in 1910 he transferred the $4,000 note to Bosbury. It must be presumed that he did this in the usual course of business by an assignment of the note. If he did, he was a guarantor of the payment thereof. The rule in Arkansas is that, although a mortgagee may pay the taxes on mortgaged land and claim reimbursement therefor, he cannot acquire title thereto under a tax forfeiture. *Ross* v. *Frick Co.*, 73 Ark. 45, 83 S. W. 343. But if he had assigned the note to Bosbury, which carried an assignment of the deed of trust, at the time he purchased the outstanding tax title, he comes within the rule that a mortgagee who assigns his note to another, if he guarantees the payment thereof by indorsement, is still under a duty to pay the taxes to protect his interest, and a

purchase by him at the tax sale would merely amount to a redemption of the land. *Howard Investment Co.* v. *Benton Lands Co.,* 5 Kans. App. 761, 46 Pac. 989; *Concordia Loan & Trust Co.* v. *Parrote,* 62 Neb. 629, 87 N. W. 348; *Manley* v. *Debenture B. Liquidation Co.,* 64 Kan. 573, 68 Pac. 31; *Beecham* v. *Gurney,* 91 Ia. 621, 60 N. W. 187; *Newton* v. *Marshall,* 62 Wis. 8, 21 N. W. 803.

As stated above, it must be presumed that he indorsed the note, as that would be the usual course, and the burden rested upon him to disprove that fact, if same was indorsed by him without recourse.

Appellees also insist that the tax deed was void because the description of the land therein was insufficient to identify it. The land in the 26-acre tract was described as "fractional southwest quarter of the southwest quarter, section 19, township 17, range 15—26 acres," and in the 138.94-acre tract as "fractional northwest quarter section 30, township 17, range 16—138.94 acres." This court ruled, in the case of *Turner* v. *Rice, ante,* p. 300, that, "where a deed conveys land by government call, the grantee takes the whole of the call, without reference to the number of acres following the description," and we see no reason why the grantee would not take the whole of a fractional call just as he would a call that was not fractional. In other words, we are of opinion that the description in the tax deed was sufficient to identify the land.

Appellant also contends that the trial court committed reversible error in limiting the foreclosure and sale to that portion of the one-seventh interest of Finis S. Ingram in the land which he acquired by inheritance from his mother, to the interest of those personally served with process. Appellant argues that the claimants to the remainder of said one-seventh interest were properly served and brought into court pursuant to the unknown owner statute, being § 1161 of Crawford & Moses' Digest, which is as follows:

"Where, in an action against the heirs of a deceased person as unknown heirs, or against other persons made

defendants as unknown owners of any property to be divided or disposed of in an action, it appears by the complaint that the names of such heirs, or any of them, or such other persons, are unknown to the plaintiff, a warning order as directed in the last section shall be made by the clerk against such unknown heirs or owners."

The statute was not intended to apply to parties whose names and the interest they claimed in the land in question appeared in the records of the county, and whose names and the interest they claim might be ascertained from an inspection thereof, and their whereabouts ascertained. The names of the persons claiming an interest in the land and the extent of the interest claimed by them might have been ascertained in the instant case from an inspection of the public records in the county, and their whereabouts ascertained by inquiring, so they should have been served by personal process.

This disposes of the questions presented for determination by the direct appeal, and several of the questions presented by the cross-appeal. We will now proceed to determine the other questions presented by the cross-appeal.

First, it is insisted that the debt secured by the $8,000 deed of trust was fictitious, and that it was executed as a cover to prevent the creditors of Finis S. Ingram from reaching his assets. There is nothing of consequence in the way of testimony in the record tending to prove either contention. Finis S. Ingram testified that he made the $8,000 note payable to his own order for the purpose of selling it in the market, and that he secured it by the trust deed to enable him to do so; that he sold and transferred the note in two or three weeks to Frank D. Ayres, the trustee in the deed of trust, for value, who afterwards assigned it to appellant. Appellant testified that he bought the note and trust deed from Frank D. Ayres, and paid full value therefor. This testimony is practically undisputed, and fully sustains the finding of the trial court to the effect that both instruments were executed and negotiated in good faith.

Appellees next contend that the $8,000 deed of trust was void because the land therein was not described in such way as to identify it. The land as described in the mortgage has heretofore been set out verbatim. The description in the mortgage would be insufficient to identify the land if it were not for the clause referring to it as the C. A. Ingram Farm. Without this identifying clause there would be no key or guide to determine the particular part of the fractional calls the mortgage intended to convey. If, however, the C. A. Ingram Farm, in said section 19, contained 26 acres, and in said section 30 contained 138.94 acres, and contained no other lands in said sections, the description, when read together, would furnish a means by which the land might be definitely located. The undisputed proof showed that at the time of the execution of the deed the Ingram Farm in said section 19 contained only 26 acres and that the Ingram Farm in said section 30 contained 139.11 acres, or only .17 acres more than was called for in the deed of trust. This slight variance in the acreage is too small to be taken into account. Mrs. Carrie Ingram had disposed of all the land she owned in said sections, except the 26-acre tract in said section 19 and the 138.94-acre tract in said section 30, at the time the deed of trust was executed.

Appellees next contend that the $8,000 deed of trust was void because not given for a present consideration, and did not provide for future advances. The deed of trust did not purport to secure future advances; it only purported to secure a note of even date, which the testimony showed was intended to be sold in the market and transferred for a consideration. When the note and deed of trust were sold for value, the consideration was received as a present consideration. At the time they were transferred for value, the note became a valid subsisting obligation and the deed of trust a valid subsisting security for the payment of the note.

It is suggested by appellees that the note was not sufficiently described in the deed of trust to identify it

as the note intended to be secured. The note is described in the deed of trust as follows: "Whereas, the said Finis S. Ingram, grantor herein named, is justly indebted upon one promissory note bearing even date herewith, payable to the order of himself, and by himself indorsed, same being dated at Chicago, Illinois, for the sum of $8,000, with interest at the rate of seven per cent. per annum, payable annually, said principal note to become due and payable at 505 Chamber of Commerce Building, Chicago, Illinois, five years from the date hereof."

We do not see how the note could be more perfectly described. The description sufficiently identified it as the note intended to be secured.

No error appearing, the decree is affirmed.

Mr. Justice KIRBY dissents.

STRAUB *v.* CAPPS.

Opinion delivered December 17, 1928.

J. H. Black and *W. G. Riddick,* for appellant.

Elmer Owens, for appellee

HUMPHREYS, J. Appellee brought this suit against appellant in the chancery court of Marion County, to quiet his title to an eight-tenths undivided interest in the southeast quarter of the southeast quarter of the northwest quarter of section 10, township 17 north, range 15 west, in said county. It was alleged in the complaint that appellee was the owner thereof, and that, through mistake, the land was included in a deed executed by George W. Chase and wife to appellant on April 3, 1920, and filed for record on May 2, 1921, and that appellee only recently discovered the execution of the Chase deed. It was also alleged in the complaint that the Chases had no title to the land whatever at the time the deed was made, and that appellant acquired no title under the deed from them.

Appellant filed an answer, denying that appellee owned the land, or that it was included in the Chase deed through mistake. Appellant interposed the further defenses that he and his grantors had paid the taxes thereon for more than seven years under color of title, and that he purchased the land at public sale ordered in a partition suit in said court, wherein J. W. McDaniel was plaintiff and Arthur J. Miller, Lizzie Capps and A. B. Capps were defendants, and obtained a commissioner's deed therefor, purporting to convey the entire title thereto; that the decree was rendered on April 28, 1925, and contained a recital that each of the parties to the suit owned an undivided three-fifteenths interest therein.

The cause was submitted upon the pleadings and testimony adduced by the respective parties, which resulted in the following findings and decree of the court:

The court found that George W. Chase had no interest in the land when he included it in the deed he made to appellant; that Straub had paid taxes on the land for the years 1922 to 1927 inclusive, amounting to $126.12; that, at the time of the partition suit in 1925, appellee actually owned an eight-tenths interest in the land, but was not made a party to the suit; and, pursuant to this finding, the court set aside the decree in the partition suit, canceled the commissioner's deed, quieted appellee's title to an eight-tenths interest in said tract of land as against appellant, and adjudged that appellee pay appellant $126.12 to cover the amount of taxes paid by him, together with interest on each tax payment from the date he paid same; from which findings and decree an appeal has been duly prosecuted to this court.

By agreement the parties filed an abstract of the title to the real estate in question as a part of the evidence in the case. Although contained in appellant's abstract of the testimony, it is too long to incorporate in this opinion. It is not necessary that it should be, in order to determine the question involved on this appeal. According to the abstract, Chase acquired an undivided one-fifth interest in the land on February 13, 1917, and retained it until January 17, 1924, at which time he conveyed it to Bell Reid. The abstract reveals that on June 25, 1921, A. B. Capps conveyed his interest in the land to Frank Capps, and that at that time a four-fifths undivided interest was owned by Frank Capps, Lizzie Capps and Arthur J. Miller, and the other one-fifth interest by J. W. McDaniel. The quitclaim deed from A. B. Capps to Frank Capps was not acknowledged in accordance with the law relating to acknowledgments in Arkansas. The acknowledgment failed to contain the word "consideration." The abstract reveals that the Capps family acquired a three-tenths interest in the land on April 5 and October 16, 1899, and subsequently other interests, until they owned between them a four-fifths interest therein, either in their own names or in the names of others for them, down to and including the year 1921. The abstract

does not disclose what became of the lands after that time.

The record reflects that from 1917 to 1927, inclusive, the land was assessed for taxes to Bell Reid *et al.*, and that the taxes for 1917 and 1918 were paid by them; that they were paid by J. W. McDaniel *et al.* for 1919; by C. B. Capps for 1920; by Morning Star Mining Company for 1921; and by Theo Straub for all the years thereafter.

The record also shows that on May 1, 1916, George W. Chase leased the land from Frank L. Wilder, A. B. Capps and Mrs. Bell Reid. This lease recites that Frank L. Wilder owned two-fifths interest, A. B. Capps owned two-fifths, and Mrs. Bell Reid owned one-fifth interest. The lease was for three years, and, according to its terms, expired on May 1, 1919. The lease required Chase to operate the mine and pay certain royalties to the lessors. It was provided in the lease that, any time during the life thereof, Chase might purchase the land for $12,000, and that, in the event he exercised the option to buy same, he should receive a credit on the purchase price for the amount of royalties paid by him under the lease.

Arthur J. Miller testified that in 1916 and 1917 he held a power of attorney from Lizzie and A. B. Capps to collect the royalties from Chase, and that from March, 1916, to February 10, 1917, he collected approximately $3,500 gross in royalties; that at the time Frank L. Wilder was acting as attorney for Frank Capps, and was holding a title in his own name to the land for Frank Capps, Lizzie Capps and A. B. Capps; that at the time Lizzie and A. B. Capps claimed to own an eight-tenths interest, and that George W. Chase did not claim to own any part of the land.

Quitclaim deeds were introduced from Arthur J. Miller and wife to appellee, dated March 17, 1928, and from Lizzie Capps to appellee, dated March 14, 1928.

Appellee testified that he acquired an eight-tenths interest in the land on June 25, 1921, by quitclaim deeds from A. B. Capps, Lizzie Capps and Arthur J. Miller; that the deed from A. B. Capps was filed for record in 1921, but the deeds from Lizzie Capps and Arthur Miller

were not filed for record, but were lost; that deeds from them had been recently obtained and filed for record in place of the ones that were lost.

The abstract also shows that George W. Chase, by quitclaim deed dated April 3, 1920, conveyed the land to the appellant, Theo Straub.

According to the testimony of a number of witnesses, Chase opened a mine upon the land, and operated same for about twenty years, claiming to be the owner thereof prior to the date on which he conveyed it to Straub; the land adjoined the Morning Star Mining Company's land, upon which Chase resided. Chase never lived upon the land in question, and it was never fenced. After Chase executed the deed to Straub, he procured a watchman to visit the mine occasionally and see that the machinery and tools used by Chase were not moved away, but he did not operate the mine. After obtaining his deed, Straub paid the taxes for six years before this suit was instituted, amounting to $126.12.

The record reflects that in the year 1925 J. W. McDaniel brought a suit in partition against Arthur J. Miller, Lizzie Capps and A. B. Capps, and obtained an order for the sale of the property; that the decree of partition contained a recital that each of the parties owned an undivided three-fifteenths interest in the land; that at the sale Theo Straub, the appellant herein, purchased the land for the sum of $400, and that, pursuant to the purchase, he received a commissioner's deed thereto, which was approved by the court; that McDaniel accepted his *pro rata* share of the $400, and that the remainder is in the hands of the clerk, amounting to $251.14. Appellee was not made a party to the suit.

Appellant's first contention for a reversal of the decree is that appellee had no title to the land on June 25, 1921, nor acquired any title after that time. It is argued that, although A. B. Capps conveyed appellee an undivided four-fifteenths interest therein on that date,

and that, although the deed was placed of record, it did not constitute notice to the public, because it was not entitled to record, on account of being defectively acknowledged, in that the word "consideration" did not appear in the acknowledgment. It is true that the deed, not being entitled to record, would not protect appellee against a subsequent transfer of the property by A. B. Capps, but it was good as between him and appellee, and passed the title to him. Appellee testified that on the same date Arthur J. Miller and Lizzie Capps conveyed their interest in the land to him, but that the deeds were lost without being placed of record, but that recently he had obtained deeds from them in lieu of the lost deeds, and placed them of record. Although the original deeds from Arthur J. Miller and Lizzie Capps to appellee were lost, the title passed under the deeds to appellee. Appellant argues that, because the A. B. Capps deed was not entitled to record and that the original deeds of Arthur J. Miller and Lizzie Capps were not recorded, such title as appellee acquired in them could not prevail over the title he acquired at the sale in the partition suit, in which A. B. Capps, Lizzie Capps and Arthur J. Miller were defendants. In other words, that, on account of appellee's failure to record his deeds, he placed it in the power of A. B. Capps, Lizzie Capps and Arthur J. Miller to partition the lands and sell them to parties who had no actual or constructive notice of his title. We do not think appellant is correct in this contention. The only title he obtained at the judicial sale was such title as J. W. McDaniel, Arthur J. Miller, A. B. Capps and Lizzie Capps had. Appellant was in no sense an innocent purchaser for value. He bought it at a judicial sale, and courts do not warrant titles. Appellee was not made a party to the partition proceeding, and was not bound by it. As far as the record reflects, appellee's grantors, Arthur J. Miller, Lizzie Capps and A. B. Capps, may not have appeared in the partition suit. The suit was instituted by J. W. McDaniel against them. It may be that the reason they did not appear was that they had conveyed the lands to

appellee, and had no interest therein. They have never claimed the proceeds from the sale. The consideration Straub paid for the land at the judicial sale is still in the hands of the clerk. McDaniel is the only one in the partition suit who accepted any part of the consideration paid by Straub. We do not think that one's title to real estate can be affected by a partition proceeding and sale thereunder to which he was not a party and of which he had no knowledge, whether his title papers be entitled to record or recorded. According to the undisputed evidence, appellee owned an eight-tenths undivided interest in the land at the time same was sold in the partition suit, and his title was not affected thereby, because he was not made a party thereto and had no knowledge of the pendency thereof.

Appellant also contends for a reversal of the decree on the ground that the Chase deed to him constituted color of title, and that he and his grantors had paid the taxes continuously upon the land for more than seven years. Chase had no actual interest in the land, as far as the record discloses, save and except as a holdover lessee at the time he made the deed to Straub. He therefore conveyed no title to Straub. Treating the conveyance, however, as color of title, Straub only paid the taxes for six years before the institution of the suit. His immediate grantor in the conveyance did not pay the taxes in 1921. According to the testimony, the taxes were paid by the Morning Star Mining Company in 1921, by A. B. Capps in the year 1920, and by J. W. McDaniel in 1919. It would have been necessary for George W. Chase to have paid the taxes in 1921 in order for Straub to bring himself within the statute authorizing one who has paid taxes continuously upon wild land under color of title for seven years to have his title quieted. We do not think that the proof is sufficient to show that Straub and his grantors acquired title to the land by seven years' adverse possession. The most that it showed was that Straub engaged a watchman to go upon the property occasionally and ascertain whether any of the mining ma-

chinery which had been used by Chase had been disturbed or removed. This act did not constitute the character of possession necessary to acquire title by adverse holding.

No error appearing, the decree is affirmed.

[redacted]

KINNEY *v.* NORTH MEMPHIS SAVINGS BANK.

Opinion delivered December 17, 1928.

[redacted]

Hawthorne, Hawthorne & Wheatley, for appellant.

E. L. Westbrooke, Jr., and *E. L. Westbrooke,* for appellee.

KIRBY, J. It is conceded that the decree from which this appeal comes correctly recites the material facts out of which this litigation arises. They are as follows:

On January 10, 1920, John R. Hirschmann, being then the owner of two lots in the town of Lepanto, conveyed them, by separate deeds, to H. S. Portis. In each deed notes were given in part payment of the purchase money, and to secure the payment of these notes, $450 in one deed and $400 in the other, a vendor's lien was reserved. These deeds were duly recorded February 2, 1920. On February 6, 1920, which was prior to the maturity of any of the notes, Hirschmann, for value, indorsed these notes to the North Memphis Savings Bank as collateral security for certain indebtedness to it, but no

assignment of record of the lien retained by Hirschmann was made.

Portis, the grantee in the deeds, became insolvent, and receivers were appointed, who took over the assets, and he executed to them a deed for the lots in question, and the receivers conveyed the lots, on February 19, 1923, to Charles E. Kinney, for the consideration of $710. Prior to the execution of this deed to Kinney, a deed releasing the vendor's lien above mentioned had been executed by Hirschmann to the receivers. Hirschmann, at the time of the execution of this release deed, was the record owner of the lien it released. This deed was executed and delivered by Hirschmann on the 25th day of March, 1920, without the knowledge or authority of the bank, and was not recorded until April 30, 1926. The North Memphis Savings Bank, for the benefit of its assignee, the Union & Planters' Bank & Trust Company, brought suit in 1924 upon the notes to foreclose the vendor's lien, and Kinney answered, and denied that the bank had a lien.

Upon these facts the decree recites that: "The court finds that, through the deed of John R. Hirschmann to H. S. Portis, defendant, Charles E. Kinney, as a matter of law, had notice of the transfer of the notes in question to the plaintiff bank, and that Hirschmann was not the owner thereof at the time he executed the release mentioned, and that under settled principles defendant, Kinney, was not an innocent purchaser of the property, the subject-matter of this action, and that the plaintiffs are entitled to enforce the liens claimed by them."

It is conceded that the decree herein appealed from accords with the law as announced in the case of *Driver* v. *Lacer,* 124 Ark. 150, 186 S. W. 824, but it is earnestly insisted that the law of that case has been changed by §§ 2 and 3 of act 374 of the Acts of 1917, which appear as §§ 7399 and 7400, C. & M. Digest. Section 2 of this act, which became § 7399, C. & M. Digest, reads as follows:

"Section 7399. Satisfaction of any mortgage, deed of trust, vendor's lien, or lien retained in deed or note

made and indorsed on the margin of the record where such instrument is recorded, by the mortgagee, trustee, beneficiary, agent of the owner of record of such indebtedness, or by the owner of record thereof, shall be full and complete protection for any subsequent purchaser, mortgagee, or judgment-creditor of the mortgagor or grantor, unless there shall appear on the margin of the record where such instrument is recorded a memorandum showing that the said mortgage, deed of trust, vendor's lien, lien retained in deed or note, or other evidence of indebtedness secured thereby, has been transferred or assigned, which said memorandum shall be signed by the transferrer or assignor, giving the name of the transferee or assignee, together with the date of such transfer or assignment, said signature to be attested and dated by the clerk. Provided that, where it shall appear from a memorandum indorsed upon the margin of the record and attested as hereinbefore provided, that the said mortgage, deed of trust, vendor's lien or other evidence of indebtedness has been transferred, satisfaction shall be made by the party appearing therein as the transferee."

By § 3 of the act, which became § 7400, C. & M. Digest, it is provided that the effectual discharge of any lien, etc., may be made by a separate release deed or instrument, duly executed, acknowledged and recorded, which instrument, when so recorded, shall be of the same effect as a marginal entry.

In the case of *Hebert* v. *Fellheimer*, 115 Ark. 366, 171 S. W. 144, it was held that, where a deed reserving a vendor's lien to secure the payment of purchase money notes was recorded, an innocent purchaser of the notes was entitled to enforce the lien retained for their payment, and that this right was not defeated by a subsequent reconveyance by the buyer to the seller, and that all subsequent purchasers of the land took subject to the vendor's lien thereon, and it was further held that a notation on the margin of the record was unnecessary to show an assignment of the notes in order to reserve to the purchaser of the notes the lien retained in the deed.

The case of *Driver* v. *Lacer, supra,* was somewhat similar, except that Lilly, the original grantor in the Driver case, in whose favor the vendor's lien was reserved securing the unpaid purchase money notes, obtained a reconveyance of the land to himself before he had transferred the notes. It was held, however, that this fact did not prevent the case from being ruled by the decision in the case of *Hebert* v. *Fellheimer, supra,* the applicable and controlling principle of law being that one is bound by whatever affecting his title is contained in any instrument through which he traces title, even though it be not recorded and he had no actual notice of its provisions. As the purchaser of the notes in the Driver case paid value for them, before maturity, and without notice of the reconveyance of the land to the original grantor, it was held that the purchaser of the notes had the right to enforce the equitable vendor's lien reserved in the original conveyance.

Obviously, act 374, as well as act 371 of the 1917 General Assembly, was intended to change the rule as announced in these cases, act 371 applying only to instruments of record prior to February 5, 1917.

Section 2 of act 374 of 1917 gives to any person who, according to the face of the record, is the owner of any of the liens there mentioned, the right to satisfy the liens of record by indorsements on the margin of the record where the instrument is recorded, and, when this is done, the subsequent purchaser, mortgagee, or the judgment-creditor, is protected against such lien, "unless there shall appear on the margin of the record where such instrument is recorded a memorandum showing that the said mortgage, deed of trust, vendor's lien, lien retained in deed or note, or other evidence of indebtedness secured thereby, has been transferred or assigned, which said memorandum shall be signed by the transferrer or assignor, giving the name of the transferee or assignee, together with the date of such transfer or assignment, said signature to be attested and dated by the clerk." There-

after follows the proviso that, when this memorandum is indorsed upon the margin of the record, satisfaction of the record can only be made by the transferee. In other words, the assignee of the note or debt secured by the lien takes, by the assignment, the lien securing the debt, but, if he neglects to have indorsed on the margin of the record the memorandum showing that the lien has been transferred to him, he is subject to have his lien defeated if satisfaction of the lien is indorsed on the margin of the record by the apparent owner of the lien.

That was done here. The bank took the notes as an innocent purchaser, but the court found that "no assignment of record of the lien retained by Hirschmann was made to the bank." Subsequently Portis executed a deed to the receivers of his estate, and Hirschmann, while apparently the owner of the vendor's lien, so far as the record reflected, executed the release deed. It is true the bank then held the notes, but it held them without having caused the notation to be made on the margin of the record, which would have protected its lien under the statute. In other words, unless and until the statute is complied with, one may deal with the person who, from the face of the record, is the owner of the lien, as if he were the owner, and will be protected in so doing.

It follows therefore that the decree of the court below must be reversed, and it is so ordered, and the cause will be remanded with directions to deny the bank the right to foreclose the lien, but judgment will be rendered on the notes for the amount thereof.

SPEARS *v.* SPEARS.

Opinion delivered December 17, 1928.

Gaughan & Sifford, Marsh, McKay & Marlin and *Mahony, Yocum & Saye,* and *I. H. Spears,* for appellant.

G. E. Snuggs and *Powell, Smead & Knox,* for appellee.

MEHAFFY, J. The appellee, Lesser Lee Spears, filed this suit in the Ouachita Chancery Court against Roena E. Spears, Isaiah H. Spears, D. W. Chenault, T. W. Chenault, Humble Oil & Refining Company, Standard Oil Company of Louisiana, Standard Pipe Line Company, Southern Crude Oil Purchasing Company and the Lion Oil Refining Company. Appellee thereafter filed an amended and substituted complaint, naming other parties as defendants. She alleges in her substituted complaint that she is a citizen and resident of Florida, and that the defendant, R. E. Spears, is a resident of Jefferson County, Arkansas; that the defendant, Isaiah H. Spears, is a resident of the State of Oklahoma; that the corporations named as defendants are nonresident corporations, authorized to do business in the State of Arkansas, and that the other defendants are nonresidents of Arkansas, except the defendants C. H. Murphy, Mrs. C. H. Murphy, Bruce Hunt, Mamie Smith McCurray, J. A. Rowland, Mrs. J. A. Rowland, C. E. Murdock and Mrs. C. E. Murdock, and alleges that they are citizens of Union County, Arkansas.

She alleges that she and A. W. Spears, now deceased, were lawfully married in January, 1898, in Jackson County, Florida; that A. W. Spears is now deceased; and that, in pursuance of said marriage, they lived and cohabited together as husband and wife, in Jackson

County, Florida, for about four years, when the said A. W. Spears deserted her, left the State of Florida, and later located in the city of Pine Bluff, Arkansas; that there were two children born to them before Spears deserted her, one of whom died, and the other now lives in Jackson County, Florida. She alleged that Spears at all times knew the whereabouts of plaintiff, or could have known by inquiry; that at the time of the desertion she was, and has been at all times since their marriage and until the death of said A. W. Spears, his lawful wife, and that she is now his widow.

She alleges that Spears, during his lifetime, owned an interest in certain property, describing it, in Ouachita County, Arkansas, and Union County, Arkansas, and that the deeds conveying to him certain property are recorded in said counties; that she is entitled to dower rights in the property described in her complaint; that the conveyances made by Spears of the property, oil, gas and mineral leases, were made without her knowledge or consent, were not executed or acknowledged by her, and that her dower right and interest in the property was never relinquished.

She then alleges the leasing and assignment of leases and transfers to other persons by said A. W. Spears, and claims that all the transfers were made without her knowledge or consent, and not executed by her, and that the parties holding the same have refused to account to her for her dower interest, and she prays for an order and decree for her interests in all of said property, as mentioned in her complaint. She also propounds certain interrogatories to certain of the defendants.

The defendants, answering, denied all the material allegations of the plaintiff's complaint with reference to her residence, her marriage with A. W. Spears, and that Spears knew of her whereabouts; alleged that she was not the lawful wife of A. W. Spears, and that she had no right, title, claim or interest in any of the property.

It is also stated in the answer of the defendants that A. W. Spears and Roena Spears were married at Pine

Bluff, Arkansas, in November, 1912, and that plaintiff knew of this marriage many years prior to the death of Spears, and knew that A. W. Spears and Roena Spears were living and cohabiting together in the State of Arkansas as man and wife from the time of their marriage in 1912; that she also knew that A. W. Spears was practicing law in Arkansas, and knew that he was transacting business in general, buying and selling real estate, and that Roena Spears was joining with him in his conveyances for many years prior to his death. It is also alleged that plaintiff knew about the execution of the mining leases.

Defendants further allege that in September, 1925, the plaintiff filed a petition in the Jefferson County Court, alleging that, at the time of the death of Spears, she was his lawful wife, and at the time of filing his petition she was his widow, and that she had a dower interest in his estate, and alleged that the marriage between A. W. Spears and Roena Spears was bigamous and void. She asked that Roena E. Spears be discharged as administratrix, and a competent person appointed.

Roena Spears filed an answer, denying the allegations of plaintiff, and the probate court made an order discharging Roena Spears as administratrix, and appointed Coy M. Nixon as administrator. Roena Spears appealed to the circuit court, and the circuit court reversed the judgment of the probate court, and removed Nixon as administrator, and reinstated Roena E. Spears. This judgment is pleaded in bar of this action.

The issue in this case is whether the plaintiff, as the widow of A. W. Spears, is entitled to dower rights in the property.

The evidence shows that the plaintiff and A. W. Spears were married on the 26th day of January, 1898, in Jackson County, Florida, near the town of Cottondale. They lived together as husband and wife in Jackson County, Florida, for about two years, when A. W. Spears left the plaintiff, and afterwards began the practice of law at Pensacola, and practiced law there until some

time in August or September, 1902, when he left there, without any intimation to his wife that he intended to leave, and without obtaining a divorce from her. He visited his wife and his people a time or two while he lived at Pensacola.

After Spears left Pensacola he settled in Pine Bluff, Arkansas, and began to practice law there. There were a few months between the time he left Pensacola and the time he located in Pine Bluff, Arkansas, that his whereabouts were not known, but he wrote a letter indicating that he had been in several States. He could not, however, have remained very long in any one of them.

After locating in Pine Bluff, in the year 1909 Spears married Minnie Temple, and they had four children, but it appears from the evidence that two of them were born before their marriage in 1909, Spears and Minnie Temple having lived together before they were married. There was never any secret about their living together, even before 1909, but he lived with her as his wife, and it is argued that it was very probable that there had been a prior marriage discovered to be illegal in some respect, and that this was the cause of the marriage in 1909. This, however, is not material, because he lived with her as his wife until she died in 1911.

About a year after Minnie Temple died, Spears married Roena Lyles, and they lived together as man and wife from 1913 until Spears died in 1925, Roena taking care of his children and living with him openly as his wife during all that time, about 12 years. The marriages, both to Minnie Temple and Roena Lyles, were at Pine Bluff, Arkansas, and were public, and they continued to reside there openly and publicly as man and wife, and Spears was engaged in the practice of law during that time.

The appellee knew of Spears' marriage for several years, but she did not notify the woman who was living with him that she was his wife, and never made any claim upon him, although she knew where he was, but claims that she burned the letters that she had received

from Spears. The appellee's contention, however, is that Spears could not have obtained a lawful divorce except in Jackson or Escambia County, Florida, and that the proof showed that he did not obtain a divorce at either of these counties, and there can be no presumption that he attempted to unlawfully obtain a divorce from her.

The first question presented and argued by counsel is whether the presumption that the marriage of A. W. Spears to Minnie Temple and his marriage to Roena Lyles were lawful, and not criminal. The appellant contends that appellee has not overcome this presumption.

Appellee testified that, after she and Spears were married in 1898, they lived together in Florida as husband and wife until the year 1900, when Spears went to Pensacola and began the practice of law there; that he practiced law there until the latter part of August or the first of September, 1902, when he left Pensacola and the State of Florida for no apparent reason, and without any notice or intimation to appellee that he intended to leave, and without obtaining a divorce. That during the time he stayed at Pensacola he visited his wife and family at intervals, and frequently contributed to their support. While in Pensacola he stayed with appellee's brother most of the time. She also testified that she had given Spears no cause for divorce or for deserting her, and had never done any of the things for which a divorce might be granted in Florida; that she had never been summoned in any divorce case brought by Spears; that she had never filed any suit for divorce herself, and that she had at all times been ready to move to the residence of Spears, but that he requested her to wait until he got his business straight and he would send for her.

The appellee has also proved that no divorce was granted in the county of Jackson or Escambia County, Florida, the only places where it is shown that Spears lived in Florida.

The proof further shows that Spears went to Memphis and stayed a while, and also to Covington, and that no divorce was granted in either of those counties. The

proof also shows that no divorce was granted in Jefferson County, Arkansas, and that no divorce was granted in St. Bernard Parish, Louisiana.

Appellee contends that this overcomes the presumption that Spears' second marriages were innocent, because he could only have been absent or away from the places mentioned for a few months, and not long enough to establish a residence in any other State. However, the proof does not show that Spears did not obtain a divorce in some county in Florida besides the one whose records were searched; it does not show that he did not get a divorce somewhere in Tennessee in some county other than Shelby or Tipton, and the proof does not show that he did not get a divorce in some county in Arkansas.

While the law requires a residence in a State for a certain length of time, it is not required that the party bringing the suit reside in the county where he brings the suit for this length of time. One might reside in Jefferson County, Arkansas, a year or more, and then establish a residence in Cleveland County, or some other county in Arkansas, where he could obtain a divorce, and then move his residence back to Pine Bluff. It is not at all impossible that he could do this without the people of Pine Bluff knowing anything about it or recalling it after so long a time. In fact, it appears very much more probable that he did something of this sort than that he would marry a woman in Pine Bluff, live with her as his wife, openly, raise children, and then, when she died, marry another woman publicly in Pine Bluff, Arkansas, and live with her many years, when, if he did not have a divorce, he would, of course, be guilty of a felony. The probability that he would not do this is strengthened by the fact that he was a lawyer, and knew that he was guilty of a felony if he did not have a divorce from his first wife. He knew that his first wife knew all about what he was doing in Pine Bluff, and knew that her people knew it. It would be entirely unreasonable to suppose that a man would incur the guilt of felony and the danger which attends the guilt of felony by marrying

another woman, living openly with her as his wife for a number of years, and then, after her death, marrying another woman and living openly with her, when he knew what the penalty of violating the law was.

We think the presumption that the marriages of Spears were innocent is also strengthened by the conduct of appellee and her people. Her brother visited at the home of Spears in Pine Bluff several years before his death. He was at that time living with a woman in the city of Pine Bluff, whom he claimed as his wife. At one of the visits of appellee's brother to the home of Spears, Spears himself was absent at El Dorado, where he was spending some portion of his time after the development of oil in Union County. The brother returned home, where the appellee lived, and she admits that she knew about the situation at Pine Bluff, and knew that A. W. Spears was living with a woman as his wife and raising a family; she knew he was dealing in Union County, and yet she never called on him for any assistance or made any claim whatever. Her conduct, as well as the conduct of her people, is a very strong circumstance tending to show that she had no claim on Spears, and it supports the presumption that Spears' conduct was not unlawful, but that he had obtained a divorce somewhere, and that his marriages in Pine Bluff were lawful.

Appellee cites and quotes from the case of *King* v. *Twyning,* 2 B. & Ald. 384. The quotation is as follows:

"The law always presumes against the commission of crime; and therefore, where a woman, twelve months after her first husband was last heard of, married a second husband, and had children by him, *held,* on appeal, that the sessions did right in presuming *prima facie* that the first husband was dead at the time of the second marriage, and that it was incumbent on the party objecting to the second marriage to give some proof that the first husband was then alive."

Appellant contends that this first announcement of the law, or the first decision to which she has referred,

was thereafter construed and modified, and quotes the following:

"There is no absolute presumption of law as to the continuance of life, nor any absolute presumption against a party doing an act because the doing of it would make him guilty of an offense against the law. In every instance the circumstances of the case must be considered." *Lapsley* v. *Grierson,* 1 H. L. C. 489.

The court also said, in the case of *King* v. *Twyning, supra*:

"It is not necessary for the court in this case to impugn the authority of the cases which have been cited nor to vary the ordinary presumptions which exist both in civil and criminal cases; for this is a case of conflicting presumptions, and the question is which is to prevail. The law presumes the continuation of life, but it also presumes against the commission of crime, and that even in civil cases, until the contrary be proved."

The court then, after calling attention to the cases with reference to presumption of life and presumption of innocence, continued:

"The cases cited only show when the presumption of life ceases, even where there is no conflicting presumption. The facts of this case are that there is a marriage of the pauper with Frances Burns, which is *prima facie* valid. But, the year before that took place, she was the wife of Richard Winter, and if he was alive at the time of the second marriage, it was illegal, and she was guilty of bigamy. But are we to presume that Winters was then alive? If the pauper had been indicted for bigamy, it would clearly not be sufficient. In that case Winters must have been proved to have been alive at the very time of the second marriage. It is contended that his death ought to have been proved, but the answer is that the presumption of law is that he was not alive when the consequence of his being so is that another person has committed a criminal act. I think therefore that the sessions decided right in holding the second marriage to

have been valid, unless proof had been given that the first husband was alive at the time."

It will therefore be seen that the case to which attention is called by appellee holds that the presumption of innocence overcomes the presumption of life. In the instant case, there was a marriage between Roena Lyles and A. W. Spears. But, many years before that time, A. W. Spears had married the appellee, and, if no divorce had been granted at the time of the second marriage, it was illegal, and Spears was guilty of bigamy. The presumption is that he was not guilty of bigamy, and, as said in the case referred to, the appellee must prove that no divorce was granted, or, at any rate, make sufficient proof that there was no divorce granted at any place to overcome the presumption of innocence.

In the next case referred to by appellee, the legitimacy of the children claiming the property was an issue. It was claimed that the mother of these children was never married to John Lapsley, and the closing paragraph of that case reads as follows: "This is a case entirely of fact, and the evidence satisfies me that in fact these parties did not live together as man and wife."

The court in the last case also discusses the case of *King* v. *Twyning* and other cases. The court also used the language quoted by appellee, but we do not think that the decision there is in conflict with the principles herein announced, nor is it against the decision in the Lathan case. It states plainly that in every instance the circumstances of the case must be considered.

When we consider the circumstances of the instant case, we think no other conclusion can be reached than that the presumption of innocence of Spears at the time of the two marriages must prevail. And all that was held in the case of *Brokeshoulder* v. *Brokeshoulder*, Okla. 204 Pac. 284, as we understand it, was that a presumption of the legality of marriage is not a conclusive presumption. A presumption of innocence is not a conclusive presumption.

"It has been seen that, where a person has been twice married, it may be presumed in favor of the second marriage that at the time thereof the first marriage had been dissolved by divorce or by death of the former spouse. This presumption, however, is not conclusive; the party against whom it operates may rebut it by any competent evidence tending to show that at the time of the second marriage the first marriage was subsisting. The presumption may nevertheless be reinforced by proof of such facts as will establish a dissolution of the prior marriage; and on an issue as to the validity of a marriage, hearsay evidence that the husband had previously been married to another woman is offset by hearsay evidence that he was subsequently divorced from her." 26 Cyc. 896.

We think the presumption in this case is reinforced by all the facts and circumstances in evidence. The fact that appellee, with her two children, knew all about where Spears was and what he was doing, and for more than twelve years had no communication with him; never called on him for alimony or support of any kind; the fact that she knew that he was living with another woman and raising a family; the fact that her brother would go to see Spears and visit in the family; the fact that Spears was a lawyer and knew the penalty of marrying a second time if he had no divorce—are all facts reinforcing the presumption of the validity of the second marriage.

"It is a well established principle that the presumption is always in favor of innocence, and this presumption, although rebuttable, remains good and must be acted on until it is disproved. While this principle is most important in criminal cases, it is frequently invoked and relied on in civil cases, in which it restates the alleged presumption against illegality, etc., as a regulation of the burden of evidence, and applies whether the question of innocence or guilt is directly or only collaterally involved." 22 C. J. 144.

"Where a man and woman have openly cohabited as man and wife and had the reputation of being such, it will be presumed that they were lawfully married;

and where a marriage is proved, it will be presumed that it was regular and valid. There is also a presumption in favor of the legitimacy of a child." 22 C. J. 145.

Appellee has called attention to many authorities to sustain her contention, but we think it would serve no useful purpose to review all these authorities. We think, in fact, that this question is settled by this court in the case of *Latham* v. *Latham,* 175 Ark. 1037, 1 S. W. (2d) 67. The facts in that case tending to prove that no divorce had been granted, we think, are stronger than in the instant case. Among other things, the court there said, quoting from another authority: "There was also a presumption that appellant's marriage with Jane Honeycutt was lawful, innocent, and not criminal. It is supposed that a man will not incur the guilt of felony and danger which attends it by marrying another woman during the life of one to whom he has previously been lawfully married."

This court, in the same case, also quoted with approval the following:

"So strong is the presumption, and the law is so positive in requiring the party who asserts the illegality of a marriage to take the burden of proving it, that such requirement obtains, even though it involves the proving of a negative, and although it is shown that one of the parties had contracted a previous marriage, and the existence of the wife or husband of the former marriage at the time of the second marriage is established by proof, it is not sufficient to overcome the presumption of the validity of the second marriage, the law presuming rather that the first marriage has been dissolved by divorce, in order to sustain the second marriage." See *Latham* v. *Latham,* 175 Ark. 1037, 1 S. W. (2d) 67, and authorities cited there.

We think the decision in the Lathan case is conclusive here. And, since we hold that the presumption of the validity of the second marriage is not overcome by the evidence, it becomes unnecessary to discuss the other questions raised and discussed by learned counsel.

Our conclusion is that the appellee failed to overcome by proof the presumption of the validity of the subsequent marriage and the presumption of innocence of Spears, and that the case shall therefore be reversed and remanded, with directions to dismiss appellee's complaint.

MISSOURI PACIFIC RAILROAD COMPANY *v.* EDWARDS.

Opinion delivered December 17, 1928.

Thos. B. Pryor and *H. L. Ponder,* for appellant.

S. C. Knight, for appellee.

MEHAFFY, J. The appellee brought suit against the appellant for damages for killing two dogs. One count of appellant's complaint alleged that a dog of the value of $100 was killed in August, 1927, and one dog of the value of $250 was killed in January, 1928. After the evidence was introduced and the jury instructed, the plaintiff dismissed the cause of action for the dog killed

in August, 1927, because of the failure of proof, and the jury returned a verdict for $250 for killing the second dog.

Appellant filed motion for a new trial, which was overruled, exceptions saved, and the case is here on appeal.

The evidence shows conclusively that the dog was killed in January, 1928; the plaintiff himself testifies to the killing, and Rogers, witness for the defendant, testifies as to the killing by the train. Moreover, defendant, in its answer, admitted killing the dog.

Whenever an animal is killed by the operation of a train, the presumption is that the company was guilty of negligence, and there is no proof offered by the appellant in this case to overcome this presumption. Neither the engineer nor the fireman that operated the train that killed the dog testified. There was an engineer who testified in the case about the killing of the first dog, and he also testified about the condition of the track at the place this dog was killed, but he was not on the engine that killed this dog, and knew nothing about the circumstances of its killing. Both the engineer and Rogers, a witness for the appellant, testified that this dog was killed near a curve, and that, in approaching the place where the dog was killed, the engineer could not see ahead at the place where the dog was killed. But both of them admit that the fireman, who was on the other side of the engine, could see. They say, however, it was probable that he was not keeping a lookout, but was performing some other duty. This, however, they do not claim to know anything about, and the fireman did not testify.

This court has often held that, while the engineer and fireman both are not required to keep a lookout, yet the company is required to keep an efficient lookout, and, at places where it would be useless for the engineer to keep a lookout, of course it is the duty of the fireman to keep a lookout.

The appellant argues that the complaint was insufficient, and that its demurrer should have been sustained. The complaint alleged the killing of the dog by the operation of the train, and that was a sufficient allegation. Of course, if the complaint did not state sufficient facts to enable the appellant to prepare for trial, it was its duty to file a motion to make the complaint more specific. The court doubtless would have required the plaintiff to state, if he could, what train killed the dog, so that the railroad company could have the persons operating that train present at the trial, and would probably have required the plaintiff to state what acts of negligence the railroad company committed, if he knew. But the appellant did not file any motion requesting any more information, but its answer indicates that it knew all about it, because it stated that in each instance the dog ran on to the track immediately in front of the engine, and ran down the track. And having this knowledge is probably the reason that it did not ask for any more specific statement in the complaint.

Appellant complains about a portion of the proof because he says there is no allegation in the complaint that the railroad company failed to keep a lookout, etc.; but when the appellee alleged that the dog was negligently killed by the operation of the train, it stated a cause of action under which it might offer proof of any negligent act that caused the killing of the dog.

Appellant also argues that the railroad company owes a trespasser no duty until his peril is discovered, and calls attention to some cases holding this. These cases, however, were decided prior to the passage of the statute under which this suit is brought. Under the present statute the railroad company is required to keep a lookout for persons and property on its track, and if it fails to keep that lookout, the burden is upon it to show that, if the lookout had been kept, the injury could not have been avoided. And this is true whether the animal or person on the track is a trespasser or not. The duty

is to keep a lookout for all persons and property on the track.

"In other words, the statute makes it the duty of the railroad company to keep a lookout for property upon its tracks, and it makes it liable for all injuries that occur by reason of its failure to perform this duty. Under the lookout statute, when the plaintiff has proved facts and circumstances from which the jury might infer that his property had been injured on account of the operation of the train and that the danger might have been discovered and the injury avoided if a lookout had been kept, then he has made out a *prima facie* case, and the burden is on the defendant to show that a lookout was kept as required by the statute." *Kelly* v. *DeQueen & Eastern R. Co.,* 174 Ark. 1000, 298 S. W. 347.

In the instant case there is no showing that any lookout was kept, and the plaintiff testified that the track was straight and even when they got to the curve. All of the testimony shows that, while the engineer could not have seen the dog, the fireman could.

Appellant cites and quotes from *C. R. I. & Pac. Rd. Co.* v. *Jones,* 124 Ark. 523, 187 S. W. 436, but all the court in that case said was that the company owed a trespasser no duty until he was discovered, or, by the exercise of ordinary care, could have been discovered. It necessarily means that they must keep a lookout. Ordinary care requires a constant lookout, and, if the lookout is kept and the property on the track is not discovered, the company would owe no further duty. That is, it must keep a constant lookout, and if such lookout is not kept, then the burden is on the railroad company to show that, if the lookout had been kept, the injury could not have been avoided.

Appellant argues and cites authorities to show that the testimony of the engineer and fireman cannot arbitrarily be set aside by the jury. We agree with the appellant in this statement of the law, but in the instant case neither the engineer nor the fireman testified at all. It is argued, however, that there is no allegation in the

complaint that the railroad company had failed to keep a lookout. This is a statutory duty, and when the plaintiff alleged that the dog was negligently killed by the operation of the train, and no motion to make more definite and certain was filed, it was proper to permit the introduction of the proof about lookout, or proof that, if a lookout had been kept, the dog could have been seen.

The instructions are as favorable to appellant as it had any right to have given, and the question of negligence is a question of fact, and it was the province of the jury to determine all the questions of fact.

It is argued that the verdict is excessive. The appellee himself testified that he dealt in dogs, and knew a good deal about them and their value, and that in his judgment the dog killed was of the market value of $250. We think this was sufficient evidence on which to base the verdict. The introduction of the testimony about the dog taking prizes and about the ribbons, we think, was not prejudicial, and tended to show the value of the dog.

The verdict of the jury as to facts is conclusive here, although we might think that the verdict was against the preponderance of the testimony. The question here is, was there any substantial evidence to support the verdict? We think there was.

The case is therefore affirmed.

GRIFFIN GROCERY COMPANY *v.* THAXTON.

Opinion delivered December 17, 1928.

Malcolm E. Rosser and *Daily & Woods,* for appellant.

Warner & Warner and *Cravens & Cravens,* for appellee.

McHaney, J. Appellee had for many years been in the employ of appellant, and, on October 1, 1927, at the time he was discharged, was a director, vice president and manager of the Fort Smith branch house of appellant company. He had been the manager of this branch house since its establishment. During the year 1926 he was paid a salary of $300 per month, and was given a bonus of $530, consisting of five shares of preferred stock in appellant company, and $30 in cash. No new contract was made with the company for his services in 1927, appellee testified, until the latter part of April, when Mr. J. T. Griffin, president of appellant, was in Fort Smith, and agreed with him that his salary for 1927 should be the same as for 1926, except that, if the company made net earnings of $75,000 or more for that year, he would be paid an additional sum of $1,400 as salary. After returning to his home in Muskogee,

Oklahoma, and on May 3, 1927, Mr. Griffin wrote appellee the following letter confirming their agreement:

"Referring to my conversation with you last Saturday evening, it is agreed and understood that in the event the net earnings of this company for this year equal or exceed the sum of $75,000, you are to be paid an additional salary of $1,400 in cash, as soon after the first of January, 1928, as the statement is figured and made up. I am confident that the company will earn that amount, or more. If it don't, I will be grievously disappointed. I know that you are going to do your full part in helping it earn all possible.

"Please file this letter away so that you will have a record of it, and can refer to it in case of necessity. I am filing my copy in my personal file. None of us know what might happen to us during the year, and while I hope to live a long, long time, of course life is uncertain.

"Yours very truly,

"Griffin Grocery Company,

"J. T. Griffin."

Mr. Griffin and appellee had for years been the best of friends, but, early in September, 1927, they became estranged, which grew out of reciprocal caustic criticisms in frequent and lengthy letters written by each to the other, finally resulting in the discharge of appellee on October 1, 1927. Appellee brought this suit to recover his salary for October, November and December, $900, and for the bonus or additional salary of $1,400, the net earnings for the year being in excess of $75,000. There was a verdict and judgment for $1,400 only, and the case is here on an appeal and cross-appeal.

Appellant's first contention for a reversal is that the court erred in denying its request for a directed verdict, on the ground that the undisputed evidence justified appellee's discharge. The undisputed evidence referred to consists very largely of the correspondence between appellee and Griffin heretofore referred to, which is too lengthy to be set out in this opinion. We have read these letters carefully, and have reached the conclusion that

the letters of appellee constituting the alleged acts of insubordination and insolence were provoked, in a measure, by letters from appellant's president. At least we do not think the court would have been justified in directing a verdict. The court properly submitted this question to the jury, under instructions not complained of, which were perhaps more favorable to appellant than the situation in this case justified. These instructions told the jury, in substance, that it was the duty of the employee to refrain from acts or conduct of insubordination and the use of disrespectful language towards his employer, and that a violation of such duty would justify his discharge, unless reasonably provoked or brought about by the employer's conduct. This is undoubtedly the correct rule as between master and servant, employer and employee. Here the employee was not a mere servant or employee, but was a stockholder, director, vice president, and manager of a branch house. He had, to the amount of his stock, the same interest in the business the president had, although the president owned the majority of the stock and was the dominating head of the company. In *Hale Hardware Co.* v. *Ragland,* 165 Ark. 258, 263 S. W. 962, we said:

"The general rule is that any person may lawfully refuse to continue in his employ a servant who has shown himself to be negligent, incompetent, inefficient, or dishonest. Ragland was impliedly bound by his contract of employment to serve the Hale Hardware Company faithfully and to refrain from doing any act knowingly and willfully which might injuriously affect the business of his employer. This court has expressly held that a servant, while engaged in the service of his master, has no right to do any act which may injure his trade or undermine his business. *McMurray* v. *Boyd,* 58 Ark. 504, 25 S. W. 505."

There is no charge that appellee was "negligent, incompetent, inefficient or dishonest," but only insubordination or effrontery to the president and the failure of that branch office to prosper were charged.

In Labatt on Master & Servant (2d ed.), p. 932, it is said:

"As the various kinds of language and behavior which constitute a breach of the duty now under discussion are described by terms which are not susceptible of any precise legal definition, the question whether, in any given instance, a breach was committed, is essentially one of fact, and therefore primarily for the jury. In determining this question, the nature of the occupation to which the given service has relation, and the social status and environment of the parties, are material elements for consideration."

Several assignments of error relate to the giving and refusing to give certain instructions, over appellant's objections and exceptions. We do not set them out and discuss them separately. Suffice it to say that we find these assignments not well taken. Instruction No. 2 requested by it was to the effect that the bonus offer in the letter heretofore quoted was without consideration and that appellee could not recover same. The evidence on this question was in conflict. The president testified that he made the contract with appellee about the first of the year 1927 to pay him $300 per month, and that he wrote the letter in May thereafter. Appellee testified that the contract for 1927 was made the last of April, and in this he is somewhat corroborated by the letter. At any rate, this was a question of fact for the jury, which was properly submitted in instruction No. 9.

It is finally insisted that the court erred in refusing to permit appellant to offer the appellee's complaint in evidence. It was offered to show that the contract for the salary and that for the bonus were separate and distinct contracts, and that the bonus contract was therefore void for want of consideration, or at least contradicted appellee's testimony regarding the contract. The proof showed that the allegations in the complaint in this regard were made by counsel under a mistake of fact; that appellee did not so state the matter; that he did not sign it, and had never seen it until it was offered

in evidence. In this respect this case is ruled by *Taylor* v. *Evans,* 102 Ark. 640, 145 S. W. 564; *Henry Wrape Co.* v. *Barrentine,* 129 Ark. 111, 195 S. W. 27.

Appellee, on his cross-appeal, says that the verdict of the jury is inconsistent; that by rendering a verdict for the bonus it was necessary for the jury to find that he was wrongfully discharged, and, if so, he was entitled to the $900 salary. We are asked to enter such a judgment here. We do not agree with appellee. The jury might have found that he was rightfully discharged, but, having worked nine months of the year, was entitled to the $1,400 as additional salary. But, even though the verdict is inconsistent, we would not feel justified in setting it aside, on the authority of the recent case of *Fulbright* v. *Phipps,* 176 Ark. 356, 3 S. W. (2d) 49.

The judgment will be affirmed both on the appeal and the cross-appeal.

McILROY BANKING COMPANY *v.* MILLS.

Opinion delivered December 17, 1928.

John Mayes, for appellant.

J. S. Combs and *J. B. Harris,* for appellee.

McHaney, J. Appellant secured a judgment against Boyd & Phipps, in the Madison Chancery Court, on October 25, 1924, in the sum of $700 and interest. It did nothing to collect said judgment until July 7, 1927, when it caused an execution to be issued by the clerk of said court and delivered to the sheriff, who promptly went to the vicinity of the residence of the judgment debtors and made inquiry as to what property, if any, they owned, and was advised that they did not own anything of value. One of them had become a nonresident of the State. On July 9 the sheriff returned the execution to the clerk, indorsed that he had served the writ but found no property, real or personal, out of which to collect the debt, which was in fact a true return as conditions then existed. As a matter of fact, Boyd & Phipps were the owners of certain lands in that county at the time said judgment was rendered, but which they had sold and conveyed to the appellee, Mills, on May 20, 1925, at a time when the lien of said judgment was an incumbrance thereon.

On September 27, 1927, appellee, John A. Phillips, the sheriff, wrote appellant he had examined the records and found that Boyd & Phipps had sold the land to Mills after the bank's judgment, and that he would advertise and sell the land as soon as he could give notice to the parties. An alias execution was issued by the clerk on November 16, and the sheriff made a levy on the land and advertised it for sale. Mills then brought this action to enjoin the sale, setting up his title, and that the lien of appellant's judgment had expired on October 25, 1927. Appellant filed an answer and cross-complaint, making

the sheriff, Phillips, and his bondsmen parties defendant, and prayed judgment against them for the failure, refusal and neglect of the sheriff to promptly levy the execution of July 7 on said land. It was charged that the failure of said officer to levy said execution was willful and with the intent to let the lien of the judgment expire as a result of a conspiracy with said Mills, and to prevent appellant from collecting its debt.

The court found that Mills purchased said land for a valuable consideration, in good faith, and without actual notice of said judgment, and permanently enjoined the sale thereof under the levy made in November. On the cross-complaint the court further found that the sheriff had used due diligence, was guilty of no negligence in the matter, and that appellant had given no directions to the sheriff as to what property to levy on, and that, after it discovered that a sale of land had been made by the judgment debtors after said judgment was rendered, it neglected to cause an alias execution to issue before the lien of its judgment expired. The court therefore dismissed the cross-complaint for want of equity.

This action against the sheriff is based on § 4360, C. & M. Digest, which reads as follows:

"If any officer to whom any execution shall be delivered shall neglect or refuse to execute or levy the same according to law, or shall take in execution any property, or if any property be delivered to him by any person against whom an execution may have been issued, and such officer shall neglect or refuse to make sale of the property so taken or delivered according to law, or if any such officer shall not return any such execution on or before the return day therein specified, or shall make a false return thereof, then, and in any of the cases aforesaid, each officer shall be liable and bound to pay the whole amount of money in such execution specified, or thereon indorsed and directed to be levied; and it shall be the duty of the clerk of the court from which any execution may be issued to indorse thereon the time when such execution was returned."

It has been held by this court that this section is highly penal. *Mayfield Woolen Mills* v. *Lewis,* 89 Ark. 488, 117 S. W. 558, and the same case, 97 Ark. 149, 133 S. W. 590.

In *Wilkerson* v. *Mobley,* 152 Ark. 124, 237 S. W. 726, it was said: "The statute in question is highly penal, and a party invoking it must bring himself within both the letter and spirit of it. Therefore he can do nothing which directly or indirectly contributed to the omission of the duty complained of and still hold the sheriff answerable under the statute." Citing *Bickham* v. *Kosminsky,* 74 Ark. 413, 86 S. W. 292, 4 Ann. Cas. 978.

As was said by the Supreme Court of Alabama, in *Governor* v. *Campbell,* 17 Ala. 566:

"It is the duty of a sheriff to use due diligence in the execution of process, whether final or mesne. If he does this, he discharges his duty, and cannot be held liable, although he has failed to execute the writ. Thus, if a defendant in execution be not in the possession of any property, and the sheriff has no knowledge that he has any, nor by ordinary diligence can ascertain that he has, and none is pointed out or shown to him as the property of the defendant, if he returns the writ no property, under such circumstances he could not be liable, although it might afterwards appear that the defendant had property liable to be sold under the writ. To hold the rule otherwise would be to hold the sheriff liable at all events, if the defendant had property, although the sheriff could not ascertain the fact or find the property."

We think this is undoubtedly the correct rule to be applied to sheriffs and other officers who receive process for execution. The undisputed facts in this case show that neither Boyd nor Phipps owned or had in their possession any of the real estate on which it is claimed the execution could have been levied at the time it was delivered to the sheriff. They had, more than two years prior thereto, sold and conveyed to appellee Mills, who had it in his possession, and, at the time the sheriff made the *nulla bona* return of the execution of July 7, neither

of them were in possession of any property out of which the sheriff might have collected the debt. Testimony on behalf of appellant tended to show that the sheriff was directed to levy on this land, although the witness who testified in this regard was not positive, direct and certain that he did so instruct the sheriff. On the other hand, the sheriff testified positively that he had no information that Boyd & Phipps had ever owned this land, or that they had conveyed it to Mills subsequent to the judgment against them. It was not the duty of the sheriff to run the records to ascertain what property, if any, the judgment debtors owned, or whether they had conveyed any property subsequent to the date of the judgment. At the date of the writing of the letter by the sheriff to the bank, hereinbefore mentioned, the execution had already been returned, and the sixty days within which the sheriff had to make a levy and return the execution had expired. About that time appellant had caused another person to examine the records, and at that time found out that Boyd & Phipps had owned this land and had conveyed it to Mills subsequent to the date of the judgment. It then became the duty of appellant to cause an alias execution to issue, with specific directions to the sheriff to levy on the land in the possession of Mills. The land being in the possession of another than the judgment creditor, the sheriff might reasonably have required the appellant to give an indemnifying bond to protect him in case of illegal levy. We are therefore of the opinion that the failure of appellant to collect its judgment was due primarily to its own negligence in failing to direct the sheriff to levy on the particular land, and to cause an alias execution to issue for such purpose.

As said by this court in *Wilkerson* v. *Mobley, supra*: "The reason is that, where the failure of the sheriff to make the return is caused by the plaintiff himself, he ought not to be permitted to obtain any advantage by it." And that "he can do nothing which directly or indirectly contributes to the omission of the duty complained of and still hold the sheriff answerable under the statute."

We are therefore of the opinion that the decision of the chancellor is supported by the preponderance of the evidence; at least we cannot say that it is against the preponderance of the evidence. The decree is accordingly affirmed.

MERCHANTS' & PLANTERS' BANK *v.* HAMMOCK.

Opinion delivered January 7, 1929.

[redacted]

Joe S. Harris and *Bridges & McGaughey,* for appellant.

J. G. Williamson, Adrian Williamson, Lamar Williamson and *John Baxter,* for appellee.

HART, C. J. (after stating the facts). The office of the writ of prohibition is to restrain an inferior tribunal from proceeding in a matter not within its jurisdiction; but it is never granted unless the inferior tribunal has clearly exceeded its authority and the party applying for it has no other protection against the wrong that shall be done by such usurpation. *Order of Railway Conductors of America* v. *Bandy, Judge,* 177 Ark. 694, 8 S. W. (2d) 448, and cases cited. It is well settled that, where the jurisdiction is disputable, the granting or refusal of the writ is discretionary. *American Casualty Co.* v. *Lea,* 56 Ark. 539, 20 S. W. 416; *Weaver* v. *Leatherman,* 66 Ark. 211, 49 S. W. 977; *Finley* v. *Moose,* 74 Ark. 217, 85 S. W. 238, 109 Am. St. Rep. 74; *State* v. *Stevens,* 159 Ark. 666, 252 S. W. 900.

In *Rush* v. *Denhart,* 138 Ky. 245, 127 S. W. 787, Ann. Cas. 1912A, 1199, the court said:

"If we should lay down the rule that application by original proceedings might be made to us to stay the hand of the inferior jurisdictions, whenever, in the opinion of counsel, the ruling was prejudicial, although it might not leave the complainant without adequate remedy, we would have much of our time occupied in the settlement of questions that could be brought before us in the regular way by appeal. Inferior courts would be obstructed in the hearing and disposal of cases, and much confusion and uncertainty would follow."

If the making of the Bank of Commerce of McGehee a party to the original action brought by the McGehee Special School District against the Merchants' & Planters' Bank and others was a fraud upon the jurisdiction of the court, then such chancery court would have the power to determine this fact. It is well settled that if the existence or non-existence of jurisdiction depends on contested facts which the inferior court is competent to inquire into and determine, a writ of prohibition will not be granted, although the superior court should be of the

opinion that the claims of fact had been wrongfully determined by the lower court, and, if rightly determined, would have ousted the jurisdiction. The chancery court in the original action had jurisdiction of the subject-matter, and it had jurisdiction to inquire into the fact whether the Bank of Commerce of McGehee had been fraudulently made a party for the purpose of giving the Desha Chancery Court jurisdiction in the premises. In this controversy we must take the cause of action as it was alleged by the school district in its original complaint; otherwise we would try the merits of the controversy for the purpose of determining whether or not we have power to try them. In other words, the contention now made by counsel for petitioners involved the whole merits of the plaintiffs' original case against petitioners. If the allegations were true, it would defeat the plaintiffs' complaint in the original case and should have been pleaded in bar in that case and evidence given under the general issue to sustain the plea.

That this view was at first taken by counsel for the petitioners is shown by the record in the original case, which is exhibited with their petition. This record comprises over 600 pages of typewritten matter. Numerous depositions were taken by both parties, and a decision had been actually rendered by the chancellor and announced to the parties. Nothing remained to be done except to enter the decree upon the records of the chancery court in accordance with the findings of the chancellor.

The response of the chancellor shows that all parties submitted to the jurisdiction of the court and agreed that he should take the case under advisement and render his decision in vacation. All the parties prepared written briefs in the case, and after the chancellor had made an exhaustive study of the case and had prepared and announced his written findings of fact, the present petition for a writ of prohibition was filed in this court. It is not plain that there was an absence of jurisdiction in the chancery court, for the question depended upon the

proof which should be made by them in the chancery court. If there was a joint liability on the part of the Merchants' & Planters' Bank and the Bank of Commerce of McGehee, the school district had a right to sue both of these parties and to establish its claim against the Bank of Commerce, notwithstanding its insolvency. It would have a right to do this in order to receive its *pro rata* share of the dividends from it as an insolvent bank under the winding-up proceedings by the State Bank Commissioner.

Since the circumstances and conditions surrounding the parties depend upon proof, we think the case is one in which to refuse the writ of prohibition would be a proper exercise of discretion. Therefore the petition for the writ of prohibition will be denied.

JONESBORO COMPRESS COMPANY *v.* HALL.

Opinion delivered January 7, 1929.

Block & Kirsch, E. P. Mathes, Aline Murray and *N. F. Lamb,* for appellant.

Frank Pace, Gordon Frierson and *Caraway, Baker & Gautney,* for appellee.

SMITH, J. Separate complaints were filed by W. A. Hall and fifty-five other persons against the Jonesboro Compress Company to recover the value of certain cotton stored by the plaintiffs in the warehouse of defendant, in the city of Jonesboro. These cases were consolidated and tried together. A stipulation covered the value of the cotton, and that question was not submitted to the jury. There was a verdict in favor of all the plaintiffs, and judgment accordingly, from which is this appeal.

The cotton was destroyed by a fire which was discovered about noon December 8, 1927, and the complaints filed by the owners of the cotton alleged numerous acts of negligence as the cause of the fire. After much testimony had been offered to sustain the various allegations of negligence, the court held that the only ground of alleged negligence upon which there was enough testimony to go to the jury was that of the failure by the compress company to keep a watchman on the premises during the noon hour, and the jury was told to find for the defendant if this ground of negligence was not established by the testimony.

At the time of the fire, cotton of the value of $500,000 was stored in the compress. The service rendered by the compress company was that of compressing the cot-

ton and storing it, subject to sale. The compress was divided into four sections, in each of which cotton was stored, and the cotton here in question was stored in section A, there being, at the time of the fire, 2,980 bales of cotton in this section; however, only 319 bales of the cotton is involved in this litigation. Although all the cotton stored in section A was destroyed, the fire department, while unable to extinguish the fire, was able to confine the fire to the section in which it originated.

The testimony on the part of the plaintiffs was to the effect that the switch tracks of the Cotton Belt Railroad ran on one side of the compress and those of the Frisco Railroad on the other, and that switch engines ran all day. Particles of loose cotton were lying on the floor of the section of the compress where the fire originated, and the day was dry and windy, and at least one door was left open, this being a door 16 feet wide. Adjacent to this section A was the engine room, where a coal fire was burning under the boilers, but there was no opening from the boiler room to the compress.

The testimony is conflicting as to where the fire originated, that on the part of the plaintiffs being to the effect that the fire was first discovered on the floor of the compress, along which it ran until some bales of cotton were reached and ignited. The testimony on the part of the defendant compress company was to the effect that the fire was first discovered on top of a bale of cotton, and from there it was soon communicated to other bales, and that the fire spread with such rapidity as to amount almost to an explosion.

Testimony was offered by the defendant to the effect that it was not customary to employ watchmen about compresses, except at night and on Sundays and holidays, when the compress was not in operation; that at all times when the compress was in operation no special watchmen were employed, as every employee was a watchman. Negro laborers had been at work in section A until the noon hour, but none of them were present in this section when the fire was discovered. They were

in a small office inside of section A, eating their lunch, when the fire started.

It is earnestly insisted that no case was made for the jury, and that a verdict should have been directed in defendant's favor. It is insisted that there was no testimony as to any negligence on the part of the defendant, except the failure to keep a watchman on duty, and that the undisputed testimony shows that it is not customary to employ watchmen at compresses during the noon hour on days when they are being operated. As presenting this theory of the case, defendant requested instruction numbered 10, reading as follows: "* * * If you find from a preponderance of the evidence that, throughout the States in which compresses are operated, it is not the practice or custom to have such watchmen during the noon hour or on days when the plant is being run, then the defendant was not guilty of negligence in not having a watchman during the noon hour on the day of the fire."

The defendant offered the testimony of several witnesses to the effect that it was not customary to keep watchmen at compresses during the noon hour when they were being operated. Such testimony is admitted, not for the purpose of permitting persons engaged in the kind of business out of which the damage arose to artificially, and without the supervision of the courts, determine what does or does not constitute negligence, but is admitted as bearing upon the degree of care which an ordinarily prudent person would use under the circumstances of a particular case. If one whose conduct was called into account as having caused an injury was shown not to have used the care which an ordinarily prudent person would and should have used under the existing circumstances, then he is negligent, although it may be shown that others were equally as negligent.

In the case of *Elmer* v. *Mutual S. S. Co.*, 114 Minn. 257, 130 N. W. 1104, evidence was offered as to the custom of keeping hatches closed in the Duluth Harbor at night,

and, in holding the testimony competent, the Supreme Court of Minnesota said:

"This evidence was admitted over defendant's objection that the custom was not pleaded, and its admission is assigned as error. We think the objection was not well taken. Evidence of custom in negligence cases is admitted, not on the theory that a breach of custom is negligence *per se*, or observance of custom necessarily conclusive that there was no negligence. It is admitted as evidence of negligence, or of due care, as the case may be, and it is no more necessary to plead it than any other purely evidentiary facts."

To render the testimony as to a custom admissible as tending to show the care that an ordinarily prudent person would use, there should be a preliminary showing of substantially identical conditions. As a practical matter, the value of such testimony would depend upon the identity of conditions. However, as we have said, these are jury questions, unless the testimony is such that only one conclusion may be reasonably or fairly deduced from the circumstances of the particular case.

The court charged the jury that: "If you find from the evidence that defendant took such care of plaintiff's cotton as an ordinarily prudent person would have taken for the purpose of guarding it against fire, then your verdict will be for the defendant."

After a careful consideration of the testimony, we are unwilling to say, as a matter of law, that the failure of the defendant to keep a watchman at the compress during the noon hour was not negligence, although this was not the custom of other compresses. The jury may have concluded that the fire hazard required the presence of a watchman at the Jonesboro compress. In addition to the testimony stated, it was shown by the undisputed testimony that, excepting only the explosives, cotton is one of the most inflammable substances, and that a fire in cotton spreads with great rapidity. The testimony also shows that, during the noon hour, at least two persons unloaded cotton into section A of the com-

press, and that no employee of the compress was present at the time. The compress was open to any one who wished to enter, and there were doors on both the north and south sides of the building. No employee of defendant was in charge of the compress at the noon hour.

There was some conflict in the testimony as to the length of time which elapsed after the discovery of the fire before it got out of control, and appellant insists that the absence of a watchman was not the proximate cause of the damage, for the reason that the fire could not have been extinguished had a watchman been present, and it is insisted that it is mere surmise and conjecture for the jury to have found otherwise. We do not think so. The care employed should have been commensurate to the attending danger. A watchman employed for the purpose would have known the portions of the compress which were open and exposed to danger, and might have directed his attention to the sections where there was reason to apprehend danger, and he might have discovered the presence of the fire earlier than those who did discover it, and who were under no duty to look for fires. He might have also employed the agencies at hand to extinguish the fire in its incipiency with which others were not familiar, and he might also have given the fire alarm sooner than was done. The persons who discovered the fire attempted to call the fire department over the telephone, but the office of the compress company, where the telephone was located, was locked, and they were unable to enter and use the company telephone until the door of the principal office had been forced open.

Under these circumstances we do not think it must be said, as a matter of law, that the failure to keep a watchman was not the proximate cause of the fire loss.

The compress company was not an insurer of the cotton. On the contrary, the receipts given for cotton delivered at the compress recited that: "Said cotton is not insured by the undersigned warehouseman against loss or damage by fire or lightning." The liability of the compress company was that of a warehouseman, and

it was liable for the loss of the cotton by fire in the event only that its negligence was the proximate cause thereof. Section 10365, C. & M. Digest; *Gulf Compress Co.* v. *Harrington,* 90 Ark. 260, 119 S. W. 249, 23 L. R. A. (N. S.), 1205.

The court refused to give, at appellant's request, an instruction numbered 12, reading as follows: "If you find from the evidence that the origin of the fire is unknown, then in that event it will be impossible for you to trace the fire to any act of negligence on the part of the defendant, and your verdict will be for the defendant."

It is pointed out that the giving of an instruction substantially to the same effect was approved by this court in the case of *Clark* v. *St. Louis, I. M. & So. Ry. Co.,* 132 Ark. 257, 201 S. W. 111. That was a case in which a railroad company was charged with kindling a fire on its right-of-way, which spread and consumed the plaintiff's property, or, if not so caused, that the fire was kindled from sparks from one of defendant's trains. There was a question of fact in that case whether the fire had originated in either of the ways alleged. The question there was that of liability for kindling or starting the fire. That is not the negligence upon which the plaintiff's cause of action is predicated in the instant case. The negligence here complained of is the failure to have a watchman to discover the presence of the fire, however caused, and that, regardless of the origin of the fire, its occurrence and the danger of spreading should reasonably have been anticipated and provided against by the presence of a watchman. There was therefore no error in refusing instruction numbered 12.

Appellant company cites and relies upon the case of *Oktibbeha County Cotton Warehouse Co.* v. *Page & Co.,* 117 So. 834, in which the Supreme Court of Mississippi held as a matter of law that the failure of the compress company to maintain a night watchman was not negligence. We think, however, that the instant case is distinguished from that case on the facts, in that there were

fire hazards in the instant case which were not present in the Mississippi case, which made the question one of fact whether a watchman should have been employed. The case of *Gulf Compress Co.* v. *Harrington, supra,* is more nearly in point.

The real and difficult question in the case is whether the testimony is legally sufficient to support the verdict, and, as we have concluded that it is, the judgment must be affirmed, and it is so ordered.

HARRISON *v.* BANK OF FORDYCE.

Opinion delivered January 7, 1929.

Scipio A. Jones, for appellant.

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

SMITH, J. Appellee, Bank of Fordyce, filed a complaint against appellants as trustees for the Grand Lodge of Masons (col.) in this State and the worshipful master and secretary of the grand lodge, in which it alleged that it had brought a suit to foreclose a mortgage given it by S. J. Anderson on a lot in Fordyce, Dallas County;

that it obtained a decree of foreclosure, pursuant to which the mortgaged property was sold to it as the purchaser, and the commissioner's deed was duly approved by the court. Thereafter the plaintiff bank discovered that Anderson had executed to the defendants, as trustees for the Sovereign Lodge of Masons, jurisdiction of Arkansas, a second mortgage on the same property, of which fact the bank was not advised when its suit was brought and the decree thereon taken. There was a prayer that the grand lodge be required to redeem from the foreclosure sale within a reasonable time, to be fixed by the court, or that, failing so to do, its right to redeem be foreclosed and barred.

Service of summons was had on the persons named as defendants. On February 23, 1928, a motion to quash the service of summons was filed on behalf of the grand lodge for the reason that it had not been served with process as required by § 6091, C. & M. Digest, which section provides that organizations similar to the Masonic Grand Lodge should appoint in writing the Commissioner of Insurance as its lawful attorney upon whom all legal process should be served, and there had been no service on the Insurance Commissioner. In this motion it was recited that the grand lodge appeared for the sole purpose of making this motion, and no other.

Before this motion had been passed upon by the court, the grand lodge filed another "motion to quash summons" on May 7, 1928, in which there was no recital that the appearance was special. In this motion the allegations of the former motion were repeated to the effect that the service should have been had on the Insurance Commissioner but was not.

In this second motion to quash it was further alleged that the principal place of business of the grand lodge was not in Dallas County, where the mortgaged property was located and the suit was pending, but was in Jefferson County, and it was alleged that under § 1176, C. & M. Digest, its suit should have been brought in Jefferson, and not in Dallas, County. Section 1176 reads as fol-

lows: "Every other action may be brought in any county in which the defendant, or one of several defendants, resides, or is summoned." It was alleged that none of the defendants were summoned in Dallas County.

The court overruled this last motion on the day it was filed, and entered a decree giving the grand lodge twenty days in which to redeem from sale, and this appeal is from that decree.

We think there was no error in the decree. It is true that one not properly summoned may appear specially for the purpose of questioning the jurisdiction of the court over his person, and when he limits his appearance to this purpose the court does not acquire jurisdiction over his person. In the case of *Spratley* v. *Louisiana & Ark. Ry. Co.*, 77 Ark. 416, 95 S. W. 776, one of the questions presented was whether the defendant had entered its appearance. It was there said:

"This question is ruled by *Union Guaranty & Trust Co.* v. *Craddock*, 59 Ark. 593, 28 S. W. 424, where we held that 'under the code of practice, a plea in abatement that the court has no jurisdiction of defendant's person for want of proper service is not waived by pleading in bar to the complaint, nor by appealing from an adverse judgment.' There is no doubt but that, where a party who has not been served with summons, answers, consents to a continuance, goes to trial, takes an appeal or does any other substantial act in a cause, such party by such act will be deemed to have entered his appearance. But this rule of practice does not apply in cases where the party on the threshold objects to the jurisdiction of his person, and maintains his objection in every pleading he may thereafter file in the case. Where he thus preserves his protest, he cannot be said to have waived his objection to the jurisdiction of his person."

Here the defendant, in its second motion, filed a plea in the nature of a plea in abatement, but contained in this motion is a plea in the nature of a demurrer. It was therein recited, and is here insisted, that this suit should have been brought in Jefferson County for the

reason that the city of Pine Bluff, in that county, is the *situs* of the grand lodge, and none of its trustees were summoned in Dallas County, where the suit was brought. This plea is an appearance for the reason that, if sustained, the service of the summons would not only be quashed but the cause of action would be dismissed.

In 4 C. J., page 1333, chapter "Appearances," § 27, it is said: "Broadly stated, any action on the part of a defendant, except to object to the jurisdiction over his person which recognizes the case as in court, will constitute a general appearance. * * * A general appearance is also made * * * by arguing a dismissal of a cause in addition to a motion to quash the summons." Cases are cited in the note to the text quoted which support it.

The motion to dismiss the cause of action was properly overruled, as § 1176, C. & M. Digest, quoted above, does not apply here. The applicable statute determining the venue of this action is § 1164, C. & M. Digest, which reads as follows: "Actions for the following causes must be brought in the county in which the subject of the action, or some part thereof, is situated: * * * Third. For the sale of real property under a mortgage, lien or other incumbrance or charge."

This is a suit to foreclose a mortgage on a town lot situated in Dallas County, and the suit was therefore properly brought in that county.

It is also insisted for the reversal of the decree appealed from, that a resale of the property should have been ordered, for the reason that at a sale foreclosing both the liens the land might have brought a larger sum than that for which it did sell and a sum in excess of the debt secured by the first mortgage, in which event appellant, as second mortgagee, would be entitled to this excess.

This question was considered in the case of *Dickinson* v. *Duckworth*, 74 Ark. 138, 85 S. W. 82, 4 Ann. Cas. 846, and there decided adversely to the contention of appellant. In that case, as in this, a first mortgage was foreclosed without making the second mortgagee a party. It was there said:

"It must be conceded that appellants were necessary parties to the foreclosure suit under which appellee Duckworth obtained title, and their rights in the property were not cut off by the sale. Having been omitted from the foreclosure proceedings, what remedy therefore remained to them in the assertion of their rights? A right merely to redeem from the lien which had been foreclosed upon the payment of the debt, or the right to require a foreclosure order and a sale thereunder? While there is some conflict in the authorities, we think that by the decided weight of authority it is settled that a subsequent lienor, or holder of the equity of redemption, after foreclosure against the original mortgagor, can only claim the right to redeem where he has been omitted from the foreclosure suit."

We conclude therefore that there is no error in the decree appealed from, and it is affirmed.

FLOWER *v.* BRICKER.

Opinion delivered January 7, 1929.

Daily & Woods and *C. W. Knott,* for appellant.

Owens & Ehrman, for appellee.

SMITH, J. The New England Securities Company was for many years engaged in making farm loans on farm property in Arkansas and other States, and its custom was to take a first mortgage for the loan and a second mortgage for its commissions or agent's fees. The first mortgage would be sold to investors and the second retained by it. In assigning the first mortgages the company would execute an agreement with the assignee whereby "it agrees to look after the collection of the interest as it falls due, and the principal at maturity, and to remit same; to keep insurance in force for and on behalf of the holder hereof according to the provisions of the deed of trust securing this bond; to make an annual examination of the taxbooks and to report any delinquencies, and to advise the holder hereof of the status of the borrower and the condition of the security whenever deemed necessary, hereby guaranteeing the deed of trust securing this bond to be a first and valid lien upon the premises described therein."

On October 23, 1919, J. T. Tye borrowed $3,000 from the securities company and gave a deed of trust to secure it, and at the same time executed to the securities company a second deed of trust covering the commissions charged for making the loan.

The securities company, on or about January 7, 1920, sold this first deed of trust, with other first securities, to the Winooski Savings Bank, a Vermont corporation, and executed an agreement containing the recitals above quoted in regard to the taxes, etc. The annual interest on this loan, amounting to $180, was paid promptly for the years 1920, 1921, 1922, 1923, 1924 and 1925, and the taxes were also paid for those years, the payments being made, as the bank later learned, by the securities company and not by Tye.

The securities company became insolvent, and Henry C. Flower was appointed receiver for it, and thereafter the annual interest on this loan was not paid to the bank,

and default was made in payment of the taxes on the land. Thereupon the bank caused suit to be brought by the substituted trustee to foreclose its lien. Tye, who was made a party, filed no answer, but an answer and cross-complaint was filed by the receiver for the securities company, in which there was set up a claim for the payment of certain taxes which, it is admitted, were paid by the securities company for the years 1921 to 1925, both inclusive, the contention being that the taxes were paid by the securities company as a junior mortgagee for the purpose of protecting its interests under a junior lien, and therefore within the rule that, where a junior mortgagee pays taxes for the protection of its security, it thereby becomes entitled to be subrogated to the rights of the State for the amount thereof.

Officials of the securities company testified that these taxes were paid at the request of the bank and upon the agreement that the bank would reimburse the securities company for the taxes; but this was denied by the representatives of the bank, who testified that they supposed Tye was paying the taxes and the interest, and that the loan was carried on that assumption, and they were not advised to the contrary until default was made in the payment of the taxes and interest.

Pursuant to its agreement so to do, the securities company advised the bank each year that the taxes had been paid, and as late as February, 1926, wrote the bank as follows: "Beg to advise all taxes in this case are paid. I mean all taxes prior to the year 1925."

The court ordered the foreclosure of the deed of trust sold to the bank as a first lien on the land, and denied the prayer of the receiver for subrogation for any of the taxes paid by the securities company, and this appeal is from that decree.

It is conceded that, where a junior incumbrancer pays taxes to protect his security and that of a prior lien as well, he is entitled to be subrogated to the paramount lien of the State or the taxing agency for the amount of such taxes, and may enforce this payment as a lien hav-

ing the same priority which the taxing agency had. *Lester v. Richardson,* 69 Ark. 198, 62 S. W. 62. We think, however, that doctrine is not applicable here.

We think the testimony does not show that the securities company paid the taxes upon the faith of a promise by the bank to refund them or to allow the securities company credit therefor. These tax payments were made for five years, and no such credit was given, nor does it appear to have been asked prior to the beginning of this litigation.

The testimony shows that the securities company acquired title to the land from Tye by a deed in 1923. This deed was of course taken subject to the deed of trust which had been assigned to the bank, and it was thereafter to the interest of the securities company to have the bank continue to carry the loan, and this it did upon the assumption that the mortgagor was paying the taxes and interest, and this it ceased longer to do when default was made in the payment of the taxes and interest.

The testimony shows that, after obtaining the deed from Tye, the securities company collected the rents for the years 1924, 1925 and 1926, amounting to $495.03, and appropriated these rents to its own account, and that all the taxes paid by the securities company amounted to less than $125. It is argued, however, that, while the rents collected by the securities company exceeded the taxes paid by it, the rents did not equal the taxes and the interest which the securities company paid to the bank. This is true, but it is unimportant.

Certainly, after acquiring the title to the land the securities company should have paid the taxes when the rents were sufficient for that purpose. We are also of the opinion that it would be inequitable to permit the securities company to claim the right of subrogation for taxes paid prior to the time the title was acquired. We find the fact to be that there was no promise on the part of the bank to refund these taxes or to allow the securities company credit for them. On the contrary, as late as 1926 the securities company reported that all taxes prior

to those of the year 1925 had been paid, and there was no intimation that the mortgagor himself had not made these payments and the interest payments as well. Had the bank known in 1921, when the taxes first became delinquent and were paid by the securities company, that the borrower was not paying them, it could then have determined whether it would foreclose its prior lien, as it had the right to do. It was lulled into inaction by the implied representation of the securities company that the borrower was paying the interest and the taxes, when such was not the fact, as both were being paid by the securities company.

The right of subrogation was properly denied, and the decree is affirmed.

MORGAN *v.* LEON.

Opinion delivered January 7, 1929.

Zeb A. Stewart and *Allyn Smith,* for appellant.

Gaughan & Sifford, for appellee.

SMITH, J. A decree was rendered May 7, 1925, in the Union Chancery Court, in favor of Morgan *et al.,* plaintiffs, against Koury and certain other defendants, for the sum of $3,375, but, upon the appeal to this court, the decree was reversed on December 20, 1926 (*Koury* v. *Morgan,* 172 Ark. 405, 288 S. W. 929), and the cause was re-

manded with permission to all parties to take additional testimony. Isadore Leon was named as a defendant in the case, and the decree appealed from was against him and all of the other defendants named. No appeal was prosecuted on behalf of Leon.

In August, 1925, an execution was issued against Leon, who, on August 29, 1925, filed a complaint in the court which had rendered the decree upon which the execution had issued, praying that the execution of the decree against him be enjoined and that it be declared void as against him, for the reason that it had been rendered without notice to him. A temporary restraining order was granted Leon, which, on final hearing, was made permanent, and this appeal is from that decree.

In making the temporary restraining order permanent the court found the fact to be that Leon had not been served with process, and this finding is clearly sustained by the testimony; indeed, it appears to be established by the undisputed testimony.

It is insisted, however, that the appearance of Leon was entered by the attorney who represented the other defendants. On this issue the testimony was to the effect that Mr. Hamp Smead, who was employed by Koury, who was trustee for himself and certain other owners of an oil lease, Leon being among that number, first filed a demurrer to the complaint, in which he named the defendants who were his clients, and Leon was not included in this number. The demurrer was overruled, whereupon Smead filed an answer on behalf of all the defendants, and upon this answer the decree from which the former appeal came recited the appearance of Leon. Smead testified that he inadvertently failed to exclude the name of Leon as one of the defendants for whose benefit the answer was filed, but that he did not at any time represent Leon and had no authority to enter his appearance. Leon's appearance was not otherwise entered, and the testimony clearly established the fact that he was never summoned, as he was not in the State until after the rendition of the original decree.

Smead duly perfected an appeal on behalf of the defendants whom he represented, and the decree appealed from was reversed, and, as has been said, the opinion (172 Ark. 405, 288 S. W. 929) gave all the parties the right to introduce additional testimony. Upon the remand of the cause Smead filed an amended answer on behalf of all of the defendants who had been appellants in the first appeal, and Leon's name was not included.

The cause was transferred to the circuit court, where a verdict was rendered by a jury against the answering defendants for $2,000. Leon's name was not included in this number. A motion for a new trial was filed, which the court overruled in so far as it applied to Koury, individually and as trustee, but granted it as to all other defendants, and set aside the judgment against them which had been entered by the clerk in the meantime, so that final judgment was rendered only against Koury, individually and as trustee. The plaintiffs duly excepted to this action, but the subsequent history of that branch of the case does not appear from the record now before us.

It is pointed out by appellants Morgan *et al.* that, although Leon did not appeal from the original decree, he was advised of its rendition in time to have made himself a party to the appeal which the other defendants prosecuted, as is shown by the fact that he brought suit to enjoin the enforcement of the decree before the expiration of the time within which he might have appealed. The testimony does not show that Leon was apprised of the litigation until after the rendition of the decree, and he testified that his first knowledge of the decree against him personally was obtained when the sheriff levied an execution on certain of his property. Leon alleged in his petition for an injunction, and he testified in support of its allegation, that he had no personal interest in the oil lease, the title being in a trustee, and it was this allegation which constitutes the meritorious defense against appellant's attempt to recover a personal judgment

against him, which he was required to show before asking to have the enforcement of the judgment enjoined.

It is true, as appellant insists, that Leon might have appealed from the original decree; but it is not true that this was his only remedy. Had he appealed, his appearance upon the appeal would have been entered, and after the remand of the cause he would have been a party to the suit, as the successful prosecution of the appeal reversing the decree for the error of its rendition without service would have entered his appearance.

Appellant insists that this proceeding is a collateral attack upon the original decree, and he invokes the numerous cases of this court in which it has been held that, upon a collateral attack on a judgment or decree, the sufficiency and validity thereof must be determined by an inspection of the judgment or decree itself, and the recital therein of service or the entry of appearance cannot be disproved. It has been so held in cases of collateral attack; but this is a direct, and not a collateral, attack upon the original decree. *First Nat. Bank* v. *Dalsheimer,* 157 Ark. 464, 248 S. W. 575; *Montague* v. *Craddock,* 128 Ark. 59, 193 S. W. 268; *See* v. *Haskins,* 129 Ark. 131, 195 S. W. 8; *Crawley* v. *Neal,* 152 Ark. 232, 238 S. W. 1054. See also *Williams* v. *Alexander,* 140 Ark. 442, 215 S. W. 721, in which case it was expressly held that equity has power to relieve against a judgment rendered upon the unauthorized appearance of an attorney.

The case of *Hall* v. *Huff,* 122 Ark. 67, 182 S. W. 535, was a proceeding under § 4431, Kirby's Digest (which is now § 6290, C. & M. Digest), to vacate a decree rendered at a former term of court which had been entered without notice to the defendant, and the instant suit is one of the same character. In the Hall case, *supra,* it was held that a proceeding to set aside or to vacate a judgment rendered at a former term upon the ground that it had been entered without notice to the defendant was a direct, and not a collateral, attack, and that the relief prayed would be granted where the testimony warranted.

We conclude therefore that the chancellor was warranted in making perpetual the injunction against any attempt on defendants' part to enforce the decree rendered against Leon without notice, and that decree is affirmed.

BOYD *v.* DUNCAN.

Opinion delivered January 7, 1929.

J. C. & Wm. J. Clark, for appellant.

George F. Hartje, for appellee.

HUMPHREYS, J. The only question involved on this appeal is whether the probate court of Faulkner County had authority, under § 71 of Crawford & Moses' Digest, to order appellee, who was the duly appointed administrator of the estate of W. P. Ledrick, deceased, to loan $2,655.69 belonging to said estate, on January 19, 1927. Section 71 of Crawford & Moses' Digest is as follows:

"If, on the return day of an inventory, or at any other time, it shall appear to the satisfaction of the court that there is a surplus of money in the hands of an executor or administrator that will not shortly be required for the expenses of administration or the payment of debts, such court shall have discretionary power

to order the executor or administrator to lend out such money on such time and on such security as may be approved by the court."

Appellee was appointed administrator of the estate on October 10, 1924, and filed his first account current over three years after his appointment, showing a balance on hand in cash of $3,989.04, after paying the debts and expenses of said administration. On January 19, 1927, he applied to the probate court for permission to lend $2,655.69, the balance remaining in his hands after advancing certain of the heirs $1,333.33. The court ordered him to lend the money, and approved the loans, and no appeal was taken from either order, and the time for appeal has expired. On February 19, 1928, the heirs filed a petition in the probate court to require appellee to make a final settlement and distribution of the estate. In response to a citation he filed a report showing a debit of $3,989.02, the amount he charged himself with in his last annual settlement, and credits for advances made to the heirs of $1,333.33, leaving a balance undistributed of $2,655.69, which amount he had loaned to certain persons, naming them, upon notes and personal security which had theretofore been approved by the court, stating that he had been unable to collect the notes, and requesting he be given until December 15, 1928, to collect same and make final settlement. Before any action was taken by the court upon the petition for final settlement and distribution and appellee's response thereto, appellee filed an amendment to his response, setting out the orders made by the court in 1927, authorizing him to lend the money, and the court's approval of the loans after being made, with a prayer on his part that he be given credit for the notes and allowed to turn them over to the heirs in final settlement, and that he and his bondsmen be discharged. The heirs excepted to these responses upon several grounds, one being that the probate court was without jurisdiction to order the loans made after the debts and expenses of the administration had been paid.

Under our view of the case it is unnecessary to set out the other exceptions to the responses.

Appellee then filed a motion to dismiss the exceptions of the heirs to his responses, upon the ground that the orders made by the probate court to lend the money became final upon the adjournment of the terms of court at which the orders were made, and, not having been appealed from, were not subject to attack in the probate court. The probate court sustained the motion of appellee to dismiss the exceptions to his responses, from which an appeal was prosecuted to the circuit court. The circuit court affirmed the judgment of the probate court, from which is this appeal.

As stated in the beginning of this opinion, the question of the authority of the probate court to order appellee to lend the money depends upon the construction of § 71 of Crawford & Moses' Digest.

By reference to that section, which has been set out verbatim in this opinion, it is apparent that no authority was conferred by it upon the probate court to order an administrator to lend money ready for distribution after all debts and expenses of the administration have been paid. It only confers authority upon the probate court to order an administrator to lend any surplus money in his hands that will not shortly be required for expenses of the administration and for the payment of debts. It appears from the pleadings in the instant case that the time had expired for creditors to present claims, and all the debts had been paid, leaving a net balance in the hands of appellee of $2,655.69 at the time he applied to the court for the order to lend the money. This net balance clearly belonged to the heirs, and was ready for distribution to them at the time the loans were ordered and approved. We find nothing in the section of the statute referred to authorizing the lending of money belonging to an estate after the time for distribution to the heirs by an administrator. The lending of money which should have been distributed to the heirs was an illegal expenditure. This court is committed to the doc-

trine that a probate court has jurisdiction to disallow credits claimed by administrators for unlawful expenditures made by them, even though ordered to be made by the court. This doctrine was announced in the case of *Burke* v. *Coolidge,* 35 Ark. 180, and governs the instant case.

On account of the refusal of the court to entertain the exceptions filed by appellants to the final account filed by appellee, the judgment is reversed, and cause remanded.

SECURITY LIFE INSURANCE COMPANY *v.* MATTHEWS.

Opinion delivered January 7, 1929.

Arthur S. Lytton and *Caraway, Baker & Gautney,* for appellant.

T. T. Mardis and *Charles D. Frierson,* for appellee.

HUMPHREYS, J. Appellee recovered damages in the sum of $838.73 against appellant in the First Division of the Circuit Court of Poinsett County upon the alleged breach of a life insurance contract, from which is this appeal.

The trial court instructed a verdict in favor of appellee upon the theory that the undisputed facts showed that, at the time the policy in controversy was forfeited, appellant had in its hands a sufficient sum of money belonging to appellee with which to pay the overdue premium and thereby prevent a forfeiture.

The life insurance policy in question was issued March 12, 1919, and the quarterly premium of $29.65 had been regularly paid thereon for seven years and nine months, but appellee overlooked paying the quarterly premium due on December 12, 1926, for a few days beyond the thirty-day period of grace, which would have carried the policy to March 12, 1927. A check for the premium was mailed and not received by appellant until January 25, 1927, at which time it declared a forfeiture of the policy and returned the check to appellee with directions how to be reinstated if he desired to apply for reinstatement. Appellee complied with the requirements for reinstatement, but appellant refused to reinstate him, without assigning any reason for its action. On the trial it appeared that appellant refused to reinstate him because it learned, from the medical examiner of the Cotton States Life Insurance Company, as a result of an urinalysis test, that appellee was not an insurable risk.

On March 12, 1926, appellee borrowed $335 from appellant, which was the full loan value available on the policy at that date. The policy provides that loans (per table of loans, etc., in the policy) may be obtained, "all premiums, including the current year's premium, having been duly paid." The table referred to provides that "If full year's premiums have been paid and this policy

has been in force for.....years," and "If premiums be paid for years stated," certain loan values are available.

J. C. Seitz, secretary and actuary of appellant, testified that the policy in question had no additional loan value under the provisions quoted when same was declared forfeited by appellant.

Under the terms of the policy it was optional on the part of appellee to pay the premiums either quarterly or annually. Appellee elected to pay the premium quarterly, and it is undisputed that had he paid the fourth quarterly premium in the eighth year of the life of the policy on or before January 12, 1927, same being the last day of grace, he would have been entitled to an additional loan of $60.

On account of appellee's option, and his election, to pay the premiums quarterly instead of annually, the trial court took the view—and we think correctly—that the loan value on the policy should and would accrue quarterly, just as it would have accrued annually had he elected to pay the premiums annually. It is true that the table of loan values contained in the policy is fixed upon the basis of payment of annual premiums, but, where premiums are paid quarterly, the loan value for the year ought to be prorated to the quarterly premium payments. This construction is reasonable and should be placed upon the contract to prevent forfeitures, which are odious in the law and never favored unless the language of the contract clearly justifies it.

It follows, from this construction of the contract and the undisputed fact that, if the loan value is prorated to quarterly payments of premiums, upon the payment of the third quarterly premium appellee was entitled to borrow $45 additional on the policy, more than enough to have paid the quarterly premium of $29.65 due December 12, 1926.

The rule is that insurance companies cannot declare forfeitures of policies for nonpayment of premiums when they have sufficient funds in their hands belonging to the insured to pay the premiums, and the duty rests upon

them to use the funds to pay the premiums and thereby prevent forfeitures. *American Nat. Ins. Co.* v. *Mooney,* 111 Ark. 514, 164 S. W. 276; *Missouri State Life Ins. Co.* v. *Miller,* 163 Ark. 480, 260 S. W. 705; *Pfeiffer* v. *Missouri State Life Ins. Co.*, 174 Ark. 783, 297 S. W. 847; *Knights of Pythias* v. *Sanders,* 174 Ark. 279, 295 S. W. 25.

Reversal of the judgment is also sought on the ground that the court adopted an incorrect rule for the measure of damages on account of the breach of the contract.

The court followed the rule announced in the case of *Mutual Relief Assn.* v. *Ray,* 173 Ark. 9, 292 S. W. 396, as follows:

"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."

The rule is applicable to premiums paid by the insured on account of any breach of a contract.

No error appearing, the judgment is affirmed.

HARDING CONSTRUCTION COMPANY *v.* DRAINAGE DISTRICT NO. 17.

Opinion delivered January 7, 1929.

J. T. Coston, for appellant.

Trieber & Lasley, Coleman & Riddick and *Little & Buck,* for appellee.

HUMPHREYS, J. The correctness of three decrees rendered by the chancery court of Mississippi County, in the Chickasawba District thereof, is involved on this appeal. The first was rendered on May 18, the second on July 14, and the third on August 1, 1928. J. T. Flanagan, Toleff Jacobson, Andrew Jacobson, J. O. Shulind, A. G. Shulind, and Harding Construction Company obtained a decree on the 27th day of September, 1926, in said court for $32,515 against Drainage District No. 17, growing out of a construction contract for a part of the improvement. During the pendency of that suit in the trial court, Flanagan, the Jacobsons, the Shulinds and Harding Construction Company procured an injunction on November 16, 1921, impounding $100,000 of the money of the district to pay such amount as they might recover from it. The injunction was not dissolved until September 24, 1923, at which time a master was appointed to state an account between the parties to the suit, the court reserving for future decision the question of damages on account of the issuance of the injunction. The reservation

in the decree is as follows: "The question of the liability of J. T. Flanagan and the other cross-complainants for interest on the $100,000 of the district's funds which were held by the bond purchasers pursuant to the order heretofore made in this cause, is expressly reserved for future decision."

In February, 1928, Drainage District No. 17 filed a petition in said court against Flanagan and his associates on the injunction bond for $5,247.68, praying that said amount be offset against the $32,515 judgment rendered against it in their favor on September 27, 1926. Flanagan and his associates interposed several defenses to the petition as follows: (1) *Res judicata.* (2) That the funds were tied up at the request of the district. (3) That the district was not damaged because it had been receiving interest on the funds, which had never been out from under its control.

The causes were submitted to the court upon the pleadings and testimony introduced by the parties, which resulted in a finding that the injunction was wrongfully issued and the funds wrongfully impounded, and a decree for damages in the sum of $3,666.66, directing that the amount be credited on the $32,515 decree, from which the Harding Construction Company and the Jacobsons appealed.

The trial court erred in rendering a decree for damages on account of the issuance of the injunction impounding the funds in the original action. That issue was reserved for future decision by the trial court when the master was appointed in 1923, and, being an issue by express reservation, should have been decided when the final decree was rendered in 1926. The trial court had statutory authority to adjudge damages in the original case for wrongfully impounding the funds at the time the injunction was dissolved. Section 5822 of Crawford & Moses' Digest provides:

"Upon the dissolution in whole or in part of any injunction or restraining order of any and every kind and nature whatsoever, the chancery court wherein the

same was pending may assess and render against principal and sureties on the injunction bond a valid judgment for any and all damages occasioned by the issuance of such injunction or restraining order; and the court may either appoint a master to report as to such damages, or may render summary judgment therefor, or at its discretion may cause a jury to be impaneled to find such damages."

The plea of *res judicata* should have been sustained, as the question of damages on account of the issuance of the injunction was an issue in the original action, made so by express reservation of the court.

After the $32,515 judgment had been rendered against the district in favor of Flanagan, the Jacobsons, the Shulinds, and the Harding Construction Company, on September 27, 1926, and after both parties had appealed the case to this court, and during the pendency of the appeal, the Farmers' National Bank of Alexandria, Minnesota, brought suit in said court to recover large sums from the Harding Construction Company and the Jacobsons and to subject their interests in said $32,515 judgment to the payment of the amounts they owed it. It made Drainage District No. 17 a party defendant. The district filed an answer in the action. Service was obtained upon the Harding Construction Company and the two Jacobsons by warning order. Upon the hearing of the cause on May 18, 1928, the trial court ascertained the amount due the Farmers' National Bank by the Harding Construction Company and the Jacobsons, and directed that certain of the funds which had been deposited with the clerk of the court by the district in payment of the judgment against it in favor of Flanagan and his associates be applied toward the payment of the amount due said bank. The Harding Construction Company and the Jacobsons filed a motion at a subsequent term of the court to vacate the judgments on the ground that they were rendered upon insufficient service, which was overruled on July 14, 1928. Appeals from both decrees were perfected, and the rever-

sal of them is sought on the alleged grounds: First, that the service upon the district was insufficient to sustain an equitable garnishment; second, that the affidavit for the warning order, warning them to appear, was defective and void for failure to comply with §§ 1159 and 1219 of Crawford & Moses' Digest. The sections referred to are as follows:

"Section 1159. Where it appears by the affidavit of the plaintiff, filed in the clerk's office at or after the commencement of the action, that he had made diligent inquiry, and that it is his information and belief that the defendant is: (1) A foreign corporation, having no agent in this State; or (2) a nonresident of this State; or (3) has departed from this State with intent to delay or defraud his creditors; or (4) has been absent from this State four months; or (5) has left the county of his residence to avoid the service of a summons; or (6) conceals himself so that a summons cannot be served upon him; or where either of the last two mentioned facts is stated in the return, by the proper officer, of a summons against the defendant, the clerk shall make and file with the papers in the case an order warning such defendant to appear in the action within thirty days from the time of making the order."

"Section 1219. Whenever the affidavit of the plaintiff or defendant is required to verify a pleading, to obtain a warning order, a provisional remedy, or any other order in an action, or on a motion or proceeding therein, it may, unless otherwise expressed, be made by the agent or attorney of the party, if the party is absent from the county, or is mentally incapable of taking an oath, or is physically unable to attend before the court or officer for the purpose of making the affidavit, in which case the affidavit shall state the reason, and that the affiant is the agent or attorney of the party."

(1) District No. 17 filed an answer in the equitable garnishment proceeding, thereby entering its appearance for all purposes. It is therefore unnecessary to determine the sufficiency of the service upon it.

(2) The complaint of the Farmers' National Bank states that it is a banking corporation; that its principal place of business is in Alexandria, Minnesota; that it has made diligent inquiry and that it is its information and belief that Harding Construction Company, Toleff Jacobson and Andrew Jacobson are each nonresidents of the State of Arkansas, and that the Harding Construction Company is a foreign corporation and has no agent in this State.

Indorsed upon the back of the complaint is the following affidavit:

"C. M. Buck states on oath that he is attorney for the Farmers' National Bank of Alexandria, Minnesota, and that said interpleader is a corporation and a nonresident of the State of Arkansas, and that the statements in the foregoing interplea are correct to the best of his knowledge and belief."

It is permissible to treat a complaint and an affidavit as one instrument in ascertaining whether the necessary essentials are set forth to warrant the issuance of a warning order by the clerk of the court. *Sannoner* v. *Jacobson,* 47 Ark. 31, 14 S. W. 458; *Ballard* v. *Hunter,* 74 Ark. 174, 181, 85 S. W. 252.

When read as one instrument, it reflects that the bank is a nonresident corporation and, by necessary inference, absent from the county and physically unable to attend before the court or an officer for the purpose of making an affidavit that the Jacobsons and the Harding Construction Company are nonresidents of the State and that the Harding Construction Company has no agent in the State upon whom summons might be served. These are the only essentials necessary to warrant the issuance of a warning order.

It is provided by § 1215 of Crawford & Moses' Digest that pleadings of corporations may be verified by their attorney in the action.

We attach no importance to the suggestion of the appellants that the use of the word "correct," instead of "true," in the affidavit, vitiates it. The statutes re-

ferred to do not require the use of the word "true" as the only means of verification.

The service upon both the district and the appellants was sufficient to ascertain the amount due from appellants to the bank and to impound and apply the funds due appellants by the district thereon.

Appellants also contend that the fund was not subject to equitable garnishment, because the drainage district was not completed. It is true the whole improvement had not been made, but the construction of the work covered by the contract in question was at an end on account of the breach, and whatever amount was due thereon was available and subject to equitable garnishment.

The decree rendered May 18, 1928, sustaining the garnishment proceeding commenced by the Farmers' National Bank of Alexandria, Minnesota, and the decree rendered July 14, 1928, refusing to set it aside, are affirmed; and the decree rendered August 1, 1928, allowing the drainage district damages on its injunction bond, is reversed, and the complaint of the drainage district for an allowance of damages is dismissed.

HILL *v.* BRITTAIN.

Opinion delivered January 7, 1929.

Dean, Moore & Brazil, for appellant.

C. A. Holland and *R. W. Robins,* for appellee.

HUMPHREYS, J. This is the second appeal in this case. On the first appeal the decree was reversed, and the cause remanded because the trial court rendered a judgment against the administrator of the estate of F. O. Stobaugh, deceased, in part for unmatured indebtedness, and decreed a foreclosure and sale of the property described in the mortgage to pay same. Reference is made to the case of *Hill* v. *Brittain,* 174 Ark. 1163, 299 S. W. 615, for a statement of the issues joined by the pleadings. It will be observed in reading the case that, during the pendency of the suit, F. O. Stobaugh, the owner and mortgagor, died, and the cause was revived in the name of R. E. Hill, administrator of Stobaugh's estate. It does not appear in the opinion when Hill was appointed administrator nor when the cause was revived. It is reflected by the transcript on this appeal that he was appointed sometime between April and December 2, 1925, and that the cause was revived against him by his consent on December 2, 1925, within a year after his ap-

pointment. The transcript also reflects that the cause was not revived at that time nor since against the heirs of F. O. Stobaugh. On remand of the case, further testimony was taken, and the cause was retried on March 19, 1928, resulting in a judgment against appellant as administrator of the estate for the amount evidenced by the notes, and a decree of foreclosure and order of sale of the lands described in the mortgage to pay the judgment.

On April 17, 1928, appellant filed a motion to set aside the decree on the ground that the cause had not been properly revived in that it had not been revived against the heirs of F. O. Stobaugh, deceased. On the hearing of the motion the court refused to set aside the judgment against appellant as administrator of the estate, but set aside the decree of foreclosure and order of sale of the lands to satisfy the indebtedness.

Appellant contends that the trial court should have set the judgment against him as representative of the estate aside as well as the decree of foreclosure and order of sale of the lands, because appellee failed to revive the cause against the heirs of F. O. Stobaugh upon the suggestion of his death; and appellee contends that the decree of foreclosure and order of sale of the lands should have been permitted to stand.

The ruling of the court upon the motion was correct. The purpose of the suit against F. O. Stobaugh was twofold; first, to obtain a judgment against him for the indebtedness evidenced by his notes, and, second, to foreclose and sell the mortgage security to pay the judgment, if obtained. Upon Stobaugh's death, and during the pendency of the suit, the action for the indebtedness survived against his administrator, and the action to subject the security to the payment of the indebtedness survived against his heirs. Section 98 of Crawford & Moses' Digest provides:

"All actions pending against any person at the time of his death which by law survive against executor or administrator shall be considered demands legally exhib-

ited against such estate from the time such action shall be revived, and shall be classed accordingly."

And § 1058 of Crawford & Moses' Digest provides in part: "If the order is made by the consent of the parties, the action shall forthwith stand revived. * * *"

Under these statutes the cause for the recovery of the indebtedness was properly revived against the administrator and amounted to a presentation of the claim to him within the time required by law. As stated above, one purpose of this suit instituted against F. O. Stobaugh was to recover a judgment for the indebtedness evidenced by the notes he had executed to A. J. Brittain, the appellee, and we know of no good reason why a mortgagee might not take a personal judgment against the estate of a deceased mortgagor, and forfeit his claim under the mortgage to a mortgage lien on the property described in the mortage by failing to revive the suit upon the death of the mortgagor against the heirs within one year from the date of his death. Sections 1062, 1063, 1065 and 1066, Crawford & Moses' Digest; *Blake* v. *Thompson,* 176 Ark. 840, 4 S. W. (2d) 514.

This court is committed to the doctrine that the heirs of a decedent mortgagor are necessary parties in a foreclosure proceeding to subject the lands described therein to the payment of the mortgage indebtedness. This rule is based upon the fact that the title to the real estate described in a mortgage descends to the heirs of a deceased mortgagor as well as the right to redeem same from the mortgage lien. They are necessary parties because of their ownership of the equity of redemption in the lands. *Buckner* v. *Sessions,* 27 Ark. 219; *Pillow* v. *Sentelle & Company,* 39 Ark. 61; *DeYampert* v. *Manley,* 127 Ark. 153, 191 S. W. 905. The trial court committed an error in rendering a judgment of foreclosure and order of sale of the lands in the instant case to pay the judgment against Stobaugh's estate because appellee failed to make Stobaugh's heirs parties defendants, and the court's action was correct in sustaining the motion to set the decree of foreclosure aside. It was error, how-

ever, for the court to grant permission to appellee to make the heirs parties at the time he set the foreclosure decree aside because appellee had, at the time of the rendition of the judgment against the administrator, lost his right to a lien under the mortgage by failing to revive the suit to foreclose said mortgage against the heirs of the deceased mortgagor within one year from the death of the mortgagor. The effect of the revivor of this suit against appellant as administrator was to present the claim as a general creditor against the estate for the indebtedness. The effect of the failure to revive the foreclosure proceeding against the heirs of the deceased mortgagor forfeited appellee's mortgage lien and right to foreclose same.

The decree therefore of the trial court will be in all things affirmed except that part thereof granting permission to appellee to make the heirs of Stobaugh parties at the time the foreclosure decree was set aside. In that respect the final decree of the court upon the motion is modified.

POWELL *v.* GRIFFIN.

Opinion delivered January 7, 1929.

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Pat McNalley and *Jordan Sellers,* for appellant.

Walter L. Goodwin, for appellee.

KIRBY, J., (after stating the facts). It is conceded that the testimony, being in direct conflict between appellant and her former attorney, Goodwin, as to the nature of the transactions resulting in the execution of the conveyance from appellant to her said attorney, Goodwin, does not meet the requirements of the rule that a deed absolute on its face can be shown to have been intended as a mortgage only by clear, unequivocal and convincing evidence; but the rule of evidence is different in transactions of this kind between attorney and client, during the continuance of such relation, which is

one of trust and confidence requiring a high degree of fidelity and good faith.

In *Swain* v. *Martin,* 158 Ark. 469, 251 S. W. 26, the court said:

"The procuring of the conveyance of the Carlisle property from Martin to Swain was during the existence of the relation of attorney and client. In such cases the burden is upon the attorney of proving the fairness and equity of the transaction and the adequacy of the consideration, and, upon his failure to make such proof, a court of equity will treat the case as one of constructive fraud. * * * The rule that an attorney who contracts with his client has the burden of proving that no advantage has been taken of the situation of the latter, is not restricted to contracts or dealings with respect to the rights of property in controversy in the particular proceeding in which the attorney is acting for the client, but it may extend to other transactions and contracts, where the relationship may be presumed to give the attorney some advantage over the client." See also *Thweatt* v. *Freeman,* 73 Ark. 575, 84 S. W. 720, and *McMillan* v. *Brookfield,* 160 Ark. 518, 234 S. W. 621.

As said in 2 R. C. L., pp. 967 and 968: "No presumption of innocence or improbability of wrongdoing can be considered in the attorney's favor. The power to enforce this rule does not depend upon the proof of actual fraud. Its application is the same whether attorneys abuse their trust, or act on generous impulses to assume risks and burdens of clients who are poor. Its enforcement does not involve an inquiry into the motives which prompt clients to sue for profits, when viewed from an ethical standpoint. Solicitude for them on account of their improvident contracts is not the basis of relief. The doctrine is founded on public policy. It is demanded by the welfare of society. It arises from the necessity of protecting proper relations of trust and confidence wherever they exist. Adherence to a principle which deprives fiduciaries of undue profits lessens the temptation to violate confidential relations." The proof

herein does not meet the requirements of this rule; the burden imposed by law upon the attorney was not discharged. He admitted, and all the proof showed, the value of the property to be around $1,000 at the time he took the conveyance from his client, agreeing to pay only $625 of indebtedness of the grantor, part of which was in payment of his fee for services rendered his client in the divorce case in the settlement of the rights of the parties therein to the property in controversy. The testimony also shows that he did not pay the $50 expressed consideration in the deed to his client, the grantor, but paid it in discharge of a plumbing bill for work done upon the premises he acquired under the conveyance; and further, he testified that he sold the property to the appellees herein, within about five months after it was conveyed to him, for an expressed consideration of $1,800, and that he actually received $1,500 in cash therefor. Also that there had been no appreciable change in value of property in the locality, and no decrease between the time he received his conveyance and the date of his deed conveying same to appellees.

Appellant stated the conveyance was a deed in form, as her attorney informed her at the time it was made, but was the same as a mortgage, and the property would be reconveyed to her upon payment of the debt. It is undisputed that she went to her grantee, having arranged for the money, the amount necessary to redeem the property, according to her understanding of the transaction, after she had been notified to quit possession by him, and he did not deny her statement about this occurrence further than to say he did not see the money at the time, and did admit that appellant kept after him so persistently that he had agreed, after he received the conveyance from her, to allow her to buy it back, but insisted that the amount for which it could be repurchased was not stated to her.

The undisputed testimony showed that appellant refused to relinquish possession of the premises to Goodwin, the grantee in her deed, upon his demand therefor,

claiming that she had the right to redeem the property upon the payment of the debt it was transferred to secure, according to her contention, and that Goodwin made the conveyance to appellee after such refusal of appellant to quit and her offer to redeem made, and while she was still in possession.

Appellees purchased the property from Goodwin while appellant continued in possession, and, so far as the testimony shows, without inquiry made as to the nature of such possession, which they were aware of, and neither of them testified on the trial. There is no question of estoppel, so far as they are concerned, and they cannot be regarded innocent purchasers, nor to have acquired any greater right under the conveyance than was possessed by their grantor when it was made.

Appellant was entitled to redeem the land from the conveyance to Goodwin, grantor of appellees, and the court erred in not so holding and declaring said conveyance to be in effect but a mortgage for the security of the money advanced by him. The decree is reversed, and the cause will be remanded with directions to allow the redemption of the lands by the appellant upon the payment of the amount of the advancement from Goodwin, with interest, and for all further necessary procedure to effect this result, in accordance with the principles of equity and not inconsistent with this opinion. It is so ordered.

SEWER IMPROVEMENT DISTRICT No. 1 *v.* DUGGANS.

Opinion delivered January 7, 1929.

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Pearson & Pearson, for appellant.

W. A. Dickson and *Price Dickson,* for appellee.

KIRBY, J., (after stating the facts). It is insisted for reversal of the judgment that it is not supported by sufficient testimony and that the court erred in giving said instructions No. 4 and No. 7.

The burden was upon appellee to show that he was entitled to recover in the action and the amount of such recovery. He testified that the only contract made by him with the sewer board was limited to the expenditure of the $600 paid in by Jackson and Graham for its construction, and that nothing was said about stopping the work when the money was expended. That he reported that the $600 had been expended, when it was done, to McIlroy and also to Mr. Graham, but had no further agreement with McIlroy, nor was he directed by him to proceed further. He relied for recovery upon the fact that he continued with the construction, after the expenditure of the $600 provided therefor, at his own expense,

upon the theory that the members of the commission saw him doing the work without any objection thereto, allowing him to complete the sewer, which was accepted and used by the city.

According to McIlroy, the officer and agent of the district, with whom the contract was claimed to have been made, no authority whatever was given for the expenditure of any more money than the $600 that had been provided for the purpose by individuals living in the territory to be served by the construction of the sewer. He denied any knowledge whatever of any expenditures by appellee of his own funds in the completion of the sewer after the expenditure of the said $600 provided therefor until more than a year after its completion, and explained his asking appellee about the progress of the work in the belief only that appellee was proceeding with the construction of the sewer under the authorization only for the expenditure of the said amount contributed therefor, the estimated cost of construction, $600.

There was therefore no substantial testimony warranting the jury's finding, and the contention that the judgment is not supported by sufficient evidence must be sustained. Since the judgment must be reversed, and there may be a new trial, it is necessary also to pass upon the other assignments of error.

Instruction No. 4, objected to, was erroneous in telling the jury that, if they found that McIlroy was employed to oversee the building of the sewer, and performed the services, and if they found, after the funds provided had been exhausted, that the agent and officer of the district, McIlroy, further authorized plaintiff to go ahead and finish the sewer, and that he had completed it in good faith and paid for its construction out of his own money, the verdict should be for the plaintiff against the district "for the amount you find plaintiff has expended."

There was no testimony showing any contract or agreement on the part of the district by any of its officers to repay for the construction of the sewer the amount

expended by appellee in having it done, and if the facts proved had warranted a continuation and completion of the work by appellee after the expenditure of the fund provided therefor, he was not entitled to recover more for such work than the reasonable value thereof as upon *quantum meruit,* no agreement having been made relative to the amount to be paid therefor.

McIlroy testified that the amount charged was excessive, and the city engineer, who had investigated the construction after the claim for compensation, testified that 75 cents per foot was the outside reasonable price for such work of construction.

Under the instruction given, this testimony was disregarded and the jury directed to find against the district for the amount of money expended in the completion of the sewer, without regard to the reasonable value of the work done, which was a question for the jury.

The court erred also in giving said instruction No. 7, allowing the jury, if they found from a preponderance of the evidence that members of the board of the sewer district had personal knowledge that appellee was constructing the sewer and "permitted him to complete same without notifying him to cease work, and you further find from a preponderance of the evidence that plaintiff expended his own money in completing same, and that the money of his own was actually spent in good faith by him, and it was necessary to spend same for the proper completion of said improvement, then defendant, commissioners, are estopped from claiming that the district should not pay for said improvement, and you will find for plaintiff against said district."

This instruction was erroneous, as contended, since it left out entirely of the jury's consideration the question of whether the commissioners had knowledge that the sum contributed for construction of the sewer had been exhausted and any knowledge on the part of the commissioners that the appellee was proceeding to the completion of the construction of the sewer after the expendi-

ture of the money provided therefor, in which event only could the district have been estopped, if at all.

It is true that in instruction No. 8 the court told the jury that the district would not be liable if the money was expended by appellee without authority of the board of commissioners, unless "you find that said commissioners, or some of them, had knowledge or information that the plaintiff was making such expenditures in excess of the amount of money borrowed from H. E. Jackson and W. E. Graham for that purpose." This statement, however, was not a qualification of instruction No. 7, which allowed the jury to find against the district if any of the members of the board had information that he was constructing the sewer and permitted him to complete same without notifying him to cease work. He was directed by the board to construct the sewer, for which they expected to pay out of the money contributed for the purpose, and certainly their knowledge that he was proceeding with the work, and failure to notify him to cease operation if such amount had been expended, could not estop the district from denying liability for payment for work done after the amount contributed had been exhausted, nor without it being shown, which was not done, that the members knew of the continuation of the work to completion by the appellee at his own expense after exhaustion of the fund provided for its construction.

In cases of conflicting instructions the jury is left without proper direction, and the error in giving said instruction No. 7, which authorized the jury to find against the district, was not relieved against by the provision in correct instruction No. 8.

On the cross-appeal it will suffice to say that the undisputed testimony shows that appellee had no contract with the district through its Commissioner McIlroy, warranting his expenditure of his own funds in the completion of the construction of the sewer with the expectation of its repayment by the district, nor was there any testimony showing any conduct on the part of McIlroy, as commissioner, that warranted any inference or finding

that he had induced the appellee to expend his money in the completion of a contract which he had attempted without authority to make for the sewer district. The court properly directed the verdict as to him.

For the errors designated the judgment will be reversed, and the cause remanded for a new trial. It is so ordered.

FORD HARDWOOD LUMBER COMPANY *v.* BRYANT.

Opinion delivered January 7, 1929.

John E. Swepston, W. G. Riddick and *Chas. T. Coleman,* for appellant.

Berry, Berry & Berry, for appellee.

MEHAFFY, J. The appellant brought suit in the Crittenden Circuit Court in replevin against the appellee, alleging that it was the owner and entitled to the immediate possession of certain horses, mules and camping and logging outfit, located near Louise, Arkansas, of the value of $2,500, and asked for judgment for said property and damages for its detention. The affidavit alleged the value of the property to be $2,500, and alleged that plaintiff was the owner and entitled to possession by reason of a chattel mortgage recorded in Crittenden County, Arkansas, on the 26th day of November, 1924, in which the appellee had conveyed the property to plaintiff to secure a note for $5,000.

The appellant executed bond, and the writ of replevin was issued, and property delivered to the appellant.

Appellee answered, denying the material allegations in appellant's complaint, and alleged that appellant failed to furnish him an itemized statement of his account, as required by law, and that said property was taken and sold in Arkansas instead of Tennessee, as provided by the mortgage. He also alleged that appellant took possession of certain property not included in the mortgage, and alleged that he was not indebted to the appellant in any sum, but that the appellant was indebted to him in the sum of $26,614.25.

The case was transferred to the chancery court, and the appellee there alleged, among other things, that the

transactions between the parties were executed over a period beginning February, 1924, and ending in November, 1926; that, during the operations in Tennessee, the appellee delivered to appellant logs of the value of $19,692.99, and that on the 24th of August, 1924, appellee executed the note sued on and the mortgage to secure the payment of said note, but alleged that, before the termination of operations in Tennessee, he had paid all of his indebtedness, including the $5,000 note.

After the case had been transferred to the chancery court and pleadings had been filed therein, the matter was referred to a master by the chancery court, and testimony was taken, and thereafter the master filed his report, finding in favor of appellee in the sum of $5,880 damages, plus $2,810, value of the property. The damages were for wrongful detention of the property after it was taken by appellant in replevin suit.

Testimony was introduced by both sides covering the transactions between the parties, but the master only reported on that part represented by the note sued on. The master found that no account was delivered to the appellee by appellant before the institution of the suit; that the trust deed was given by defendant to secure the sum of $5,000 of indebtedness which appellee owed appellant on August 26, 1926, and that the indebtedness at that time amounted to $9,928.80; that the $5,000 note was executed at the same time, and that the account between the parties was continued as an open account, no credit being given for the note; that the trust deed did not secure any future indebtedness. The master also found that the indebtedness secured by the trust deed was paid before the institution of the suit, and that appellant was not entitled to any of the property described in the trust deed; that appellee was entitled to judgment for the return of the property, or its value, and for damages for its detention. The master further stated that it is difficult to determine the value of the property, but he found it to be $2,660, giving a value of $120 each for the mules, $125 each for the wagons and

chains. The master fixed the value of miscellaneous items not covered by the mortgage, but taken by the plaintiff, at $150. He reported, however, that there was no testimony taken on this item, but he estimated it. He also found that the trust deed was not given to secure any particular indebtedness, but merely to secure $5,000 indebtedness of appellee.

Appellant filed exceptions to the master's report, but the court entered a decree approving the master's report and holding that the right to an ultimate accounting between the parties was not involved in the action, and the right of appellant to a set-off against the amount adjudged was not decided, and dismissed the plea of set-off without prejudice.

Appellee suggests that the questions to be decided are:

(1). Is the appellant entitled to the possession of the property?

(2). If not, what is the amount of damages for the wrongful detention?

(3). Under the pleadings and proof developed up to the time the report of the master was approved by the chancellor, can the appellant have a set-off against the appellee for the account?

The appellee contends that the appellant was not entitled to the possession of the property, first, because it failed to comply with the statute requiring the making and delivering to the mortgagor a verified statement of his account, etc. The statute reads as follows:

"Before any mortgagor, trustee or other person shall proceed to foreclose any mortgage, deed of trust, or to replevy under such mortgage, deed of trust or other instrument, any personal property, such mortgagee, trustee or other person shall make and deliver to the mortgagor a verified statement of his account, showing each item, debit and credit, and the balance due."

This court has held that the purpose of the statute is to give the mortgagor an opportunity, before suit, to pay the debt and to settle any controversy of any items

that might be in dispute without going to law. The Legislature did not have in view the matter merely of saving the mortgagor the costs that might be incident to a lawsuit. Its purpose was not only to prevent that, but also any annoyance and inconvenience he might suffer by having property taken from him by process of law before giving him an opportunity to adjust any differences with the mortgagee, and to settle his account, if possible, without a lawsuit. The burden was therefore placed on the mortgagee, as a condition precedent to the maintenance of a suit to foreclose or for possession, that he comply with the statute. He still has the right to his debt and to any other remedy provided by law for the enforcement of its payment. See *Lawhon* v. *Crow*, 92 Ark. 313, 122 S. W. 999.

This suit, as originally brought by appellant, was for the purpose of getting possession of the property described in the mortgage, in order that it might be sold to pay the note secured by the mortgage. The appellant did not sue on any account, did not seek to recover any other indebtedness, but sought simply to replevin the property for the purpose of selling it to pay the $5,000 note. This court has said:

"Does this statute require a sworn statement of the amount of a note secured by the mortgage, as in this case, where no payments have been made thereon? We think not. Construing the statute literally, it applies only to an account secured by the mortgage; and to hold that it applies to a note, without credits thereon, would be to extend it beyond the spirit and reason as well as beyond the letter of the law. Manifestly, the Legislature intended only to require a mortgagee to furnish a verified statement of an account under the mortgage, the amount of which is or might be in dispute, so as to give the mortgagor an opportunity, before suit, to pay the debt; and not to the single item represented by a note without credits, which is fully identified in the mortgage, and about which there can be no dispute. The court therefore erred in holding that the furnishing of

the verified statement is a prerequisite to the bringing of the suit." *Perry County Bank* v. *Rankin*, 73 Ark. 589, 84 S. W. 725, 86 S. W. 279.

The statute provides for making and delivering to the mortgagor a verified statement of his account, and, as said in the case last referred to, this is not a suit on an account. It is a suit on a note on which there are no credits. The furnishing the itemized statement would simply have been a showing of the $5,000 note, and this question is ruled by the decision in *Perry County Bank* v. *Rankin*, and there was no necessity to file a verified statement of the account between the parties, because the account was not sued on.

This court again said: "The facts bring the case squarely within the rule announced in *Perry County Bank* v. *Rankin*, 73 Ark. 589, 84 S. W. 725, 86 S. W. 279, and no verified statement of account under the statute was required. It appears from the record that the chattel mortgage was given as additional security for the mortgage indebtedness. The mortgagee had a right to first foreclose his mortgage on the land, and, when it did not sell for enough to satisfy the mortgage indebtedness, to foreclose his mortgage on the chattels." *Van Pelt* v. *Russell, Admr.*, 134 Ark. 236, 203 S. W. 267.

In the above case there was a foreclosure and sale of the land, and that left a balance of the sum between the amount of the indebtedness and the amount the land sold for, and it may be said here, as there, that no useful purpose could have been served by the rendition of an account.

After the replevin suit had been begun, the appellee filed answer and cross-complaint, and brought into the case the entire accounts between the parties, and asked for an accounting, alleging that the note had been paid, and that the appellant was indebted to the appellee in the sum of several thousand dollars. And it was the contention of appellant that it was entitled to a full accounting between the parties in that suit after it had

been transferred to chancery and appellee had asked for an accounting.

Since there must be an accounting, according to appellee's contention, before it could be determined whether the note had been paid, it was the duty of the court to settle the entire matter and all disputes between the parties in the one suit. To do otherwise would require a multiplicity, or at least would require an additional suit, and the taking of the same testimony in the second suit that was taken in this; and, for that reason, a full and complete settlement should have been made, and the decree should have adjusted the rights and equities of the parties and determined all matters involved in the litigation growing out of or connected with the subject-matter thereof. It should have finally disposed of the controversy. 10 R. C. L. 370; *Short* v. *Thompson,* 170 Ark. 937, 282 S. W. 14; *McGaughey* v. *Brown,* 46 Ark. 25; *Horstman* v. *LaFargue,* 140 Ark. 558, 215 S. W. 729; *Tallman* v. *McGahhey,* 164 Ark. 205, 261 S. W. 306; *Ferguson* v. *Rogers,* 129 Ark. 202, 195 S. W. 22; and *Estes* v. *Lucky,* 133 Ark. 98, 201 S. W. 815.

The court erred in not determining the matters involved in the litigation between the parties or growing out of or connected with the suit; it should have finally disposed of the entire matter.

The doctrine as to the application of payments is stated by this court as follows:

"The general rule is that, where neither debtor nor creditor makes an appropriation at the time of payment, the law applies it to the liabilities of earliest date. The reason is because that course is presumed to conform to the intention of the creditor. *Kline* v. *Ragland,* 47 Ark. 119, 14 S. W. 474. If there is any particular reason for a different appropriation, the rule does not apply. Thus, where cotton covered by a mortgage is delivered to the mortgagee, with authority to sell and retain the proceeds, the law appropriates the payment to the discharge of the mortgage debt, because the parties have impliedly agreed in advance how the proceeds shall

be disposed of. * * * Whenever the relation of the parties or the nature of the account or transaction between them shows that an appropriation of payments to the earliest items of the account would do injustice between them or fail to conform to their understanding or agreement, another application is made." *Faisst* v. *Waldo,* 57 Ark. 270, 21 S. W. 436.

If it had been intended that the payments made right along after the execution of this mortgage went to the payment of the mortgage debt, it being the oldest debt, the giving of the mortgage would have been perfectly useless. The parties would be in the attitude of having the mortgage given to secure a debt which the mortgagor was paying off at the time and leaving the parties without any security, when the evident intention of the parties was to give security for at least $5,000. But the testimony in this case shows that the intention of the parties was that the payments made should not be applied on the note. The appellee himself testified that he understood that the note was not to be paid until a year. Therefore, according to his understanding, at the time he made the payments which he claims should be applied to the note, the note was not due, and the general rule in the application of payments is that they shall be applied to debts due rather than to debts not due.

It clearly appears from the testimony in this case that it was the understanding of the parties that this note was not to be paid at once, and therefore the conclusion is irresistible that the payments made were to be applied on the account and not on the note. At least, not on the note until the time when, according to the agreement of the parties, it was to be paid. This time, the appellee says, he understood to be one year. If he thought the note was not to be paid within a year, he could not have thought that these payments made before the expiration of a year were to be applied on the note.

"The account exhibited by appellees, pursuant to the request of appellants, showed a running account with

credits on it, and appellants insist that those credits should be applied to the earlier items according to the ordinary rule of application of payments on a running account, and that, when so applied, they extinguish a portion of the claim which appellees now assert. There is an explanation, however, given in the testimony of the witness to the effect that all of the contract with Shenk Construction Company had not been completed by appellees in furnishing materials when the job was abandoned by contractors, and that the items of credit were entered on the books at the time the payments were made, all of which tended to show that the credits were not intended to be applied on the earlier items as shown on the account. The rule as to application of payments on an account to the earlier items is not an inflexible one, to be enforced when contrary to the intention of the parties." *Terry* v. *Klein,* 133 Ark. 366, 201 S. W. 801.

Not only did both parties testify that the note was not to be paid at once, but the testimony also shows that statements of the account were sent to appellee from time to time, and this statement necessarily showed debits and credits, and appellee was bound to know that the payments were not being applied on his note.

Again, while appellee claims that he had paid the entire note before he moved to Arkansas, he also is positive that he secured the consent of the mortgagee before he moved the property. This itself is inconsistent with the contention that the payments were to be applied, or were applied, to the payment of the note rather than the open account, because, if his contention that these payments were to be applied to the note and that it had been paid, then, when he moved the property to Arkansas, there would have been no reason to get the consent of the mortgagee, because, according to his contention, the mortgage had been paid.

For the errors indicated the decree will be reversed, and remanded with directions to settle the entire account between the parties, and enter a decree not inconsistent with this opinion.

DRIESBACH *v.* BECKHAM.

Opinion delivered January 7, 1929.

John P. Streepey, for appellant.

Walter L. Goodwin, for appellee.

MEHAFFY, J. The appellee brought suit against the appellant in the Union Chancery Court, alleging that

he was the owner of the southeast quarter of the southwest quarter and the southwest quarter of section 22, township 17 south, range 14 west, in Union County, Arkansas, and lives on said land as his homestead; that said land has been leased for oil and gas, and there has been more or less prospecting for oil and gas in that neighborhood; that, in the late spring of 1922, the defendant, J. F. Driesbach, well knowing that the plaintiff was the owner of the above described land, and well knowing that plaintiff was unaccustomed to the methods of trade and title to land in so far as oil rights are concerned, approached this plaintiff, and told him that there was an oil lease on his land, which lease was an incumbrance on the title to said land, and that he would lose his land, or a great interest therein, unless said lease was removed as a cloud on his title; that the defendant persuaded this plaintiff that said lease was a serious obstacle to the title to his land, and that he, the said defendant, would remove said lease from the land if the plaintiff would deed him a one-fifth interest in the oil and gas and other minerals under said land; and that this plaintiff, being inexperienced as to the titles of said land, and believing that there was something seriously the matter with the title to his land, executed a conveyance to the defendant, conveying one-fifth interest in and to all the oil, gas and other minerals in and under the above described land, which said instrument is recorded in book 131, at page 251 of the deed records of Union County, Arkansas, a copy of which instrument is attached to said complaint.

Plaintiff also alleged that said instrument was fraudulently procured from him by the defendant, and that the defendant did nothing towards straightening out the title to his land, and that he paid nothing in consideration for the conveyance of said interest. Plaintiff stated that the conveyance to defendant was a cloud upon his title, and he had been greatly damaged by reason of said instrument in that he had not been able to have his land prospected for oil and gas.

There was a prayer for a cancellation of the instrument made to defendant and for the lands to be vested in the plaintiff, etc. There was attached to the complaint a copy of the deed made to defendant, and, among other things, the deed stated that the parties were desirous of having the oil, gas and mineral lease canceled in order that they might be able to execute a valid lease on the property described; and to plaintiff's complaint the defendant filed the following demurrer:

First, that the complaint on its face does not state a cause of action; second, the complaint shows on its face that any right of action that may have existed is barred by the statute of limitations; third, that plaintiff is estopped from asserting any cause of action he may have had because of his being guilty of laches. The court overruled the demurrer, and the defendant appealed. Defendant had filed his answer, but withdrew the answer and stood on his demurrer.

It is first contended that the demurrer should be sustained because it contended that the complaint does not state any facts constituting a cause of action. It does, however, state the fact that the defendant knew that the plaintiff was unaccustomed to the methods of trade and title to land, and that defendant told him there was an oil lease on his land, which lease defendant alleged to be an incumbrance on the title, and that plaintiff would lose his land, or a great interest therein, unless this lease was removed. He further alleged that defendant persuaded plaintiff that the lease was a serious obstacle to plaintiff's title, and that plaintiff, being inexperienced, and believing that there was something serious the matter with the title to his land, executed the conveyance sought to be canceled. He alleges that the instrument was fraudulently procured, and that defendant never at any time did anything towards straightening out the title; that he paid nothing in consideration for the conveyance, and that the conveyance is a cloud on the title of plaintiff.

It is true that a complaint must state something more than mere conclusions, but the fraud charged by plaintiff, we think, is a sufficient statement of the facts constituting the fraud to justify the court in overruling the demurrer.

This court has frequently held that, in testing the sufficiency of a pleading by general demurrer, every reasonable intendment should be indulged to support it, and that, where facts are defectively stated, the remedy is by motion to make more definite and certain, and not by demurrer. It is also true that, while the Code forbids the allegation of mere conclusions of law, its spirit and object require that the facts constituting the cause of action shall be stated according to their legal effect. The rule requires the statement of fact, and not the evidence of fact. *Ellis* v. *First National Bank,* 163 Ark. 471, 260 S. W. 714; *Cox* v. *Smith,* 93 Ark. 371, 125 S. W. 437, 137 Am. St. Rep. 89; *Bruce* v. *Benedict,* 31 Ark. 301; *Turner* v. *Tapscott,* 30 Ark. 312; *Ferrell* v. *Elkins,* 159 Ark. 31, 251 S. W. 380.

"The allegations of the bill, which are confessed by the demurrer, control in this case. Contrary to the common-law rule, under our Code every reasonable intendment and presumption is to be made in favor of a pleading, and a complaint will not be set aside on demurrer unless it be so fatally defective that, taking all the facts to be admitted, the court can say they furnish no cause of action whatever. A demurrer will not lie to a complaint if it states sufficiently, but imperfectly, a cause of action; but the remedy in such case is by motion to make the complaint more definite and certain." *Williams* v. *Memphis, Dallas & Gulf Railroad Co.,* 133 Ark. 188, 202 S. W. 228. See also *Shelton* v. *Landers,* 167 Ark. 638, 270 S. W. 522; *Lane* v. *Alexander,* 168 Ark. 700, 271 S. W. 710; *Harnwell* v. *Ark. Rice Growers' Cooperative Assn.,* 169 Ark. 622, 276 S. W. 371; and *Fitch* v. *Walls,* 169 Ark. 745, 276 S. W. 578.

Tested by these rules, the complaint was sufficient on demurrer.

It is next contended by appellant that the demurrer should have been sustained because it is alleged that the complaint shows on its face that it was barred by the statute of limitations. We do not agree with appellant in this contention. The defense of the statute of limitations should be raised by answer and not by demurrer, where the facts stated in the complaint do not show that the action is barred.

This complaint alleges, in effect, that the plaintiff was ignorant; did not know about transfers and land titles and things of this sort, and that he was made to believe by the defendant that there was a serious defect in his title. But, of course, it cannot be assumed that the plaintiff knew, at the time that he alleges the fraud was committed, that it was a fraud, and there was no indication as to when he discovered it. The complaint does not therefore show on its face that the cause of action was barred by the statute of limitations.

This court has many times held that, in an action at law, the statute of limitations cannot be taken advantage of by demurrer unless the complaint shows that the action is barred. And it has also been said that it must not only show on its face that the action is barred, but it must show the non-existence of any ground of avoidance. See *Sanders* v. *Flenniken,* 172 Ark. 454, 289 S. W. 485; *Brown* v. *Ark. Central Power Co.,* 174 Ark. 177, 294 S. W. 709; *Central Clay Drainage Dist.* v. *Hunter,* 174 Ark. 293, 295 S. W. 19; *Miles* v. *Scales,* 174 Ark. 412, 295 S. W. 375.

There was no error in overruling the demurrer, and the decree is affirmed.

JOINER *v.* SORRELS.

Opinion delivered January 7, 1929.

Henry Stevens, for appellant.

McKay & Smith, for appellee.

MEHAFFY, J. The appellees brought suit, alleging that they were the owners of the northeast quarter of section 28, township 18 south, range 22 west, in Columbia County, Arkansas, and that they were informed that the appellant, Joe Joiner, claimed some interest in said land, and asked that the deeds by which the appellant claimed title be canceled as a cloud on appellee's title, and that appellee's title be quieted and confirmed against the appellants.

Appellees deraigned title to said lands as follows: That the said lands were patented to the State of Arkansas as swamp land, and conveyed by the State of Arkansas to certain parties, and that afterwards said land was forfeited for the nonpayment of taxes, and that the State thereby acquired title, and that in March, 1884, the State issued to George Crouch a donation certificate, and afterwards, on August 29, 1885, issued to the said George Crouch a donation deed.

Appellees alleged that George Couch went into possession of said land, and improved the same, and commenced paying taxes thereon; that he continued in the exclusive, open and adverse possession of said lands, paying the taxes thereon each year, until his death in 1899. The said George Couch died intestate, the owner and in possession of said lands. And the administrator of

Crouch's estate, under order of the probate court, sold said lands to Emerson and Davies, and, after the sale had been confirmed by the court, the administrator made a deed to Emerson and Davies. Emerson thereafter died, leaving his interest in said property to Sarai Emerson, Alice Emerson Sorrels and Donan Emerson Thomas, and that the appellees, through these conveyances, became the owners of the property described.

The appellant filed answer, denying that plaintiffs were the owners of the property, and denying the possession of Crouch—in fact, denying all the material allegations of plaintiff's complaint, and alleged that he was the owner in fee simple of said land by virtue of deeds from A. J. Marsh, to whom it had been conveyed by T. E. Wilson, and that Wilson claimed under a donation deed from the State. The parties entered into a stipulation, agreeing to the following facts:

"Agreed Statement of Facts.

"The plaintiffs and the defendant in the above styled cause, by their respective attorneys, hereby agree that the following facts may be considered as evidence upon the trial of the above styled cause:

"(1) The lands in controversy were patented to the State of Arkansas by the United States as swamp land. (2) In 1857 the State of Arkansas conveyed the southwest quarter of northeast quarter of section 28, township 18 south, range 22 west, to William H. Key. (3) In 1857 the northwest quarter of section 28, township 18 south, range 22 west, was entered from the State of Arkansas by Perry G. Key, but no patent was ever issued thereon. (4) In 1860 the State of Arkansas patented the east half of northeast quarter of section 28, township 18 south, range 22 west, to N. T. McAlister. (5) All the lands in controversy forfeited for nonpayment of taxes for the year 1868, and said forfeiture was duly certified to the State, as required by law. (6) That on March 8, 1884, the State of Arkansas issued to George Crouch a donation certificate covering all the above

described lands. (7) That on the 29th day of August, 1885, Paul M. Cobbs, as Commissioner of State Lands, executed and delivered to George Crouch a deed covering lands in controversy, which deed was recorded on the 23d day of September, 1885, and appears of record in record book P, at pages 15 and 16 of the deed records of Columbia County, Arkansas, a copy of which is hereto attached, marked Exhibit A, and made a part hereof. (8) That George W. Crouch died intestate, and W. W. Souter was duly appointed administrator of his estate by the probate court of Columbia County, Arkansas. (9) The probate court of Columbia County, Arkansas, entered an order authorizing W. W. Souter, as such administrator of the estate of George W. Crouch, deceased, to sell the lands in controversy belonging to the estate of George W. Crouch, a copy of which order is hereto attached, marked Exhibit B, and made a part hereof. (10) That W. W. Souter, as such administrator, reported the sale of said lands to the probate court of Columbia County, Arkansas, and said court entered an order purporting to confirm the same, which was entered of record, which is hereto attached, marked Exhibit C and made a part hereof. (11) That W. W. Souter, as such administrator of the estate of George W. Crouch, deceased, executed his deed to R. L. Emerson and A. W. Davies, purchasers of said lands, which deed is recorded in record book W, at pages 263-264 of the records of Columbia County, Arkansas, a copy of which is hereto attached, marked Exhibit D, and made a part hereof. (12) That R. L. Emerson died testate, and that by the terms of his will Alice Emerson Sorrels and Donan Emerson Thomas, by virtue of said will, became the owners of whatever interest R. L. Emerson might have had in the above described lands; that both Alice Emerson Sorrels and Donan Emerson Thomas are dead; that Alice Emerson Sorrels died testate, and that W. W. Sorrels is the owner of whatever interest she might have held in said lands at the time of her death; that Donan Emerson Thomas died

intestate and solvent, and that Sarai Rosalie Thomas, Riley Emerson Thomas and Mabel Louise Thomas, minors, her sole and only children, are now the owners of whatever interest Donan Emerson Thomas may have owned in said lands at the time of her death, and that S. R. Thomas is the duly qualified and acting guardian of said minors. (13) That taxes have been paid on said lands by the person shown in statement hereto attached, marked Exhibit E, and made a part hereof. (14) It is agreed that the only suit under the overdue tax act of 1881 in which the lands in controversy were included in the warning order entered of record by the clerk, or in any decree of foreclosure, is a certain case No. 241, which is styled 'The State of Arkansas, on relation of W. H. Arnold, v. the northwest quarter of the southwest quarter of section 4, township 16 south, range 18 west, and other lands,' upon which taxes are due and unpaid. (15) That chancery records, volumes B and C of the chancery records of Columbia County, Arkansas, contain all orders made and entered of record by the circuit court in chancery sitting in Columbia County, Arkansas, from 1860 to November 4, 1894, and that the only orders in the above styled cause appearing of record are as follows:

"'No. 1. Page 490, volume B, dated June 2, 1882, attached hereto and marked Exhibit 1. No. 2. Page 571, volume B, dated June 13, 1883, attached hereto, and marked Exhibit 2. No. 3. Page 22, volume C, dated September 11, 1883, attached hereto, and marked Exhibit 3. No. 4. Page 62, volume C, dated March 6, 1884, attached hereto, and marked Exhibit 4. No. 5. Page 64, volume C, dated March 6, 1884, attached hereto, and marked Exhibit 5.'

"(15-A) That there is hereto attached copy of chancery court docket D, page 121, marked Exhibit E-1. (16) That there is hereto attached, marked Exhibit F, copy of an instrument appearing of record in book labeled 'Lands Sold to State and Individuals, 1859-83,' pages

225-246, county clerk's office. (17) That there is hereto attached certificates of Herbert E. Wilson, Commissioner of State Lands, dated March 17, 1926, marked Exhibit G, and that this certificate covers the only instrument on file or of record in the State Land Office purporting to show any disposition of the lands in controversy in the overdue tax suit. (17-A). That there is hereto attached statement issued by the State Land Office, dated June 17, 1924, marked Exhibit G-A. (18) That on the 15th day of November, 1919, William B. Owens, Commissioner of State Lands, executed and delivered to T. E. Wilson a deed covering the lands in controversy, which deed was recorded on the 6th day of December, 1919, and appears of record in record book 47, at pages 105-106 of the deed records of Columbia County, Arkansas, a copy of which is hereto attached, marked Exhibit H, and made a part hereof. (19) That on the.....day of....., ..., T. E. Wilson executed a quitclaim deed to A. J. Marsh, which deed was recorded on the.....day of ....., ..., and appears of record in record book .....at page.....of the deed records of Columbia County, Arkansas, a copy of which is hereto attached, and marked Exhibit I, and made a part hereof. (20) That on the 29th day of April, 1922, A. J. Marsh executed a quitclaim deed to Joe Joiner, covering the east half of northeast quarter of section 28, township 18 south, range 22 west, which deed was recorded on the 1st day of January, 1923, and appears of record in record book 56, at page 236 of the deed records of Columbia County, Arkansas, a copy of which is hereto attached, marked Exhibit J, and made a part hereof. (21) That on the 28th day of December, 1922, A. J. Marsh executed a deed to Joe Joiner, covering the west half of northeast quarter of section 28, township 18 south, range 22 west, which deed was recorded on the 1st day of January, 1923, and appears of record in record book 56, at page 235 of the deed records of Columbia County, Arkansas, a copy of which is hereto attached, marked Exhibit K, and made a part hereof.

"It is especially agreed and understood that, notwithstanding it is agreed that the matters set forth herein may be considered as evidence in the trial of this cause, exceptions for incompetency, irrelevancy and immateriality are specifically, separately and severally saved as to each of the statements and as to each of the exhibits herein, and that said exceptions shall be preserved as a part of this agreement.

"This the.....day of June, 1927."

At page 32 of the transcript is a State donation deed from Paul M. Cobbs to George Crouch, covering the land in controversy. Pages 34-37 inclusive cover the proceedings in the Columbia Probate Court, wherein the land was sold to R. L. Emerson as the property of George Crouch, deceased.

Page 38, Exhibit 6, shows the payment of taxes by George W. Crouch for the years 1886-1897 inclusive, and in 1898 by W. W. Souter as administrator; in 1899 by R. L. Emerson; 1900-1919 by R. L. Emerson, A. W. Davies, and estate of R. O. Emerson; 1920-21 by W. W. Sorrels, A. W. Davies and the estate of Donan Emerson Thomas; 1922 by Joe Joiner; 1923 and 1924 by Sorrels and others.

The material facts in this case are identical with the facts in the case of *Wilson* v. *Chisholm*, 157 Ark. 418, 248 S. W. 273, and it would serve no useful purpose to set them out more fully here, and we will simply call attention to what the appellant claims is the difference between the facts in this case and the case of *Wilson* v. *Chisholm*.

Appellant contends that this differs from the Wilson-Chisholm case because Crouch had possession only 14 years, and died, and that there is therefore no continuous possession. The undisputed proof, however, is that Crouch took possession of the property under a donation deed from the State, made improvements, and actually occupied the land until the time of his death, which was about 14 years from the time he took possession, and that he paid the taxes all this time. After his

death, in 1899, the property was sold under an order of the probate court by the administrator of Crouch's estate, and was purchased by the parties alleged in appellee's complaint, and that appellees became the owners by proper conveyances from the persons who purchased at the administrator's sale.

It is admitted by appellant that the taxes were paid by Crouch and those claiming under him, from 1886 to 1924 inclusive, except taxes for the year 1922, which were paid by appellant. Practically the same questions of law were raised in the case of *Wilson* v. *Chisholm* as are raised in this case. In fact, the appellant contends that the material difference is that Crouch himself did not pay the taxes for the 38 years, but that he only paid for 14 years, and that his possession did not continue. But, if the presumption of redemption be indulged, as it was in the case of *Wilson* v. *Chisholm,* then this distinction, if there be any distinction, is immaterial. The appellant does not claim to have ever had possession of the property. There is no claim of possession by anybody except Crouch and those claiming under him; no taxes were paid by anybody during the entire 38 years, except for one year, and this case is so nearly identical with the case of *Wilson* v. *Chisholm* that we think it is clearly within the rule announced in that case.

In that case the authorities were reviewed, and it is wholly unnecessary to review them again. We simply call attention to the authorities and reasoning of that case, and hold that this case is governed by that. The court there said, among other things:

"The only question presented by this appeal is whether the presumption will be indulged that the land was redeemed from the overdue tax foreclosure for the taxes of 1869 and 1870 by James M. Owen or his successors in title. Appellants take the position that James M. Owen and his successors in title had no right to redeem the land, because they acquired no interest therein under the donation certificate and the donation deed made pursuant thereto."

The appellant here makes exactly the same claim as was made in the above case. The court further said:

"The case of *St. Louis Ref. & Wooden Gutter Co.* v. *Langley*, 66 Ark. 48, 51 S. W. 68, is cited in support of their contention that they acquired no interest whatever in said land under said certificate and deed. That case does hold that the State, by purchase at such sale, acquired no title which the State Land Commissioner had power to convey until after the redemption period expired, and that, during the pendency of the overdue tax suit, the Commissioner of State Lands had no authority to issue a donation certificate and deed based upon a foreclosure of land for the nonpayment of taxes; and also that after-acquired titles had no application to conveyances made by the State. It is true that James M. Owen and his successors in title acquired no interest in the land as against the true owner under the donation certificate, but it served the purpose of showing that he went into possession of the land in good faith, and not as a squatter or mere trespasser. His possession and claim of title in good faith constituted such an interest in the land as gave him a right to redeem the land from the sale in the overdue tax foreclosure against any one other than the true owner."

The decision of the chancellor in this case is not only in accord with the principles announced in the case of *Wilson* v. *Chisholm*, but it is in conformity with the principles of justice and right. When one has purchased property from the State, taken possession, and made valuable improvements in good faith, occupied such property for many years, and paid the taxes thereon, it would be manifestly unjust to deprive him of the property, if there is any ground for indulging the presumption that there has been a redemption.

The decision of the chancellor is not only in accord, as we have said, with the principles announced in the case of *Wilson* v. *Chisholm,* but in conformity with the principles of equity, and is therefore affirmed.

STEWART *v.* HUNNICUTT.

Opinion delivered January 7, 1929.

Wilson & Wilson and *Evans & Evans,* for appellant.

W. P. Strait and *Hays, Priddy, Rorex & Madole,* for appellee.

MEHAFFY, J. The appellant filed suit in Yell Circuit Court to contest the nomination for the office of assessor of Yell County, the nomination having been awarded by the Democratic County Central Committee to the defendant, Jess Hunnicutt. The chairman and secretary of the Democratic Central Committee of Yell County were made defendants also.

The complaint alleges, in substance, that plaintiff and defendant were both candidates for the office of assessor at the primary election held on the 14th day of August, 1928, and that Clarence George, Jacob Anderson, Hubbard Winchell and Walter Howell were also candidates at said election for the nomination for the same office. There are allegations of fraud, and specific statements with reference to the townships in which the fraud was committed, and it is alleged that, on the face of the returns, Hunnicutt received 996 votes, Clarence George received 296 votes, Jacob Anderson 231 votes, Hubbard Winchell received 459 votes, and Walter Howell received 637. Plaintiff also alleged that he received the highest number of votes, and was entitled to the certificate of nomination.

The defendants answered, and demurred to the complaint. The court overruled the demurrer. The answer denied specifically all the material allegations of the complaint. Defendant Hunnicutt filed a cross-complaint, in which he alleged fraud. Stewart, as shown by the returns, received 950 votes. The court made an order placing all the election returns in the custody of C. C. Sharp. This order was made with the consent of all the parties. Hunnicutt had filed a special plea, and the court, when it overruled the demurrer, took this special plea under advisement. The parties then took proof, and, after taking some proof, appeared, and it was shown that, after taking the proof and throwing out the votes that were illegal, both those cast for Stewart and for Hunnicutt, each of them had fewer votes than Walter Howell was shown to have. Howell was not a party to the suit. The court's order is as follows:

"On this day this cause comes on to be heard, the plaintiff appearing in person and by Evans & Evans and Wilson & Wilson, his attorneys; the defendant, Jess Hunnicutt, appearing in person and by W. P. Strait and Hays, Priddy, Rorex & Madole, his attorneys; and it appearing to the court, by the admission of both contestant and contestee, that the proof now taken by both parties shows that contestant and contestee have each received a less number of votes than was alleged in the complaint to have been received by Walter Howell, who was a candidate for tax assessor at the same time with the parties to this suit, and who has not been made a party to this suit, and the court holds:

"That, by reason of the admission of the parties contestant and contestee, that said number of votes alleged to have been received by said Howell, as shown by the returns of the central committee, destroys contestant's cause of action, and the court holds that it is incumbent upon contestant to legally show that he has received a plurality of votes cast in said election over and above any and all candidates."

The court then dismissed the complaint, and the contestant has appealed.

It is first contended by appellant that the court erred in holding that, by reason of the admission of the parties contestant and contestee, the number of votes alleged to have been received by Howell for tax assessor in the primary, as shown by the returns of the central committee, destroys the contestant's cause of action. We do not agree with appellant in this contention. The right of contest is conferred by statute. The statute provides that a right of action is conferred on any candidate to contest the certification of nomination and certification of votes made by the county central committee. Section 3737 of Crawford & Moses' Digest, among other things, provides:

"If the complaint is sufficiently definite to make a *prima facie* case, the judge shall, unless the circuit court in which it is filed is in session or is to convene within 30 days, call a special term," etc.

It will be observed that the statute provides that if the complaint is sufficiently definite to make a *prima facie* case, etc. The complaint in this case, when filed, was sufficiently definite, and the court so held. But the plaintiff thereafter in open court conceded that Howell, as shown by the returns, received more votes than he did. Howell was not a party, and the presumption is that the returns showing the number of votes that Howell received are true. Therefore, when the contestant made the admission that the returns showed more votes for Howell than he had received, he thereby showed that he was not entitled to contest the election. Howell was not a party; the presumption is that he received the votes shown by the returns, and therefore the pleadings on their face showed that the contestant was not entitled to the nomination, and he had no right to maintain the action.

The complaint in a contested election case must show that the contestant had such an interest in the election

as will entitle him to maintain the contest under the statutes authorizing it. That is, he must show that he has a right to the nomination himself. Where an election is contested by a defeated candidate, he must allege that he was a candidate for election to the office in controversy, and that he was duly elected. That is, that he received more votes than the contestee. In other words, he must show that he received a plurality of the votes in said election.

The contestant recognized this principle of law, and stated in his complaint: The plaintiff received the highest number of legal votes cast in said primary for the office of tax assessor for the county of Yell, and is entitled to be declared and certified as the Democratic nominee for said office.

The plaintiff received 958 legal votes in said primary, and the defendant Hunnicutt received, or is credited with receiving, 996 legal and illegal votes, etc.

But afterwards, in open court, the contestant conceded that, according to the returns and the proof taken, he had not received the highest number of legal votes cast in said primary election. This is true because the presumption is that Howell's votes were all legal. There is nothing to indicate to the contrary. And therefore, when the contestant made this statement and this admission, it amounted to an amendment to his complaint so that it stated that he had not received the highest number of legal votes. To have continued the trial of the lawsuit after this admission, without Howell being a party, would have been a contest simply for the purpose of determining which of two defeated candidates received the greater number of votes.

"The ordinary statutory contest is an adversary proceeding, the contestant defeated on the face of the returns being the contestant and the candidate returned as elected being the respondent or contestee; and all parties having interests adverse to the contestant should be brought in as contestees. Where the only question pre-

sented by the pleadings is whether the petitioner or the incumbent of the office was elected, other defeated candidates not claiming the office need not be made parties. But, where several candidates are voted for on the same ticket, each candidate being opposed to every other candidate for the office, and none of them running for any particular one of the several places to be filled, all successful candidates and all persons who were candidates in the same election are necessary parties, although a successful candidate, whose election as one of several city commissioners is conceded by all parties, need not be made a party to a proceeding contesting the election of other commissioners." 20 R. C. L. 223.

But in the instant case, the contestant, as we have already said, admits that Howell received more votes than contestant did. Appellant states in his brief that Howell was not a party, and that there was no investigation of or proof taken with reference to the character of the votes credited to Howell by the central committee. Howell did not contest the nomination of Hunnicutt, and Stewart did not have a right of action against Howell. That is true, but the right of contest is given to a defeated candidate who alleges that he is entitled to the nomination, and if no proof is taken with reference to the character of votes credited to Howell, the presumption is that all the votes credited to him are legal. This number of votes shows that he received more than contestant. The contestant therefore is in the attitude of claiming that he is entitled to the nomination and at the same time admitting that he did not receive as many legal votes as Howell did.

Appellant calls attention to § 1096 of Crawford & Moses' Digest, which provides that any person may be made a defendant who has or claims an interest in the controversy, or who is a necessary party to complete determination and settlement of questions involved in the action. And he then argues that Howell was not a necessary or proper party. That may be true, but, when

the plaintiff himself shows that he is not entitled to any relief, it would be useless to continue the investigation after he has already shown that he did not receive as many votes as Howell, and he could not be entitled to any relief when his own showing was that Howell received more votes than he did. In other words, in order to entitle plaintiff to the relief he asked, he must show that he received a plurality of the legal votes cast, and it would be idle to continue to take proof as between contestant and contestee after an admission that contestant did not receive a plurality of the votes.

In the case of *Hill* v. *Williams,* 165 Ark. 421, 264 S. W. 964, this court said: "It alleged that there were four candidates for the office of sheriff and collector, including appellant and appellee, but failed to set out the number of votes received by each. A demurrer was interposed to the complaint, which, upon hearing, was sustained by the court, and, upon failure to plead further, the complaint was dismissed, from which judgment of dismissal an appeal has been duly prosecuted to this court. * * * It was incumbent upon appellant to allege facts, and not conclusions, which would disclose, if true, that he received a plurality of all the votes cast for sheriff and collector in said county. The allegation that certain votes were cast for and accredited to one of his three opponents would not of itself show that he received the highest number of votes in the election for said office. There should have been an allegation in the complaint showing the number of votes received by each candidate, so that it would appear, after deducting the alleged fraudulent votes from the number accredited to appellee, that appellant would then have more votes than either one of his opponents."

The instant case comes squarely within the rule announced by the court in the above case. To begin with, there was an allegation showing that contestant was entitled to the office, but, after his admission that one of the other candidates received more than he himself re-

ceived, he would then not be entitled to continue the contest, because, as the court said in the above case, it must appear, after deducting the alleged fraudulent votes from the number accredited to the appellee, that appellant would then have more votes than either one of his opponents.

This court has also said: "The question necessarily presents itself in the beginning, whether or not appellant is in an attitude to contest the certificate of nomination awarded to appellee. Appellant's contention being that there was no valid nomination at all, he is not a claimant himself for the nomination, and all that can be done by the court is to cancel the certificate of nomination awarded to appellee. This is therefore not really a contest for a nomination as contemplated and authorized by the statute. In order to make a contest for the nomination, appellant must show that he is entitled to the nomination himself, which he fails to do. The statute (Crawford & Moses' Digest, 3772) declares that a right of action is conferred on any candidate to contest the certificate of nomination or the certification of vote as made by the county central committee. This confines the right of contest to a candidate at the primary election, and to one who claims to be the rightful nominee. He must show that he is the nominee instead of the contestee, and he fails to show a cause of action unless he so states in his complaint." *Storey* v. *Looney*, 165 Ark. 456, 265 S. W. 51.

Finding no error, the judgment is affirmed.

ELLIS *v.* STATE PRINTING BOARD.

Opinion delivered January 7, 1929.

Hays, Priddy & Rorex and *Ed I. McKinley, Jr.*, for appellant.

H. W. Applegate, Attorney General, *Hal L. Norwood,* Assistant, and *Daily & Woods,* for appellee.

McHANEY, J. Appellants, Tod Ellis and J. L. Boyd, operate as partners the business known as the Russellville Printing Company, and on December 31, 1927, brought this action against the appellees, who were the then Governor, State Auditor, Secretary of State and State Treasurer, composing the State Printing Board, and the Calvert-McBride Printing Company, to enjoin them from carrying out a contract for State printing let to Calvert-McBride Printing Company. Appellants and the Calvert-McBride Printing Company were competitive bidders for a certain contract known as miscellaneous contract No. 18. Each bid was submitted to the Secretary of State on identical forms, as follows:

Plain composition, per 1,000 ems	$ .30	$ .30
Tabular composition, per 1,000 ems	.40	.50
Book paper, per pound, M. F.	.08½	.08
Book paper, per pound, S. S. C.	.11	.09
Book paper, per pound, enamel	.13	.15
Cover paper, S. S. C., per pound	.03	.05
Manila tag board, per pound	.01	.02
Press work, per 100 sheets, first form	.30	.10
Press work, per 100 additional sheets	.12	.09

Folding, per 100 signatures or less	.10	.09
Gathering, per 100 signatures or less	.04	.05
Stitching, per 100 pamphlets	.04	.05
Pasting, covering and trimming per 100	.04	.05
Binding in full cloth, each, not larger than 6x9	.01	.01
Binding in full cloth, each, not larger than 8x11	.01	.02
Binding in full cloth, each, larger than above	.01	.02

The first column of figures above represents the bid of the Russellville Printing Company, and the second column that of Calvert-McBride on the different items entering into the production of the pamphlets covered by contract No. 18. The principal difference in these bids is shown in the item for "press work, per 100 sheets, first form," the Russellville Printing Company's bid being 30c and Calvert-McBride's being 10c for the same work. However, it is contended by appellants that this item in their bid was based upon sheets containing sixteen pages, and that of appellee, Calvert-McBride, was based upon the assumption that a sheet contained four pages, and that while on the face of the bids appellant's bid appears to be 300 per cent higher, in reality it was lower, in that it involved four times the amount of work, which would make their bid 7½c, and appellee's 10c. On this account it is claimed that it submitted the lowest bid, and that it should have been awarded the contract for this work. The bill for an injunction was submitted to the chancery court upon the evidence of both parties, which resulted in a decree dismissing appellant's complaint for want of equity.

The statute does not in terms define the meaning of a sheet of paper as used in the above bid. It does define the term "signatures" as used in the bid. The word "signatures" among printers has a well defined meaning in accordance with a provision of the statute, which is § 9218, C. & M. Digest, and is as follows: "In all sections of this chapter where the word 'signature'

occurs, it shall be construed to mean a 'sheet' containing sixteen pages." It appears from the testimony that the standard sheet among printers and printing establishments is a sheet of paper, which, when folded, makes sixteen pages without waste. It may be, probably is, that a sheet of paper means such a size sheet as when folded will make sixteen pages. The above definition of "signature" seems to indicate such a meaning. But, regardless of whether a sheet contains sixteen pages or less, it appears from the evidence that these bids were submitted in July, and that shortly thereafter the Secretary of State called in to conference the Governor, Auditor and the State Treasurer, whose duty it is to approve all contracts that may be let for State printing, who held hearings on this particular contract, and considered the matter thoroughly from every standpoint based on the contentions of appellant and that of appellee, until the latter part of December, when the contracts were finally approved. It does not appear, in fact there is no allegation in the complaint, that there was any fraud, collusion or unfairness on the part of those whose duty it is to let and approve these contracts. The statute vests them with this power, and necessarily gives them some discretion in determining who the lowest bidder is. True, the statute requires the board to let the contract to the lowest bidder, but in contracts of this kind, where the items entering into the bid are numerous, complicated, involved, and require technical knowledge to a determination of the question as to which bid is the lowest, the judgment of those upon whom the duty rests of letting the contract to the lowest bidder should be and is final in the absence of fraud, collusion, favoritism or demonstrable mistake. It appears from the evidence that the Secretary of State was assisted in figuring these bids by the State Printing Clerk, who at least is supposed to possess technical knowledge in the matter of figuring such contracts.

Moreover, it is conceded that if a sheet means four pages, then Calvert-McBride's bid was the lowest, and

we think it appears from a preponderance of the evidence that, figuring the appellee's bid based on a sixteen page sheet, it is still lower than that of appellants.

In *Arkansas Democrat Co.* v. *Press Printing Co.*, 57 Ark. 322, 21 S. W. 586, it was held that, where the Board of Commissioners let a contract for binding for the various departments of the State Government to one who was not the lowest bidder, and who had not accompanied his bid with a bond, the lowest bidder to whom the contract was not awarded had no rights under the contract entitling him to an injunction to restrain the board from proceeding under the contract as let. But in that case the Press Printing Company brought the action to enforce what it conceived to be a private right, and not in the interest of the public, while in this case the appellants bring the suit in the interest of the public as citizens and taxpayers, as well as to enforce a private right. We are therefore of the opinion that, under the circumstances of this case, this court should not substitute its judgment for that of the Board of Commissioners, even though we might be of the opinion that the board had erred in its judgment in letting the contract, especially so in the absence of any allegation and proof of fraud or demonstrable mistake.

We find no error, and the decree is affirmed.

SOUTHERN NATIONAL INSURANCE COMPANY *v.* LOFTON.

Opinion delivered January 7, 1929.

Martin K. Fulk, for appellant.

Oscar Winn, for appellee.

McHaney, J. Appellee brought this action to recover on an accident insurance policy issued by appellant to her husband, Ira Lofton, deceased, in which she was named as the beneficiary. The policy provided protection against accidental death in the sum of $500 "by violent, external and accidental means." The insured was an employee of the Dixie Cotton Oil Company, and, on November 18, 1926, while he was asleep, one Son Lewis, a foreman in the employ of the Dixie Cotton Oil Company, applied to the insured's body and over his heart, an electrical shocking machine, which so severely shocked him that he died a few minutes thereafter. Son Lewis did not intend to injure him, but only intended to wake him up or to play a joke on him. There was a verdict and judgment for appellee.

The only contention made for a reversal of this case is made under clause "T (1)" which is as follows: "The company's liability for death or disability, due directly or indirectly, wholly or in part, to * * *; (b) injuries intentionally inflicted upon the insured for private or personal reasons; * * * then in all such cases benefits shall be ten per cent. of the amount otherwise payable under this contract."

It is the contention of appellant that, under this clause in the policy, its liability should be limited to $50, for which amount appellant offered to confess judgment, and which it asked be entered here. This contention is based upon the fact that Son Lewis intentionally applied the device to the body of the insured, which shocked him, and from which shock he died, and that, under the "limited coverage" clause above quoted, the company is only liable for ten per cent. of the full amount, where he received the injury at the hands of another, which was intentionally inflicted upon him for private or personal reasons.

We cannot agree with appellant in this contention. Numerous cases are cited by counsel for appellant from other jurisdictions, which he insists tend to support this contention, but this court has held directly to the contrary in the recent case of *Mutual Benefit Health & Accident Assn.* v. *Tilley,* 176 Ark. 525, 13 S. W. (2d) 20. In that case the administrator of the insured was permitted to recover on an accident policy for the insured's death, who was shot by his wife, and who was the beneficiary under the policy, where the jury found that the killing was intentional but not justified, and that such killing was accidental within the meaning of the policy. In this case it is true that the device was intentionally applied to the body of the insured by Son Lewis, but the result was wholly unintentional. His death therefore was accidental within the meaning of the policy. The injuries inflicted upon the insured by Son Lewis were not intentional injuries, therefore, within the meaning of the limited coverage clause.

We find no error, and the judgment is affirmed.

FULTON *v.* STATE.

Opinion delivered January 14, 1929.

H. B. Means, for appellant.

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

SMITH, J. This cause was tried in the court below upon an agreed statement of facts, from which we copy the following recitals:

The grand jury of Hot Spring County, at an adjourned day of its January, 1927, term, returned indictments numbered 1646 to 1662, inclusive, in which appellants, Wallace Fulton and Murl Morehead, were charged with the crime of robbery; that on the 4th day of March, 1927, Fulton was placed on trial on indictment No. 1649, and was found guilty, and his punishment fixed at a term of nine years in the State Penitentiary; that on the 18th day of April Fulton was placed on trial on indictment No. 1656, found guilty, and his punishment fixed at six years in the penitentiary; that on the 22d day of March, 1927, Morehead was placed on trial on indictment No. 1662, found guilty, and his punishment fixed at six years in the penitentiary; that on the 27th day of April, 1927, Fulton and Morehead were sentenced by the court as above set forth, and on the same day commitments were issued, and the sheriff delivered the defendants to the penitentiary of the State of Arkansas, and they have been confined in the penitentiary ever since that day; that they have not been brought into open court and put upon trial, or given an opportunity to demand a trial.

Upon the record made by the agreed statement of facts, the appellants moved the court to quash the indictments against them upon which they had not been tried. That motion was overruled, and this appeal is from that judgment.

The motion to discharge is based upon § 3132, C. & M. Digest, which reads as follows:

"If any person indicted for any offense, and committed to prison, shall not be brought to trial before the end of the second term of the court having jurisdiction of the offense, which shall be held after the finding of such indictment, he shall be discharged so far as relates to the offense for which he was committed, unless the delay shall happen on application of the prisoner."

The interpretation and proper application of this statute was thoroughly considered in the case of *Ware* v. *State,* 159 Ark. 540, 252 S. W. 934, where the previous decisions of this court which had construed this statute were reviewed, and cases from other jurisdictions construing similar statutes were cited. We will not again review these authorities. The entire subject was summed up in the Ware case by quoting from the early case of *Stewart* v. *State,* 13 Ark. 720, where Chief Justice WATKINS had said that, for a person to be entitled to his discharge under this statute, he must place himself in the attitude of "having demanded a trial, at least in an attitude of resisting postponement."

It is stipulated here that appellants "have not been brought into open court and put upon trial and given an opportunity to demand a trial," and we are therefore of the opinion that they are entitled to the benefit of this statute.

It is insisted that the word "prison," as used in the section quoted, has no application whatever to persons committed to the penitentiary, as appellants were, upon a conviction for some other offense against the State. We do not concur in this view, and the weight of authority is against it.

In the Ware case, *supra,* it was said: "In *State* v. *Keefe,* 98 Pac. 122, a statute was under review which reads as though it might have been copied from our statute, or the Missouri statute, from which our statute was probably borrowed. The court concluded a most learned and exhaustive opinion as follows: 'The court decides that the fact of defendant's imprisonment in the penitentiary, under the circumstances set forth in the agreed statement of facts, does not constitute a sufficient defense to the application of the defendant for his discharge; that §§ 5382 and 5384 apply to the defendant, and, upon the facts, the defendant has not had a speedy trial as provided in the Constitution.' See also *Hollandsworth* v. *Godby,* 117 S. E. 369."

The opinion in the Ware case also cited the case of *State* v. *Wurdenmann,* 295 Mo. 566, 246 S. W. 189, which is to the same effect.

The Keefe case, *supra,* appears as an annotated case in 17 Ann. Cas. 161, and the annotator says in the note that constitutional and statutory provisions providing that a person accused of crime shall be entitled to a speedy trial apply to one who is already a convict as well as to other persons, for the reason that the convict is not only amenable to the law, but is under its protection as well, and the fact that the defendant is a convict does not prevent him from availing himself of the statute. In 16 C. J., page 442, in chapter on "Criminal Law," it is said that: "It has been held that the right to a speedy trial does not apply to a convict, but the weight of authority is to the contrary."

See also *Arrowsmith* v. *State,* 131 Tenn. 480, 175 S. W. 545, L. R. A. 1915E, 363; *Ex parte Trammer,* 25 Nev. 56, 126 Pac. 337, 41 L. R. A. (N. S.) 1095.

The Constitution guarantees every one accused of crime the right to a speedy trial, and the statute quoted is declaratory of the Constitution, and is an expression of the legislative judgment as to the time within which this right should be accorded an accused person.

Section 3134, C. & M. Digest, provides that § 3132 shall not be so construed as to discharge any person who may have been indicted for any criminal offense, on account of the failure of the judge to hold any term of the court, or for the want of time to try such person at any term of the court. It is also provided in § 3135, C. & M. Digest, that if, when application for the discharge is made, the court shall be satisfied that there is material evidence on the part of the State which cannot be had, that reasonable exertions have been made to procure such evidence, and that there is just ground to believe that such evidence may be had at the succeeding term, the cause may be continued to the next term.

There is nothing in the agreed statement of facts from which to find that either § 3134 or § 3135, C. & M.

Digest, applies here, and, as it is stipulated that appellants have not been brought into open court and put upon trial or given an opportunity to demand a trial, we hold that these men, who have had no opportunity to demand a trial, should not be regarded as having waived this valuable right. They are entitled to have the indictments discharged upon which they have not been tried. This order does not, of course, affect the judgments under which appellants are confined in the penitentiary.

The judgment of the court below is therefore reversed, and the cause will be remanded, with directions to discharge the indictments upon which appellants have not been tried.

OUACHITA VALLEY REFINING COMPANY *v.* WEBSTER.

Opinion delivered January 14, 1929.

Powell, Smead & Knox, for appellant.

T. O. Abbott, for appellee.

SMITH, J. E. M. Telle leased a certain pipe line gathering system for the term of one year, which lease he later renewed, and on February 21, 1925, he entered into a contract, which designated him as party of the first part, with the Ouachita Valley Refining Company, which was designated as party of the second part, for the joint use of the pipe line. This contract recites that both parties should have the right to transport crude oil through the pipe line during the life of the lease, and that the cost of operation should be borne by the parties in proportion to the quantity of oil each transported through the line for each monthly period covered by the lease. The contract provided how the accounts should be kept of the oil which each party transported through the pipe line, and "that there shall be no attempt to distinguish the oil belonging to first party and the oil belonging to second party, each party being entitled to receive oil of approximately the same gravity as that which goes into the line from their respective leases. Each party shall be entitled to his proper proportion of the total runs, based on approximately equal daily deliveries as shown by the run tickets signed by the producer from whom said oil is purchased."

The contract further provided that, "the pipe line now being full of crude oil, it is understood and agreed that said crude is the property of the first party, and shall so remain during the existence of this contract."

This agreement for the joint use of the pipe line was renewed to cover periods of the renewals of the original lease to Telle.

The parties operated under this contract until January 1, 1927, after which time the second party, the re-

fining company, hereinafter referred to as the company, ceased to use the pipe line, and testimony was offered on behalf of the party of the first part that the company had abandoned the contract for joint use of the pipe line, and had begun the sole use of a line which it had constructed.

Telle died by his own hand on January 12, 1927, and on the following day the company emptied the pipe line, taking therefrom 424 barrels of oil, this being the quantity of oil required to fill it. The testimony on the part of the company was to the effect that, after it had been charged with this oil, the company had still received 22.86 barrels of oil less than the quantity of oil which it had put into the line. It is insisted that this testimony is undisputed, and that a verdict should have been directed in favor of the company in this suit, which was brought by Telle's executor against the company for the value of the oil in the pipe line at the time of Telle's death.

The testimony as to the quantity of oil which the company had received does not appear to have been undisputed, but, even if it were, we do not think a verdict should have been directed in the company's favor.

The company requested the following instruction: "7. Even though you should find that the defendant company had not run any oil into said line for several weeks, yet if you should find from a preponderance of the evidence that it had failed to take from said line an amount of oil equal to the amount placed by it into said line (and this oil had been delivered to plaintiff's intestate), and you should further find that, although plaintiff's intestate continued to run oil into said line, so that at no time was said line completely empty, then you are told that the defendant at all times had title to an amount of oil in said line equal to the amount which it had placed in said line and had failed to receive, but which had been delivered to plaintiff's intestate, and you are instructed that it had a right to

take said oil by peaceable means at any time, either before or after the death of plaintiff's intestate."

This instruction was given after the court had added the following modification: "Provided you find the defendant company had not previously abandoned the use of the line under the contract." The company excepted to this modification; but we think it was proper, and that the instruction as modified declared the law as favorably to the company as it could ask. There was a stipulation covering the quantity and value of the oil drawn off by the company on January 13, and, as the jury found for the plaintiff for the value of the oil, we must assume that the jury found the fact to be, under the instruction set out above, that the company had previously abandoned the use of the line under the contract. If this be true, the title to the oil in the pipe line on January 13 was in Telle, notwithstanding the contract for the joint use of the pipe line; indeed, the provision of the contract quoted above, that "the pipe line now being full of crude oil, it is understood and agreed that said crude is the property of the first party, and shall so remain during the existence of this contract," appears to have contemplated that this should be so. It may be that the company did not receive as much oil out of the pipe line as it put in, but, if so, it should have asked and obtained an accounting for the difference. It had no right to proceed in the summary manner in which it did to have a settlement of this balance.

The case of *Henderson Co.* v. *Webster, ante,* p. 553, is in point. That case, like this, was one brought by Telle's executor, and it was shown there as it is here, that Telle's estate was insolvent. Telle's creditor in that case had sold him a carload of casinghead gasoline, and, upon being advised of Telle's death, the creditor undertook to retake the oil, and in attempting so to do claimed that it was exercising the shipper's right of stoppage *in transitu,* where the insolvency of the consignee was discovered. The jury found that delivery of the shipment had been made to Telle in his lifetime, and

upon this finding we said that the right of stoppage *in transitu* could be not be exercised.

In that case, as in this, Telle's executor sued for the value of the converted property, and it was there contended that the shipper had the right, under § 1198, C. & M. Digest, to offset its claim for the purchase price of the oil against the demand of the plaintiff's executor for its value. But we held that the statute "does not authorize one who has sold goods to a person to go to the place of business of the buyer and retake the property which has been delivered, and then, when sued for the value of the property so retaken, set-off debts due to the seller in an action of this kind."

So here, the company having retaken oil the title to which was in plaintiff's testator, could not, when sued for its value, set-off against this demand a claim, however well founded, that the testator owed it for the same quantity of oil, or upon any other account. The company should have probated its claim against the estate for the value of any deficiency in the quantity of oil which it failed to get, for, as we have already said, it had no right to proceed as it did to collect its demand against Telle's estate.

The judgment is therefore affirmed.

STATE *v.* KINCANNON.

Opinion delivered January 14, 1929.

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

HUMPHREYS, J. Appellee was acquitted in the circuit court of Mississippi County, Osceola District, on

appeal from a judgment of conviction in the court of a justice of the peace in said county, upon a charge for violating § 4775 of Crawford & Moses' Digest, which inhibits and makes it a misdemeanor for any person to catch or otherwise take any fish from any of the waters of the State without first procuring an annual license to do so. The case was tried in the circuit court upon the following agreed statement of facts:

"Whereas, Dan Kincannon, a resident of the Osceola District of Mississippi County, Arkansas, has heretofore been arrested upon a charge of violating the game and fish law of the State of Arkansas; and whereas the said Dan Kincannon has been fishing for the market with a hoop-net upon the waters of the Mississippi River without license; and whereas he was convicted of this crime in the justice of the peace court before G. L. Waddell, a justice of the peace for Monroe Township, Mississippi County, Arkansas; and whereas this case is before this court upon appeal; it is therefore agreed between the parties hereto that the defendant, Dan Kincannon, has been fishing upon the waters of the Mississippi River for market purposes, and has been using a hoop-net, and has not procured a license as set out in § 4775 of Crawford & Moses' Digest."

The trial court took the view that § 4775 of Crawford & Moses' Digest was repealed by act No. 423 of the Acts of the General Assembly of 1923, and that, after the repeal, it was not necessary for a person fishing upon the waters of the State for market with a hoop-net or nets to have a license. The interpretation of the later act by the trial court was incorrect. Section 1 of the later act, standing alone, would have the effect of repealing § 4775 of Crawford & Moses' Digest, but, when read in connection with the other sections of the act, it is manifest that the Legislature only intended to repeal § 4775 of Crawford & Moses' Digest so far as it related to Marion County. Section 4 of the act limits all other provisions of the act to Marion County only.

On account of the error indicated the judgment of acquittal is reversed, and the cause is remanded for a new trial.

HART, C. J., concurs in construction of act, but dissents on ground that the venue was not proved.

Justices SMITH and MEHAFFY dissent.

ROWLAND *v.* WARD.

Opinion delivered January 14, 1929.

Block & Kirsch, for appellant.

D. G. Beauchamp, for appellee.

HUMPHREYS, J. This suit was brought by the administrator of the estate of L. W. Rowland, deceased, against appellees, in the chancery court of Greene County, to recover certain indebtedness owed to said estate by E. W. Rowland and to set aside a deed executed by him and his wife to Arthur H. Ward to his undivided one-eleventh interest in the real estate described therein, and to subject same to the payment of said indebtedness.

It was alleged in the complaint that the deceased, L. W. Rowland, signed a note in his lifetime for $1,730.68 to the National Bank of Commerce at Paragould, as surety for his son, E. W. Rowland, which was duly probated against the estate of the deceased, and paid by the administrator out of the assets of said estate. It was also alleged that E. W. Rowland borrowed $500 from his father on the 8th day of June, 1925, and executed his note for the amount, and that the administrator had been unable to collect either amount on account of the insolvency of E. W. Rowland. It was further alleged that E. W. Rowland fraudulently conveyed his undivided one-eleventh interest in all real estate owned by his father at the time of his death to Arthur H. Ward, for the purpose of cheating and defrauding the estate of L. W. Rowland in the collection of said indebtedness, for a pretended consideration of $500, although his interest in the real estate was worth twice that amount, and that in fact no consideration was paid for the real estate; and that Arthur H. Ward knew of Rowland's indebtedness to the estate, and participated in and aided him in effecting the fraudulent conveyance.

E. W. Rowland and his wife, although personally summoned, filed no answer to the complaint. Arthur H. Ward filed an answer to the complaint, denying each and every material allegation therein.

The cause was submitted upon the pleadings and testimony adduced, resulting in a finding in favor of Arthur H. Ward, and a dismissal of the complaint against him for want of equity, from which is this appeal.

On October 31, 1925, L. W. Rowland died intestate, and one of his sons, G. W. Rowland, qualified and administered upon his estate. He died seized and possessed of a large amount of real estate, in addition to his personal property. The personal property was insufficient to pay the indebtedness of the estate, and the administrator sold a part of the real estate to satisfy the unpaid probated claims. During the pendency of the administration all of the heirs, except E. W. Rowland,

sold their respective interests in the real estate to Sam McHaney for $700 to $900 a share. Taking into account the indebtedness of the bank, which the administrator paid, E. W. Rowland was indebted to his father's estate a little over $2,400, including interest. At the time of his father's death, in October, 1925, E. W. Rowland was in the grocery business, which he continued until April, 1926. During the time he was operating the grocery business the administrator requested him to deed his interest in the estate in liquidation of the debt which he owed it. The administrator testified that he agreed to do so, but he denied making such promise. In April, 1926, E. W. Rowland failed in the grocery business, and turned his stock, notes and accounts over to creditors. This seemingly satisfied his mercantile creditors, although the amount turned over by him to them did not entirely pay their claims. E. W. Rowland had several children in school, and needed money with which to support his family and keep the children in school. His wife, a sister of Arthur H. Ward, who resided at Peoria, Illinois, wrote to him concerning their financial distress. Ward had moved to Peoria from the neighborhood of Paragould in 1921. After receiving the letter from his sister, he and his family went to St. Louis to visit his wife's mother, and, while there, Ward concluded to go to Paragould to see how his sister and family were getting along. E. W. Rowland told him of his failure in the grocery business, and that he had turned over all his accounts and stock to his creditors in settlement of their bills, but informed him that he needed money very badly to live upon. Without telling Ward anything about his indebtedness to his father's estate, Rowland proposed to sell his undivided one-eleventh interest therein to Ward for $900, but Ward refused to pay him more than $735 for it. Rowland accepted this offer. Ward brought $535 to Paragould in cash, and, on the morning of his arrival, deposited it in the Paragould Trust Company. Rowland and his wife conveyed the land to Ward for an express consideration of $500, and the

deed recited that the interest conveyed is "subject to the debts and expenses of administration." Ward gave Rowland a check on the Paragould Trust Company for $500, and, after he returned to Peoria, he borrowed $200 and deposited it in the bank and sent a check for $235 to Rowland's wife to pay the balance of the consideration. The money paid Rowland by Ward was used for living expenses, and was not paid on any of his existing indebtedness. Ward testified that he brought the money in cash when he came to Paragould because a man would never know when he needed money. He further said that he sometimes bought and sold second-hand furniture. When asked why he deposited the money after arriving, he said that he did not want to walk around with that much money on his person. Before he purchased Rowland's interest in his father's estate, he and Rowland, and perhaps his sister, consulted John G. Hoskins, an attorney, as to whether Rowland had a right to convey his interest in the land, and was informed that, as there were no judgments or liens against it, he could do so. Ward testified that his only motive for buying the real estate was to provide means for the support of his sister's family, and that it was not his purpose or intention to assist Rowland in defrauding the estate. E. W. Rowland testified that his only purpose in selling his interest in the real estate was to get money upon which to live and send his children to school. Ward did not inspect the real estate before purchasing it, but, having lived there before, was familiar with it. There is no substantial evidence in the record tending to show that the value of Rowland's interest in his father's estate materially exceeded $735.

Appellant contends for a reversal of the decree upon the ground that the preponderance of the testimony is clearly against the finding of the chancellor to the effect that the conveyance of Rowland to Ward was not fraudulent. Appellant alleged, in substance, that the conveyance was a voluntary one, but, according to the

weight of the testimony, Ward paid Rowland $735 for his interest in his father's estate.

Appellant further contends that, as the deed conveying the Rowland one-eleventh interest in the estate to Ward recites a consideration for $500, they were bound by the recital, and could not show that the consideration was in excess of that amount. The case of *Carmack* v. *Lovett,* 44 Ark. 180, is cited in support of the contention. In that case the consideration recited was love and affection, and the court held that no consideration could be shown other than love and affection, because it would be repugnant to the consideration mentioned in the deed. In the instant case a valuable consideration was recited, and it would not be repugnant to the consideration mentioned by proving that the consideration recited was for more than $500. This court ruled in the case of *Galbraith, Stewart & Co.* v. *Cook,* 30 Ark. 417, that it was allowable to prove an additional valuable consideration because not repugnant to the one mentioned in the deed. We think the rule announced in *Galbraith, Stewart & Co.* v. *Cook, supra,* is the correct rule applicable to the facts in the case at bar. Although there are some discrepancies and conflicts in the testimony of the witnesses for appellee, the purport of their testimony was to the effect that the conveyance was made for an adequate consideration in cash, and for the sole purpose of providing means for the support of the Rowland family, and without knowledge on the part of Ward of any facts or circumstances which would put him upon notice that the purpose of Rowland in making the transfer was to defraud the estate out of the indebtedness he owed it. Their direct testimony was to the effect that the transaction was *bona fide,* and we do not think that a few discrepancies and conflicts in the testimony introduced by appellee—that Ward brought cash to the amount of $535 to Paragould in his pocket; that he failed to inspect the land before he purchased it; and that he consulted an attorney before doing so—are sufficient to overcome the find-

ings of the chancellor to the effect that the conveyance was not fraudulent. In this State an heir inherits the real estate of his ancestor free of any indebtedness he may owe the estate. *Wheeler Mercantile Co.* v. *Knox,* 136 Ark. 95, 206 S. W. 46; *Falls* v. *Driver,* 177 Ark. 703, 7 S. W. (2d) 780. Under this rule E. W. Rowland had a right to make any disposition of his interest in his father's real estate he wished to make, unless his purpose in doing so was to defraud his creditors Even if his purpose was to defraud his creditors, it would not affect his grantee who purchased it for a valuable consideration, unless the grantee had knowledge of facts and circumstances sufficient to put a man of common sagacity upon inquiry so that, by diligent investigation, he would discover the fraudulent purpose of the grantor.

No error appearing, the decree is affirmed.

INTERSTATE BUSINESS MEN'S ACCIDENT ASSOCIATION *v.* ADAMS.

Opinion delivered January 14, 1929.

Buzbee, Pugh & Harrison and *John Marshall Shackleford,* for appellant.

Cox & Cox, for appellee.

KIRBY, J., (after stating the facts). It is earnestly urged that the court erred in refusing to grant the con-

tinuance and in striking out the defense of the limitation of the amount that could be recovered under the policy for death resulting from a discharge of a firearm, unless shown to be accidental by an eye-witness of the transaction other than the insured or beneficiary.

It will suffice to say, in answer to the assignment of error for denying the motion for a postponement, that this motion also disclosed that there were no witnesses to the killing of the insured except Giles, who, it was alleged, had shot him, and that Giles had refused to testify in the case as he agreed to do, claiming exemption, as he had the right to do, because his answers or testimony might tend to incriminate him. There was no reason to think that he would change his mind thereafter. The motion itself disclosed that there was no probability of producing any other witness who had seen the occurrence, in fact that none others did see it.

This court has concluded, however, that the court erred in striking out the defense alleged, limiting appellant's liability under the clause of the policy to the payment of $100 only for the loss sustained by the death of the insured as a result of the discharge of a firearm, there being no testimony of any witnesses showing the conditions at the time of the shooting. This clause is not in any wise in conflict with our statutes, § 6156 of C. & M. Digest, declaring that no policy of insurance shall contain any conditions or provisions which shall, directly or indirectly, deprive the insured or beneficiary of the right to trial by jury of any question of fact arising under such policy, and that all such provisions or conditions are void. The clause of the policy relied on as a defense is not in conflict with this statute, and is but a limitation of the liability on a risk that could have been excepted altogether from the policy. The liability on the risk to the insured resulting from the discharge of a firearm was limited, as specifically provided, to the sum of $100, unless the cause of the injury or death was established by the testimony of some witness other than

the insured or claimant. This language of the policy is susceptible of no reasonable construction that would require the payment by the insurer of more than the limited amount designated for accidental death of the insured resulting from the discharge of a firearm, unless proved by the testimony of an eye-witness, as provided therefor. This is not an attempt to control the action of the courts in admission of evidence or in the effect or weight to be given it, nor to oust the court of jurisdiction over such a contract. It does not affect the right of recovery, but only limits the amount that can be recovered, in the absence of the establishment of the cause by the kind of testimony designated, a matter about which the parties had the right to contract, as already said, and to except such risk entirely if they chose to do so.

We do not regard the decision of the Oklahoma case of *Modern Woodmen of A.* v. *Michelin,* 101 Okla. 217, 225 Pac. 163, as an authority against our conclusions above announced, and certainly entitled to no such conclusive determining effect as appellee insists should be accorded it. Neither do we agree with the contention that the provision of the policy is void as against public policy. It is but a limitation of the amount of the recovery, unless the cause of the accidental injury is shown by the kind of evidence designated, to a fixed sum, in a matter the parties had the right to contract about, and which could have been excepted entirely from the policy. *Ellis* v. *Interstate Business Men's Accident Association,* 183 Ia. 1279, 168 N. W. 212, and note L. R. A. 1918F, page 420; and especially *Lundburg* v. *Interstate Business Men's Accident Association,* 162 Wis. 474, 156 N. W. 482; *Moses* v. *Ill. Commercial Men's Association,* 189 Ill. Ap. 440.

This provision of the policy being valid, appellant was entitled to rely upon it in defense of the suit, and the court erred in holding otherwise and striking out that part of the answer setting it up.

Since the case appears to have been fully developed, and shows that there was no eye-witness to the trans-

action resulting in the death of the insured, except Giles, by whom it was alleged he "was accidentally killed by being shot with a rifle," and refused to testify about the matter, as he had the right to do, on the trial, and there does not appear to be any reason for remanding the cause, the judgment will be modified in accordance with the stipulation or provision in the contract limiting the liability to the recovery of $100, and, as modified, will be affirmed. It is so ordered.

FEILD *v.* KOONCE.

Opinion delivered January 14, 1929.

Longstreth & Longstreth and *Ernest Whitelaw,* for appellant.

Carmichael & Hendricks, for appellee.

MEHAFFY, J. The appellants brought suit in the Pulaski Chancery Court against the appellees, alleging that James C. Ward died insane and intestate on the 19th day of June, 1927; that he had been legally adjudged insane July 5, 1891, and continued *non compos mentis* until death; that he acquired the property in controversy by inheritance, gift and purchase while he was insane, and that, while insane, he sold the property to Miss Mondschein, on the 8th of February, 1902, and that she sold the property to the present owners, and that they executed a mortgage to J. M. Davis, trustee, for $5,000. Appellant alleged that all the purchasers were actually or constructively on notice of the incompetency of J. C. Ward, and asked the cancellation of all the deeds and mortgages in favor of the heirs of J. C. Ward. They alleged that he gambled away the money he received when he sold the property.

Appellees answered, and admitted that Ward was adjudged insane in July, 1891, but that he was sane on February 8, 1902. It was alleged that Ward, in 1902,

needed money, having mortgaged the property for $1,000, and that he sold said property for $2,000 cash, and the purchaser assumed the $1,000 mortgage debt and paid the taxes. It is alleged that the first purchasers lost money on the property—that is, they had to sell it, and received less for it than they paid Ward.

The case was tried in the chancery court on oral evidence and the following agreed statement of facts:

"It is agreed and stipulated by all parties hereto that J. W. Ward died, leaving three children, to-wit, J. C. Ward, Lula Ward and Lila Ward Neal; that the deed records of Pulaski County reflect the following conveyances after the death of the said J. C. Ward: October 29, 1900, Ralph Neal and wife, Lila, to Lula Ward and J. C. Ward, consideration $900; August 8, 1901, Lila Neal and husband to J. C. Ward, consideration $675; October 28, 1901, J. C. Ward, unmarried, to J. G. Leigh, trustee, deed of trust $1,000; February 7, 1902, J. C. Ward, unmarried, to Amelia Mondschein, warranty deed, consideration $2,000; August 16, 1902, Amelia Mondschein to William Mondschein, consideration $4,000; July 17, 1907, William Mondschein to George C. and Dora Koonce, consideration $5,000. It is further stipulated and agreed that the probate records of Pulaski County, Arkansas, show that on the fifth day of July, 1891, the said J. C. Ward was adjudicated insane, and said records do not show any finding that he was restored; that the father, J. W. Ward, was appointed his guardian; J. C. Ward was released from the State Hospital for Nervous Diseases on the eighth day of January, 1892; that thereafter, to-wit, on the 15th day of April, 1897, his father died, and no other guardian was ever appointed for the said J. C. Ward; said probate records show also that on September 8, 1900, said J. C. Ward was accepted as a surety with another on the bond of the administrator of the estate of Adaline Ward; that on December 29, 1900, he was accepted as a surety with another on the bond of the administrator

of the estate of Lula Ward. It is agreed that the above stipulation may be introduced and considered by the court as evidence in this case. (Signed by all attorneys for all parties)."

When the above stipulation was filed, the appellants asked the court to declare that the burden of proof was on defendant to show that Ward was sane on February 8, 1902, at the time the deed was made. The court announced that it held the burden of showing that Ward was sane at the time of the execution of the deed to Mondschein was on the defendant claiming under said deed. The court further announced, however, that, under the circumstances shown in the agreed stipulation of facts by counsel, the presumption of sanity would be raised, which would shift the burden, and that the burden was on the appellants to show at the time of the execution of the deed to Mondschein that Ward was of unsound mind.

A number of witnesses testified that they had known J. C. Ward and been intimate with him, and that they did not believe he was mentally normal at the time he executed the deed. Other witnesses testified that they had known Ward, and had dealt with him, and that he understood ordinary business transactions and dealings.

The undisputed proof shows that Ward was committed to the Insane Asylum on the 5th day of July, 1891, and that his father was appointed his guardian; that J. C. Ward was released from the State Hospital for Nervous Diseases on the 8th day of January, 1892, and that J. C. Ward's father died on the 5th day of April, 1897, and that no other guardian was ever appointed for Ward; that J. C. Ward transacted his own business, and the property in controversy belonged to Ward's father, and at his death it descended to his three children, J. C. Ward, Lila Ward Neal and Lula Ward. Lila conveyed her interest to Lula and J. C. Then Lula died, and Lila conveyed to J. C. the interest she inherited from her sister, Lula, thus placing the entire title

in J. C. Ward. The deed from Lila and her husband to Lula Ward was made on the 29th day of October, 1900, and on the 8th day of August, 1901, Lila and her husband made a deed to J. C. Ward for the interest inherited from Lila's sister. On the 28th day of October, 1901, J. C. Ward executed a deed of trust to J. G. Leigh for $1,000, and on the 7th day of February, 1902, Ward sold the property to Amelia Mondschein. Ward was married on July 20, 1902. Mrs. Ward testified that she had known Ward about 18 months prior to her marriage. She also testified that they had the following children: James H. Ward, 24 years old; S. M. Ward, 23 years old; Alice Ward, 21 years old; Ralph Ward, 17 years old; Marvin Ward, 8 years old; Melba Ruth Ward, 5 years old.

The undisputed proof also shows that from the time he was released from the Insane Asylum, January 8, 1892, up to shortly before he died, in 1927, he managed his own affairs, and that his relatives, who now think he was insane, dealt with him as if he were capable of attending to business.

Appellant's first contention is that the decree should be reversed because the lower court refused to hold that the burden of showing that J. C. Ward was of sound mind at the time of the execution of the deed rested upon the parties claiming under the deed. The chancellor, in fact, held that the burden was upon the person claiming under the deed, but that, under the circumstances shown by the stipulation and agreement of the parties, the burden shifted. In other words, the chancellor simply ruled that, in his judgment, the *prima facie* case made by showing that Ward had been adjudged insane was overcome by the agreed statement of facts, and that, so far as putting on the proof was concerned, the plaintiff should proceed with the proof, and there was no error in this ruling of the court. In the first place, cases appealed from the chancery court to this court are tried here *de novo,* and, where the decision of the chancellor is on a question of fact, the case will be

affirmed if the finding of the chancellor is supported by a preponderance of the evidence. In a trial before a jury it is proper to instruct them as to the burden of proof, because they are the triers of the facts, and they are required to return a verdict in favor of the party who has the preponderance of the evidence in his favor. And they are required to return a verdict against the party on whom the burden of proof rests if the evidence is evenly balanced or preponderates in favor of the other party.

The statute provides that the party holding the affirmative of an issue must produce the evidence to prove it. Section 4113, Crawford & Moses' Digest.

Section 4113 of Crawford & Moses' Digest provides that the burden of proof in the whole action lies on the party who would be defeated if no evidence were given on either side.

In this case the court held that, if no evidence was given on either side, the burden rested upon the party claiming under the deed to show that Ward was sane at the time it was made. But evidence had been introduced; the stipulation had been agreed to and filed as evidence in the case, and the court held that that was sufficient to overcome the *prima facie* case of insanity. However, the burden of proof in a chancery case, so far as the procedure is concerned, is resorted to for no purpose other than to determine who shall proceed with his proof. And, even if the chancellor should require the wrong party to proceed first, it would not affect the decree or the trial in this court, unless it manifestly resulted in prejudice to the other party. This is true because the cases are tried here *de novo,* and if the chancellor required the wrong party to proceed first and then found in accordance with the preponderance of the evidence, the decree would be affirmed anyway.

Appellant cites authorities in support of the rule that contracts of insane persons are void, and also that when one is adjudicated insane the presumption is that

the insanity continues. This court has held that a contract made by an insane person is not void, but voidable. We think the proof conclusively shows that for a number of years after Ward had been adjudged insane he was sane, and for 25 years took no steps whatever to avoid his contract.

The two questions involved in this case are, first, was Ward sane or insane at the time he made the deed to Mondschein? If he was sane, of course that ends the controversy. If he were insane at that time, then the question would arise whether he recovered and lived a number of years here without taking any steps to rescind the contract. Some witnesses testify that Ward was insane. Some of these witnesses, however, the interested ones, so conducted themselves prior to, at the time of, and after the execution of the deed, as to contradict the testimony that he was insane at the time.

In Moore on Facts, vol. 2, § 1136, we find the following, which seems to be a correct statement of the law, supported by the great weight of authority:

"In one of the master productions of his luminous intellect, Lord Stowell referred to the testimony of a witness who, as he said, was totally unimpeached as to general character, and therefore, *a priori,* entitled to be fully credited, and then proceeded as follows: 'However, it is a good safe rule, in weighing evidence of a fact which you cannot compare with any other evidence to the same fact, to compare it with the actual conduct of the persons who describe it. If their conduct is clearly such as, upon their own showing, it could not have been, taking the fact in the way they have represented it, it is a pretty fair inference that the fact did not so happen. If their action, at the very time that the fact happened, represents it one way, and their relation of it, at a great distance of time, represents it another way, there can be no doubt which is the authentic narrative, which is the naked truth of the matter."

In another case the same great magistrate said: "I am not deaf to the fair pretensions of human testimony,

but, at the same time, I cannot shut my senses against the ordinary course of human conduct. Conduct of a witness clearly inconsistent with his testimony and not satisfactorily explained is one of the most fatal species of impeachment; because the trier of facts is thus justified in disbelieving the testimony without in any degree reflecting upon the integrity of the witness, who, it may be presumed, is a victim of the proverbial fickleness of memory—especially after considerable time has elapsed —or of various perturbing psychological influences which affect men of the highest probity as well as those of indifferent moral natures, and operate with peculiar force if the witness is interested or otherwise biased."

As we have already said, the above statement of the law is supported by authority, and many decisions are cited under the above section. Chamberlayne on Evidence, vol. 2, discussing admissions by conduct, among other things says: "They are, perhaps, in the popular sense, 'admissions' when the act done is inconsistent with the present contention of the actor, and so tend to weaken the effect of his direct evidence."

Acts done by a party suggesting an inference that his present contention is false or an exaggeration, or is an afterthought, may be shown by the adverse interest. Either party may, in like manner, prove that the other has failed to assert a claim which he now makes, has recognized the validity of a demand which he at present disputes, or in other particulars occupied in the past a position inconsistent with his present one.

The brother-in-law of Ward went with him, when he was married, on July 20, 1902. He was to be married, and did marry a girl about 17 years of age. This was quite a while after he had been adjudicated insane. His sister deeded him her interest in the property, which she certainly would not have done if she had believed him to be insane, and he and his wife lived together, raised a family, and, for more than 25 years after the execution of the deed sought to be set aside, treated him as

if he were sane. They were bound to know that he executed a mortgage on it; that that mortgage became due, and he was unable to pay it, and that he sold it; and yet no suggestion was ever made by any of the interested parties at any time that the deed was void or that he was insane at the time he made it. If he was insane at the time he inherited the property, his sister is in the attitude of conveying her interest to him and putting it in his power to squander it.

The proof also shows that there was no advantage taken of him; that the price paid for the property was fair. In fact, the purchasers lost money; sold it for less than they had actually been out on it. And, while the fact that Ward was adjudicated insane and stayed about six months in the insane asylum raises a presumption or inference that his state of mind continued, yet this presumption does not prevail where the contrary is made manifest by the conduct of the party and all of his relatives and friends. An adjudication of insanity is only *prima facie* evidence, as held by this court, and we think the facts in this case overcome this presumption, and show clearly that, at the time of the execution of the deed, Ward was mentally capable of executing it.

The Virginia court has said: "To this overwhelming array of facts and circumstances the appellee opposes, first, the fact that a committee was appointed for Joseph G. Rutledge in 1866; and, second, the testimony of a number of witnesses who testify to his mental incapacity, of whom few, if any, had had such opportunities for knowing accurately his capacity, and some of those who testified to his incapacity even judged only from his appearance and the general reputation in the neighborhood as they understood it. If any inference of continued mental incapacity must be deduced from the adjudication of the county court in 1866, and the appointment then of G. D. Thomas as his committee, such presumption must be regarded as entirely worthless, from the fact that when, in 1871, Joseph G. Rutledge,

by his counsel, G. G. Junkin, Esq., moved to revoke the powers of G. D. Thomas as such committee pending which motion Mr. Thomas came into court and tendered his resignation, which resignation, for reasons appearing to the court, was accepted, the said court did not appoint any successor to Mr. Thomas as such committee, but permitted Joseph G. Rutledge to resume the custody and control of his own property from that time until November, 1881. It was during this long period of freedom from the control of the court, in which Joseph G. Rutledge enjoyed without restraint all the rights of a citizen, that the transactions assailed in this suit were had. * * * Nor was any fraud or unfair dealing or anything proved for which the contracts, or either of them, should be invalidated." *Miller* v. *Rutledge,* 82 Virginia 863, 1 S. E. 202.

In the instant case Ward's father was appointed his guardian. He afterwards died. No request was ever made for the appointment of another guardian. He was permitted, not only by the court, but by his relatives, who knew all about him and were with him constantly, to conduct his affairs without hindrance or suggestions from them. His relatives conveyed property to him; gave him control of it; he was permitted to marry and raise a family, and this course of conduct on the part of the wife and relatives continued for many years, with the full knowledge, so far as his relatives are concerned, of the fact that he had conveyed the property, and his purchaser conveyed it to others, and valuable improvements have been made, and it would be difficult to believe that his relatives and friends would have thus conducted themselves if they believed at the time that he was insane.

The decree of the chancery court is supported by a preponderance of the evidence, and is therefore affirmed.

SANFORD *v.* BELL.

Opinion delivered January 14, 1929.

[redacted]

C. E. Yingling, for appellant.

John E. Miller, for appellee.

KIRBY, J. Appellant, an owner of real property included within the boundaries of Street Improvement District 13 in Searcy, Arkansas, brought this suit to enjoin the commissioners of said district from issuing bonds incumbering the real property and proceeding with making the improvement authorized by the creation of the district, the paving of Pleasure Street from the west corporate limits of the city to the intersection of Spring Street with Pleasure Street, in said city.

The district was alleged to be void, because the city had already, upon the petition signed by more than ten property owners asking that the territory described therein be laid off into an improvement district, duly passed an ordinance creating said territory into Street Improvement District No. 12, for making the identical improvement of Pleasure Street authorized to be made and provided for by the creation of said District 13.

After said District 12 was created, the city council, upon a petition of twelve real property owners, organized said District 13, which included all this territory, and more than was formerly included in District 12. It only included the territory lying within one-half block on either side of and immediately adjacent to this street

to be improved, while 13 included a block of territory on each side of said Pleasure Street.

The commissioners of District 13 answered, admitting they were proceeding, in the discharge of their duties, to issue bonds to obtain funds for making the improvement authorized by the creation of the district; also that the city council did, by ordinance duly passed on May 14, 1928 (No. 179) lay off the territory now included in District 13, into District No. 12, for making the same improvement. Denied that District 13 was void. Alleged that, after District 12 was created and before the second petition was filed asking that the improvements as contemplated be made, it was ascertained by the proponents of District 12 that the total assessed value of the property situated in the district as created was only $30,070, and the cost of making the improvement as contemplated was $49,418.20, exclusive of interest, an amount far in excess of the assessed value of all the real property in the district, and that the improvement could not be made by the district as laid out. Thereupon the same persons who were interested in having the street improved filed a petition on June 11, 1928, with the recorder, asking that the territory that had been included in District 12, and the additional territory, be organized into another improvement district of such extent as to insure the making of the desired improvement; that the same improvement was contemplated in each district, and the proponents of both districts desiring it should be made, and because it had been ascertained that the cost of paving the street exceeded the assessed valuation of the property in District 12, making it necessary to create District 13; that District 12 was void because of that fact, and so understood to be by the city council and the proponents of District 12 in creating District 13. That District 13 was legally organized, and the proponents of District 12 had abandoned same, not filing within the three months the second petition asking that the improvement be made as contemplated in the ordinance creating it. That no other proceedings

had been taken by any one to make the improvement in District 12, and more than three months had passed since the passage of ordinance 179 authorizing it. That District 13 had been legally organized, and the commissioners are now engaged in carrying out the purpose and will proceed to make the improvement as therein contemplated by District 12 unless restrained, the improvements contemplated in District 13 being the same in every detail as were intended to be made by District 12.

A general demurrer was filed to the answer, with prayer that District 13 be declared void and the commissioners permanently enjoined from making the improvement contemplated or from issuing bonds incumbering the real estate therein, and for costs, etc.

The cause was submitted to the chancellor in vacation, the demurrer to the answer was overruled, and, plaintiff declining to plead further, the complaint was dismissed for want of equity, and this appeal is prosecuted from that decree.

Appellant owned property in District 13 and also in old District 12, and sued for his own benefit and all other property owners in District 13. Appellant insists for reversal that the court erred in holding that the city council had authority to create District 13, including the territory embraced in District 12, before the expiration of 90 days allowed them for filing the second petition asking that the improvements be made as contemplated by the ordinance creating it.

Although it is true that the ordinance creating District 13 was passed before the expiration of three months from the date of the adoption of the ordinance 179 creating District 12, it is also conceded to be true that no second petition asking that the improvement be made as contemplated in said ordinance creating District 12 was filed during that term, or at all, and the 90 days in which any such petition could be filed had expired before this suit was brought.

It was alleged in the answer of the commissioners and admitted by the demurrer that, after District 12 had

been created by ordinance 179, and before the filing of the second petition asking that this contemplated improvement be made, it was ascertained by the proponents of the district that the total assessed value of the real property within said District 12 as laid out was only $30,070, while the cost of making the improvement as contemplated and described in the petition for an ordinance creating the district would be $49,418.20, exclusive of interest charges, an amount greatly in excess of the assessed valuation of the property in the said district, and the improvement could not therefore be made. No board of improvement had been appointed by the council, it is true, but, when it was ascertained that the assessed value of the real property in District 12 was far less than the cost of the contemplated improvement, then the parties promoting District 12 joined in the movement and procedure for the creation of District 13, including, in addition to the territory that had been included in District 12, sufficient territory to enable the new district to make the identical improvement contemplated in the creation of District 12, which was necessarily abandoned. All the parties active in the creation of each of the districts were interested in having made the same improvement contemplated in both districts, and all knew that it could not be done by District 12, the assessed value of the property included therein being far less than the cost of the improvement contemplated, which fact was also known to the city council in the creation of enlarged District 13.

The law provides that no single improvement shall be undertaken by any district, created as this was, which alone will exceed fifty per centum of the value of the real property in the district as shown by the last county assessment, and, although it allows an improvement to be made, the cost of which shall not exceed one hundred per centum of the assessed value of the property in the district when petitioned for by 75 per cent. in value of the property owners, no authority is given for creation of an improvement district to undertake or make an

improvement which will exceed the estimated value of the property in the district from which alone the money is to be collected for making the improvement. Section 5666, C. & M. Digest, as amended by Acts of 1925, Castle's Supplement, 548. *Gault* v. *Nolan,* 177 Ark. 117, 5 S. W. (2d) 932.

It is not contended that Improvement District No. 13 was not otherwise duly organized, and it is shown to have been regularly constituted and authorized to proceed with the construction of the improvement, as the lower court correctly held.

The court did not err in dismissing the complaint for want of equity, and the decree is affirmed.

SOUTHWESTERN BELL TELEPHONE COMPANY *v.* BAGLEY & COMPANY.

Opinion delivered January 14, 1929.

Edward B. Downie, for appellant.

Bogle & Sharp, for appellee.

MEHAFFY, J. Bagley & Company, the appellee, is engaged in the cotton business in Memphis, Tennessee. L. A. Waddell was employed by appellee as a cotton buyer for its Memphis branch. On the 30th day of September, 1926, Waddell, representing Bagley & Company in Arkansas, purchased 132 bales of cotton from different parties in Cotton Plant, Arkansas, and, late the same afternoon, called the central office of the appellant at Brinkley, and told the operator that he wanted to talk to A. T.

LeFils at Memphis. After making repeated inquiries, Waddell was informed by the operator that he was connected with Mr. LeFils' home, but that Mr. LeFils was out, and that Mrs. LeFils was on the line. Waddell agreed to talk with her, and did talk with some woman who said she was Mrs. A. T. LeFils, and would convey to her husband the information that Waddell wanted him to have.

Waddell told her that he had purchased 132 bales of cotton, and she said she would convey the information to her husband. Waddell relied on the truthfulness of the statements made to him by appellant's operator at Brinkley that he was connected with the home of LeFils and talked with Mrs. LeFils. He did not have an opportunity to talk with LeFils, and did not talk with him until the evening of the following day, after the market had closed. He then learned that appellant's employees had not connected him with LeFils' home, and that he had talked to some other party.

If Waddell had talked to Mrs. LeFils or LeFils, and given him the information that he had purchased 132 bales of cotton, LeFils would have sold a similar number of bales on the future market the morning of October 1. He could, on October 1, have sold 132 bales of cotton for 14.25 cents per pound, but, because of his failure to communicate with LeFils at that time, he was forced to sell for 13.53 cents per pound, the market having declined.

Appellee alleges that, on account of defendant's carelessness and negligence, it has been damaged 72/100 cents per pound on 132 bales, a total of $475. Appellee's contention is that he lost the amount of money sued for, not on the bales of cotton that he actually bought in Arkansas, but because he did not buy futures on October 1, and that he lost the difference between the price on October 1 and the price at the time he got the information; that the damage was caused by the telephone company negligently giving him the wrong party.

Waddell testified that he lives at Brinkley, and was a cotton buyer for Bagley & Company, and that Bagley

& Company's main office is in Nashville, Tennessee; that he bought the 132 bales of cotton, as alleged in the complaint, and he was in the habit of telephoning to the Memphis branch when he would buy cotton, so that the Memphis office could sell cotton against it—in other words, hedge. He testified that they would have sold cotton on the board, and would not have sold it for delivery; would just sell at future market, and if the price went up he would be all right, and if it went down, he would take a loss on that purchase. He did not sell the 132 bales that he had purchased, but what they wished to do was to sell on the board 132 bales to protect the cotton that witness had bought. It was never the intention to deliver that cotton. It was merely sold on the board. After they would sell this on the board, then, when the actual cotton was sold, he would take up his hedge. On that particular business, if he sold the 132 bales, he did not intend to deliver any actual cotton. He would deliver against his selling. When selling on the board, he doesn't intend that there is going to be an actual delivery.

There was considerable evidence about the negligence of the appellant company and about the manner in which cotton was bought and sold, and the damages that resulted on account of the negligence of the appellant in this case. We do not think it necessary to set out any of that testimony, for the reason that the appellee itself states that the telephone communication was desired for the purpose of selling futures.

Appellant submits four reasons why the judgment should be reversed. First, it is contended that the damages are special, and appellant had no notice or knowledge of the circumstances, etc. It also contends that appellee was guilty of contributory negligence; and also that, under the rule of the company, it does not assume the responsibility of insuring that the party answering the telephone is the party called for. We do not decide any of these questions, for the reason that, according to appellee's own showing, this was a gambling trans-

action and is prohibited by our statute, and for that reason no recovery can be had in this case.

Section 2652 of Crawford & Moses' Digest prohibits maintaining an office for dealing in futures, and § 2653 of Crawford & Moses' Digest reads as follows:

"Every contract or agreement, whether or not in writing, whereby any person or corporation shall agree to buy, or sell and deliver, or sell with an agreement to deliver, any wheat, cotton, corn, or other commodity, stock, bond, or other security, to any person or corporation, when in fact it is not in good faith intended by the parties, or either of them, that an actual delivery of the article shall be made, is hereby declared to be unlawful, whether made or to be performed wholly within this State or partly within and partly without the State; it being the intent of this act to prohibit any or all contracts and agreements for the purchase of or sale and delivery of any commodity or other thing of value on margin, commonly called dealings in futures, when the intention or understanding of the parties or either of them is to receive or pay the difference between the agreed price and the market price at the time of settlement, and any person violating the provisions of this section, for each transaction shall be deemed guilty of a misdemeanor, and upon conviction shall be fined in any sum not less than five hundred nor more than five thousand dollars, and upon conviction for a second offense, in addition to said fine, the defendant shall be imprisoned in the county jail not exceeding twelve months."

The appellee, however, contends that the cases of *Harris* v. *Western Union Tel. Co.,* 136 Ark. 63, 206 S. W. 52, and *Western Union Tel. Co.* v. *Osborne,* 136 Ark. 68, 206 S. W. 54, are cases where the facts are similar to the facts in the present case. Or rather, he contends that the facts in the instant case bring it clearly within the rule announced by this court in the two cases above mentioned.

In the case of *Harris* v. *Western Union Tel. Co.*, 136 Ark. 65, 206 S. W. 52, this court said: "The testimony affirmatively shows that actual delivery of the corn bought and sold was contemplated by the parties, and the transactions set out above were evidenced by elevator receipts for corn duly assigned."

In the instant case the testimony affirmatively shows that there was no actual delivery of the cotton contemplated. On the contrary, the appellee's witnesses themselves and the purchaser, Mr. Waddell, testify that there was no intention to deliver any actual cotton, but that this was merely selling futures in order to hedge or protect themselves on the purchase of the 132 bales. No one claims that there was any actual delivery of cotton contemplated, but, on the contrary, the undisputed proof shows that the intention was not to deliver any actual cotton. It was therefore a transaction to sell in violation of the statute. The statute says that every contract whereby a person shall agree to buy or sell and deliver, * * * when in fact it is not in good faith intended by the parties, or either of them, that an actual delivery of the article shall be made, is hereby declared to be unlawful, whether made or to be performed wholly within this State or partly without the State. The statute further provides: "It being the intent of this act to prohibit any or all contracts and agreements for the purchase or sale and delivery of any commodity or other thing of value on margin."

The appellee's witnesses all agree that this was on margin; that it was dealing in futures, the very thing prohibited by the statute.

This court has said, in discussing the above statute:

"A mere message containing merely a narrative of a past sale would not be either within the spirit or the letter of the statute, for it would not relate to an unlawful sale merely by giving information that there had been such a transaction. But, where the message constitutes an acceptance or offer, it necessarily relates to a

purchase or sale, whether there be a consummation of the deal or not." *State* v. *Western Union Tel. Co.*, 160 Ark. 444, 254 S. W. 838.

In the instant case appellee's witnesses all testify that there was to be no delivery, and they claim damages solely on the ground that the failure to connect them with the right party prevented them from buying futures. One cannot recover damages because another refuses to do what the statute forbids.

There seems to be some conflict in authority with reference to the liability of transmission companies, especially where there is no statute on the subject. The following is a fair statement of the law:

"While a telegraph company may not refuse to transmit or deliver messages relating to 'futures' or similar gambling transactions, or escape a statutory penalty for failing to transmit such messages, yet the amount of damages to be recovered for an error made in the transmission of such are only nominal, and cannot exceed the amount paid for their transmission. There is a distinction between real gambling and dealing in what is commonly called 'futures;' and this distinction gives those dealing in the latter a right similar to that enjoyed in the transmission of ordinary messages. It is presumed in the 'future' contracts that there is to be a delivery of the goods; but in gambling there is a wager outright for a loss or a gain. These companies are under no obligations to accept messages for transmission which are purely gambling messages, for to do so would be contrary to law, good morals, and public policy." Jones on Telegraph and Telephone Companies, § 429.

The distinction made in the above text between messages as to real gambling and dealing in futures is put on the ground that, in buying futures, there is an intent to deliver the property bought; but in the instant case all the proof shows that this was a gambling contract, pure and simple.

The Supreme Court of Pennsylvania, discussing this question, said:

"But, when ventures are made upon the turn of prices alone, with no *bona fide* intent to deal in the article, but merely to risk the difference between the rise and fall of the price at a given time, the case is changed. The purpose then is not to deal in the article, but to stake upon the rise or fall of its price. No money or capital is invested in the purchase, but so much only is required as will cover the difference—a margin, as it is figuratively called. Then the bargain represents not a transfer of property, but a mere stake or wager upon its future price. The difference requires the ownership of only a few hundreds or thousands of dollars, while the capital to complete an actual purchase or sale may be hundreds or thousands or millions. Hence ventures upon prices invite men of small means to enter into transactions far beyond their capital, which they do not intend to fulfill, and thus the apparent business in the particular trade is inflated and unreal, and, like a bubble, needs only to be pricked to disappear, often carrying down the *bona fide* dealer in its collapse. Worse even than this, it tempts men of large capital to make bargains of stupendous proportions, and then to manipulate the market to produce the desired price. This, in the language of gambling speculation, is making a corner—that is to say, the article is so engrossed or manipulated as to make it scarce or plenty in the market at the will of the gamblers, and then to place its price within their power. Such transactions are destructive of good morals and fair dealing and of the best interests of the community. If the article be stocks, corporations are crushed and innocent stockholders ruined to enable the gambler in its price to accomplish his ends. If it be merchandise, *e. g.*, grain, the poor are robbed, and misery engendered." *Kirkpatrick* v. *Bonsall*, 72 Penn. 155.

Not only are the statements above copied from the Pennsylvania case true, but to hold that a person seeking to transmit messages for the purpose of dealing in

futures could recover damages for failure to transmit such messages would be to aid and assist in the gambling transaction. It would be aiding and assisting to violate the statute.

In the instant case, to hold that the appellee could recover would be, in effect, to hold that any one in Arkansas could require a transmission company to receive and transmit messages dealing in futures, in violation of the statute, and that is one of the things the Legislature intended to prohibit.

This court said, many years ago, when the statute was nothing like as plain and comprehensive as it is now:

"Certainly the Legislature did not intend to impose any restrictions upon legitimate commerce, but only to destroy the parasite that infests it. Contracts for future delivery, if entered into in good faith and with an actual intention of fulfillment, are as valid as any other species of contract. A farmer may sell and agree to deliver his wheat or his cotton for a stipulated price before it is harvested. Nay, one may sell goods to be delivered at a future day which he has not in actual or potential possession, but which he intends to go into the market and buy. But this is not what is commonly known as dealing in futures. This phrase has acquired the signification of a mere speculation upon chances, where the grain, cotton or stocks dealt in exist only in imagination, and where no delivery is contemplated, but the parties expect to settle upon the difference in the market." *Fortenbury* v. *State,* 47 Ark. 188, 1 S. W. 58. See also *Huff* v. *State,* 164 Ark. 211, 261 S. W. 654; *William W. Cohen & Co.* v. *Austin,* 172 Ark. 723, 290 S. W. 579.

Our statute expressly forbids dealing in futures. The testimony in this case shows that it was not the intention of the parties to sell cotton, and that it was dealing in futures, because there was no intention to deliver, and this is the thing prohibited by the statute. No person can be required to do what the statute prohibits, and no person is liable in damages to another if he refuses to do what the statute makes a crime.

The appellee referred to the case, as we have already said, of *Western Union Tel. Co.* v. *Osborne,* 136 Ark. 68, 206 S. W. 54. In that case there was no wager—no dealing in futures, and no violation of the statute. But that was a contract for furnishing market reports. Such a contract is not prohibited, and we therefore think that that case has no application here.

In the case last referred to, the court said that it was the foundation of the plaintiff's cause of action that he purchased 40 bales of cotton on the basis of the market report erroneously furnished him by the defendant, to his loss and damage. The company having agreed to furnish cotton market reports, was required to do so. The court further said that plaintiff was in the business of buying cotton and selling it again at a profit; that the defendant knew this fact, and made a contract with him to furnish the market reports daily, knowing that these reports would be used by him as a basis for buying cotton. It is no violation of the statute to furnish market reports, and in the last case referred to, and relied on by appellee, there is nothing to indicate that there was to be any gambling or dealing in futures.

Having reached the conclusion that this suit is based on the negligence of appellant in failing to give the appellee the right party, thereby enabling it to deal in futures, it becomes unnecessary to discuss or decide the other questions discussed by counsel. The transaction or contract that the appellee desired to enter into or make was dealing in futures, in violation of the statute. And, as the Pennsylvania court has said, such transactions are destructive of good morals and fair dealings and of the best interests of the community.

The judgment of the circuit court will therefore be reversed, and the cause dismissed.

THURMAN *v.* MOORE.

Opinion delivered January 14, 1929.

Robert A. Kitchen, for appellant.

Saxon, Wade & Warren, for appellee.

McHANEY, J. Title to the land covered by the oil and gas lease in controversy, southeast southwest 6-16-15, Union County, was involved in litigation on May 20, 1925, and was settled by this court in two cases, *Wilson* v. *Biles,* 171 Ark. 912, 287 S. W. 373, and *Clark* v. *Wilson,* 174 Ark. 669, 297 S. W. 1008. Pending a final determination of this litigation, and on the date aforesaid, all the parties thereto, being all the claimants to said land, joined in the execution of an oil and gas lease thereof to appellant, M. B. Thurman, for a consideration of $40,000, $20,000 cash and $20,000 to be paid out of seven-sixteenths of the first oil produced from said land. The lease further provided that the cash payment and all

future payments from a sale of the oil produced therefrom should be deposited in escrow and held by the First National Bank of El Dorado for the benefit of the lessors, subject to the final determination of their respective rights in the litigation aforesaid. The lessors also executed and delivered to said bank a separate escrow agreement in accordance with said provision in the lease. Thurman paid the $20,000 cash to the bank, and proceeded to drill for oil, resulting in a very rich well. He sold the oil therefrom to H. E. Clark *et al.*, doing business under the name of Penn Liberty Oil Company, and to the Magna Pipe Line Company, each of whom was furnished a copy of the above-mentioned agreement. Thurman, the lessee, and both purchasers of said oil, neglected or refused to deposit the sums required by both the escrow agreement and the lease with the bank in payment of the balance due on the purchase price of said lease, and on October 27, 1926, all the parties, lessor and lessee, together with the escrow agent, joined in a suit to collect said money. Both purchasers had credited the lessors with the correct amount due them, but had not deposited same to their credit in the bank. On the filing of the suit, the Magna Pipe Line Company paid all the money due by it to the bank, and the Penn Liberty Oil Company paid certain sums, which reduced the amount still owing on the purchase price to $5,354.73. On March 26, 1926, appellant Thurman assigned this lease to appellant Continental Supply Company, by the terms of which the Continental took subject to the payment of the $20,000 out of oil as aforesaid. The appellees here intervened in the action against Penn Liberty Oil Company, above mentioned, in what they call an intervention over, by which they sued Thurman and his assignee, the Continental Oil Company, for the balance due, in which they alleged that appellants had taken more than sufficient oil from the lease to pay said balance due thereon. The court decreed judgment against both appellants and a foreclosure of a purchase money lien for the sum of $5,354.73, which included interest to the date of the decree.

We think the decree of the chancery court was correct. The balance found due by the decree was purchase money due by Thurman, the lessee, and he could not relieve himself from personal responsiblity by selling the oil to a purchaser who merely credits the amount due the lessors on his books, unless they agree to look to the purchaser therefor, or estop themselves by inconsistent conduct in some manner misleading the lessee to his injury. We find no such agreement in the record, and no conduct on which to base estoppel. True, they tried to get the Penn Liberty to pay into the depository the amount due, and joined with the lessee and escrow agent in a suit to compel them to pay, but by so doing they did not waive their right to require the lessee and his assignee to pay. They still have their action against the Penn Liberty Oil Company to recover the amount it is due and owing for such oil. The assignee simply stepped into the shoes of the lessee. He took his assignment subject to the payment of the purchase price out of the oil produced. This was a covenant running with the lease, and was not satisfied by the fact that sufficient oil had been run prior to the assignment to satisfy the claim, when, as a matter of fact, it had not been applied thereto. In such a case the assignee is liable. 1 Thornton on Oil, § 102.

Moreover, under the lease the lessee had full control of all the oil except the 1/8 royalty. He had plenary power to produce, sell or otherwise dispose of 14/16 of the oil and to collect for same, without consulting with the lessors. The lease did require him to deposit in said bank the proceeds of the sale of 7/16 of the oil until $20,000 was paid in full. "* * * and $20,000 to be paid out of 7/16 of the first oil and gas produced and saved from the lease hereinafter described. * * * It is further agreed that all payments under this lease shall be deposited in the First National Bank," etc. This duty of making such deposits rested on the lessee and his assignee, and not on the purchaser.

The decree is correct, and is affirmed.

TOLBERT BROTHERS & COMPANY *v.* MOLINDER.

Opinion delivered January 14, 1929.

John A. Sherrill, for appellant.

E. L. Hollaway, for appellee.

McHANEY, J. Appellee was a subcontractor under appellant, Tolbert Brothers & Company, who were the principal contractors on the Corning-Piggott road, and

appellant, Ætna Casualty & Surety Company, was surety on the bond of Tolbert Brothers. Appellee brought this action against both appellants to recover $642.82 on account of labor performed for Tolbert Brothers. He alleged that the work was completed in September, 1926; that he demanded payment of Tolbert Brothers, and that, on default in payment, he notified the surety company in December, 1926, of such default, and that the surety company agreed to pay same. The surety company filed a demurrer to the complaint, the principal ground of which, and the only one urged here, is that the complaint shows on its face that the action was barred by the statute of limitations. There was no answer or other pleading for Tolbert Brothers. The circuit court overruled the demurrer, the surety company elected to stand on its demurrer, and judgment was entered in favor of appellee and against both appellants in the sum above stated.

The only question presented on this appeal is whether the action is barred by the statute of limitations. Appellee brought the action under § 67 of the Harrelson Act, act No. 5, extraordinary session of 1923, page 11, which provides, in substance, that every contractor for work in excess of $1,000 shall be required to give bond to be approved by the State Highway Commission, equal to the amount of the contract, conditioned for the payment of material and labor used in the work, including that which may be done by subcontractors, for which an action on the bond may be maintained by such persons. This section further provides that claims for material and labor and amounts due subcontractors shall be filed with the Highway Commission within thirty days after the completion of the work, or within sixty days after the time of its abandonment by the contractor, unless the commission shall issue an order extending the time. This act does not fix any period of time in which suit shall be brought on the bond, but does direct claimants to file their claims with the Highway Commission within thirty days after the completion of the work by the contractor, or within sixty days after it is abandoned by the contractor,

if it is abandoned, unless the time is extended. The complaint in this case does not allege that the claim was filed with the Highway Commission within such time.

It is the rule in this State, as said in *Earnest* v. *St. L. Memphis & S. E. Ry. Co.*, 87 Ark. 65, 112 S. W. 141, that "the statute of limitations cannot be taken advantage of by demurrer to the complaint, in an action at law, unless the complaint shows that a sufficient time has elapsed to bar the action and the non-existence of any ground of avoidance." This rule has been followed in many subsequent cases by this court.

Another rule is, in determining from the complaint whether a cause of action is stated, all the allegations therein, together with all inferences reasonably deducible therefrom, must be considered. *Brown* v. *Ark. Central Power Co.*, 174 Ark. 177, 294 S. W. 709. Applying these rules to the case at bar, we are of the opinion that a cause of action was stated in the complaint, and that it does not show on its face that it is barred under the above statute. While the complaint shows that the work was done by the appellee in 1926, it does not show when the contractor completed the work, nor when he abandoned it, if he did abandon it. In other words, it does not show on its face the non-existence of a ground of avoidance.

It is next contended by appellant that § 6914, C. & M. Digest, is the general statute of limitations applicable to this case. This section provides that no action shall be brought on the bond after six months from the completion of the work. We do not agree with appellant that this is the applicable section. Another section, 6950, gave the appellee three years in which to institute an action against Tolbert Brothers, and the statute requiring the bond in this particular case not having fixed any period of limitations for bringing suit on the bond, we hold that it may be maintained at any time within three years, the contract with Tolbert Brothers not being in writing.

In the case of *Ætna Casualty & Surety Co.* v. *Henslee,* 163 Ark. 492, 260 S. W. 414, the action was based on § 5446, C. & M. Digest, which was § 30 of the act of 1915,

requiring contractors to give a bond for the faithful performance of such road contracts as may be awarded to them by commissioners of improvement districts, conditioned for the prompt payment to all persons supplying labor and material, and providing that suit may be brought in the name of the district upon the bond. No period of limitation was fixed in the act, but this court sustained a judgment against the surety in favor of a subcontractor furnishing labor and material under contract with Mobley, the principal contractor, on an action brought long after the six months' period had expired. In that case the lower court allowed to be read to the jury a decree obtained in the chancery court by Henslee against Mobley upon the same cause of action. That decree was obtained on directions from this court in reversing the decree of the chancery court in *Henslee* v. *Mobley,* 148 Ark. 181, 230 S. W. 17. With reference to this matter the court said: "The surety was not a party to that suit, but it was upon the same cause of action, and we are of the opinion that the decree was properly admitted in evidence against the surety in this case. It proved at least a *prima facie* breach of the bond by showing the amount due by Mobley to Henslee for a breach of the contract which the bond was given to secure."

We have found no case directly in point on the question of limitation, either under the act now being considered or § 5446, and the diligence of counsel has not cited any. Counsel does cite a number of cases to the effect that statutes such as the one now under consideration, as well as §§ 5446 and 6914, were enacted for the purpose of requiring the obligation of a bond as a substitute for the security which might, in the case of private ownership, be obtained by mechanics' liens, such liens being impossible in cases of this kind, and not being given in the case of public buildings or other public work. This question was not raised in the Henslee case. While this is true, it does not follow that the right of action is limited to the six months' period of time fixed by § 6914 of the Digest. This section was passed with particular refer-

ence to public officers who construct public buildings, or other public works, and while school directors and drainage district commissioners have been held to be public officers within the meaning of this section, we do not think that this period of limitation was intended to apply to bonds given for contractors to enter into contracts with the State Highway Commission to build public roads; else the statute requiring the bond would have definitely fixed the time.

Finding no error, the judgment is affirmed.

HICKS MEMORIAL CHRISTIAN ASSOCIATION *v.* LOCKE.

Opinion delivered January 14, 1929.

Claude V. Holloway, for appellant.

Morris & Barron, for appellee.

McHaney, J. This case was tried on an agreed statement of facts, which is as follows:

"The city of England has a population of approximately three thousand people. The city is divided by the railroad of the Cotton Belt that runs north and south through the center of the city, but more of the inhabitants live on the east side than on the west side, possibly two thousand people live on the east side of town. On either side of the railroad is the business section of the town. Practically all of the business houses are located on the streets that parallel the railroad on either side. The testator, Mr. J. E. Hicks, on coming to England, about thirty years ago, located on the west side of town, where he lived until his death. He accumulated much business property on the west side of town, but none on the east side. His estate was worth approximately $350,000 at the time of his death. On the west side and on the street adjacent and parallel to the railroad he owned much valuable property. The property designated in the will by Mr. Hicks for the erection of the recreation building, to-wit, lots seven, eight, nine and ten, block fifty, is located on the street adjacent and parallel to the railway right-of-way. In block forty-nine, immediately south of fifty, Mr. Hicks had large holdings. On the northeast corner of block forty-nine is located the Citizens' Bank & Trust Company, which institution was organized and controlled by Mr. Hicks. He was very devoted to the bank, being the promoter thereof and a large holder of stock therein, and much of his time was consumed in making it a success. Mr. Hicks also owned considerable business property in block forty-eight, which is immediately south of block forty-nine. Most all of the business property belonging to Mr. Hicks, located near block fifty, was in his last will devised to his two sisters for life, remainder to the bodily heirs of his sister, Mrs. Robinson, all of whom are defendants in this action. The donors (donation) of the ten thousand dol-

lars, raised by plaintiffs, is being tendered with the understanding and upon the condition that the erection of the recreation building would be upon a proposed site near the high school, admitted to be an extremely desirable location. The proposed site is on the east side of town, and approximately nine blocks from block fifty. The town has one graded school, the same being located on the east side of town and within three or four blocks of the high school.

"It is further agreed that it is unlikely plaintiffs could raise the required ten thousand dollars for the erection of the recreation building on block fifty, as a large majority of the people and donors prefer the high school location, as it is much more accessible to the young girls and boys for whom it was intended, and, if placed near the high school, a considerable expense could be saved in maintaining and caring for the property, as the school's janitors and librarians could be used in connection with the recreation building at no large additional expense.

"It is finally agreed that, although the proposed high school site is probably more adapted to the location of the contemplated building, according to the consensus of opinion, yet no conditions have arisen since the death of the testator that would render the site selected by him less desirable or less adapted for the purposes specified."

The paragraph in the will of J. E. Hicks referred to in the above agreed statement of facts reads as follows:

"It is my wish and desire that my trustees and the citizens of England, Arkansas, or a committee representing the citizens, form a recreation association for the benefit of Christian young men and women of the city of England, and erect a building for their use. When said association has been organized upon such plans as may be agreed upon, my trustees shall deed and convey to such association, in trust for the purpose herein named, lots seven, eight, nine and ten, block fifty, and lots four and five, in block forty-nine, in the city of England, Arkansas. Provided, said deed is not to be made until the citizens of the city of England shall contribute the sum

of $10,000, nor until the said $10,000 in cash is delivered to my trustees, and the same shall be delivered within one year after the date of my death. If my trustees deem best, they are hereby empowered to sell lots four and five, in block forty-nine, city of England, Arkansas, and shall erect the recreational building on lots seven, eight, nine and ten in block fifty, city of England, Arkansas. The $10,000 contributed by the citizens of England, together with the proceeds of the sale of lots four and five, in block forty-nine, shall be used in the erection of a recreational building and equipments on lots seven, eight, nine and ten, in block fifty, city of England. In any event, the $10,000 shall be used in the erection of a recreational building, and if lots four and five, in block forty-nine, are not sold by the time the building is completed, then the trustees shall deed and convey these lots, as well as lots seven, eight, nine and ten, in block fifty, to said recreational association. If the citizens of England fail, within one year from the date of my death, to raise and contribute the $10,000 required of them, then I direct that my trustees sell all the property named in this item, and if the citizens of Lonoke, Arkansas, shall, within six months after said year, or within a period of eighteen months after my death, raise $10,000 and deposit same with my trustees for the erection of a recreational building in Lonoke, Arkansas, then my trustees shall use the proceeds from the sale of said property, together with the $10,000, in the erection of a recreational building in the town of Lonoke, Arkansas, for the benefit of Christian young men and women of the town of Lonoke, with the same purpose and object as provided if erected in England."

According to appellants, the question to be determined is "whether the testator intended to confine the location of the building to one of the pieces of property devised in said section 13, or whether he intended to create a trust fund to be matched by a fund of $10,000 to be raised by the citizens of England, to erect and maintain said building, and to leave the location of said

building in question to the citizenship of England, as expressed by the plaintiff association, and where it would be more serviceable to the entire citizenship of the city of England."

It is a universal rule in the construction of wills to ascertain and determine the intention the testator had in mind from the language used in the will, giving consideration to the entire instrument, and to give effect to that intention, if not against some rule of law. In the recent case of *Hurst* v. *Hinderbrandt, ante,* p. 337, we said: "It is a fundamental rule of construction of both deeds and wills to ascertain the intention the grantor had in mind, as to the course he desired his property to take, from the language used in the instrument, and to give effect to such intention, if it may be done without doing violence to the law." We there quoted from *Booe* v. *Vinson,* 104 Ark. 439, 149 S. W. 524, as follows: "The purpose of construction of a will is to ascertain the intention of the testator from the language used, as it appears from the consideration of the entire instrument, and, when such intention is ascertained, it must prevail, if not contrary to some rule of law, the court placing itself as near as may be in the position of the testator when making the will."

Bearing this well-established rule in mind, we must look to the will to determine the intention of the testator. In one clause or sentence of the above section of the will he said: "If my trustees deem best they are hereby empowered to sell lots four and five, in block forty-nine, city of England, Arkansas, and shall erect the recreational building on lots seven, eight, nine and ten, in block fifty, city of England, Arkansas. The $10,000 contributed by the citizens of England, together with the proceeds of the sale of lots four and five, in block forty-nine, shall be used in the erection of a recreational building and equipment on lots seven, eight, nine and ten, in block fifty, city of England."

The testator then provided that, if lots four and five in block forty-nine had not been sold by the time the

building is completed, then at that time his trustees were required to deed all the property to the recreational association. The trustees were empowered to convey this property to the association only when the building had been completed on the lots named. We do not think there is any room for construction, or reason to doubt the intention of the testator. He intended exactly what he said in the will, that is, that the recreational building should be erected upon the lots named, in any event, on lots seven, eight, nine and ten, block fifty. The trustees were empowered to sell lots four and five, in block forty-nine, and to use the proceeds in the erection and equipment of the building on lots seven, eight, nine and ten, in block fifty. He gave no authority in his will to sell lots seven, eight, nine and ten at all, but only to convey them to the recreational association after the building had been completed thereon. Not having given his trustees any general power to sell lots seven, eight, nine and ten, and use the proceeds in the erection of a building in another location, they had no such power. The *cy pres* doctrine, or the doctrine of approximation, has no application in this case, as there can be no reason for the application of the doctrine of *cy pres* until it is shown conclusively that the will or wish of the testator cannot be given effect. It is the duty of the court to construe the will in the light of the intention of the testator as gathered from the will, but the court is not permitted to substitute its judgment for the judgment of the testator, because the court may think that a better location for the building may be found.

In 5 R. C. L., page 365, § 105, it is said:

"The *cy pres* doctrine can properly be applied only where it is or has become impossible beneficially to apply the property left by the founder or donor in the exact way in which he has dictated it to be applied, and it can only be applied beneficially to similar purposes by different means. And there can be no question of *cy pres* until it is clearly established that the directions of the testator cannot be carried into effect. Therefore a court of equity is not entitled to substitute a different scheme

for the scheme which the donor has prescribed in the instrument which creates the charity, merely because a coldly wise intelligence, impervious to the special predilections which inspired his liberality, and untrammeled by his directions, would have dictated a different use of his money. Of course the doctrine of *cy pres* can have no existence when the donor himself provides for the application of the fund in the event of the failure of the charitable use to which he, in the first instance, directed that it should be devoted." See also *McCarroll* v. *I. O. O. F. of Ark.*, 154 Ark. 376, 243 S. W. 870.

It is agreed in the statement of facts that no conditions have arisen since the death of the testator that would render the site selected and designated by him less desirable or less adapted for the purposes specified. In other words, the site designated by the testator for the erection of the building is just as suitable now for the purpose designated by him as it was when the will was written.

A court of chancery would therefore have no power to select a new location *cy pres*. The decree of the chancery court dismissing the complaint for want of equity was correct, and it is in all things affirmed.

DILDAY *v.* DAVID.

Opinion delivered January 21, 1929.

[redacted]

M. F. Elms, for appellant.

W. A. Leach, for appellee.

SMITH, J. Appellees, doing business as the Aurora Southwestern Sales Company, brought suit against appellant to recover the balance alleged to be due upon a contract for the sale of a pump. Appellant answered and admitted the balance sued for was due on the contract, but, by way of counterclaim, alleged there had been a breach of the guaranty under which the pump had been sold, that it would furnish or supply 1,200 gallons of water per minute to a rice crop which the pump was purchased to irrigate.

The contract of sale was in writing, and the guaranty contained in it reads as follows: "The above pump is guaranteed to have a range of capacity from 800 to 1,600 CPN, and is to be especially adapted to pumping 1,200 gallons per minute against the total lift of 120 feet, and when so performing to show not less than 70 per cent. efficiency of the power applied to the shaft above. This pump is also guaranteed to be free from defective material and workmanship, and we will replace any part free of charge that proves to be defective from above causes."

The court below construed the language just quoted as a guaranty of the capacity of the pump only, and not one that a flow of 1,200 gallons of water per minute would result from its use; and we think this construction of the

contract is correct. The fact that the pump did not actually deliver 1,200 gallons of water per minute did not necessarily show a breach of the guaranty. The water might not have been in the well, or sufficient power might not have been provided, or other causes might have contributed to the failure to produce a flow of 1,200 gallons of water per minute.

It was insisted by appellant (defendant below) that, after the execution of the written contract of sale, there was a subsequent oral agreement whereby plaintiff proposed to furnish defendant with a different pump and which was guaranteed to produce 1,200 gallons of water per minute. The making of this subsequent agreement was denied by plaintiff, but that question of fact was submitted to the jury, as will be later shown.

Defendant offered testimony tending to show that he had sustained a large loss on account of the lack of water for his rice crop, and by way of mitigating this damage he testified that he dug a canal to bring water from another field which was supplied with water by another pump; that there was an improper setting of the pump, and certain pieces of the machinery were removed or lost, and damages were asked on account of these items.

Upon these issues the court charged the jury that: "If you find there was a subsequent contract entered into between the parties, and that the plaintiff in this case failed to live up to the terms and conditions of that oral contract, then the measure of damages of the defendant are those items that I have just enumerated to you, and a fair rental value of 20 acres of rice land for the year 1926."

It is insisted that this instruction is erroneous, as it eliminates as an element of the recoverable damages the difference in value of the crop produced and the one which would have been produced, had the guaranteed amount of water been supplied. We have concluded, however, in view of the testimony in the case, that no error was committed in giving this instruction.

The pump was sold in 1925, and the damages claimed covered the 1925, 1926 and 1927 crops. The admitted balance due on the pump was $650, and the jury returned a verdict for the plaintiff for the sum of $500, showing that the jury allowed a credit of $150 for the items submitted by the court.

The testimony was to the effect that a flow of 1,200 gallons of water per minute will properly irrigate 175 acres of rice in an ordinary season, and that defendant was under contract to grow 175 acres each year on the land to be watered by this well, and that he planted that acreage in 1925. Defendant offered testimony to the effect that the well did not produce a sufficient amount of water to irrigate this acreage, and that to supply the deficiency he was compelled to bring water through a canal from another field, supplied by another well, at a cost of $75.

The testimony did not show that there was any shortage in the crop of the 175-acre field, but it was contended that taking the water from the other field reduced the yield on it, but there appears to be no testimony showing in what amount this yield was reduced. Under this testimony the jury could allow nothing more on account of the 1925 crop than the cost of the construction of the canal.

If it was discovered in 1925 that the pump was inadequate and would not meet the guaranty under which it was sold, then defendant should, in mitigation of his damages for the breach of the guaranty, have ceased to rely upon it. He did not have the right to continue planting an acreage in excess of the known capacity of the pump to water, with the expectation of calling upon his guarantor to make good any deficiency between the crop made and the one which would have been made with a pump of the guaranteed capacity. A different measure of damages would apply.

The testimony on behalf of appellant was to the effect that he planted the 175-acre field again in rice in 1926, and that he had to get water from another field,

which, according to the allegations of his cross-complaint, resulted in a failure to cultivate 20 acres of land in 1926 in this second field. Defendant's testimony was to the effect that he reduced this acreage 40 acres, although he alleged a reduction of only 20 acres; but the undisputed testimony shows that, upon a test of the well on May 1, 1926, the pump was actually delivering 1,140 gallons of water per minute, and, according to defendant's own testimony, this would have watered 167 acres, so that the water supplied by the pump in controversy was sufficient to irrigate all but 8 acres of the land to be irrigated by it, and there was no showing of any loss or damage in the year 1926 other than the land which was not planted.

There appears to be an absence of any testimony sufficient to support a recovery for any loss in 1927.

The law is settled that, where no crop has been planted, the measure of damages for an actionable wrong so preventing is the rental value of the land (*St. L. I. M. & S. Ry. Co.* v. *Saunders,* 85 Ark. 111, 107 S. W. 194), and the court told the jury, as we have seen, that this was the measure of damages for the year 1926 for the land not cultivated.

The verdict indicates that the jury considered and took into account all the recoverable elements of damage sustained by a sufficiency of testimony to support a verdict. The judgment must therefore be affirmed, and it is so ordered.

MISSOURI PACIFIC RAILROAD COMPANY *v.* BOZEMAN.

Opinion delivered January 21, 1929.

E. B. Kinsworthy and *Richard M. Ryan,* for appellant.

D. M. Halbert, for appellee.

SMITH, J. The appellant railroad company brought suit in unlawful detainer to recover possession of the southwest quarter of the northeast quarter section 17, township 5 south, range 19 west, Hot Spring County, from appellee Frank Bozeman.

The complaint alleged that in 1910 the railroad company executed a written lease, with an option to purchase, of the land described to one J. T. McCowan, and that McCowan took possession under the lease and remained in possession until 1926, when he surrendered the possession to Bozeman. There was an allegation of notice to quit and demand for possession, in writing, and the refusal of Bozeman to surrender possession.

Bozeman filed an answer, in which he alleged that he was in possession of the land, and had been for two years, and that he acquired his right of possession by a deed from McCowan. The answer denied that McCowan had ever been a tenant, but alleged the fact to be that McCowan had been in the adverse and exclusive possession of the land for more than twenty years continuously before the institution of the suit.

On behalf of the railroad company the lease was offered in evidence, and it was shown that Bozeman was let into the possession by McCowan.

McCowan, while hostile to the railroad company, was called as a witness in its behalf, and testified that the forty-acre tract was in the center of his field, and that he had cleared and put the land in cultivation. He admitted signing the lease, but testified that it was his understanding, when he did so, that he was signing a lease for land south of the forty-acre tract described

on which a little house stood, and that he occupied the land as a part of his farm for much more than seven years, claiming to be the owner thereof, and that he had sold and conveyed the land by deed to Bozeman. McCowan did not claim to have paid any taxes on the land, and it was shown that all taxes had been paid by the railroad company, except those for 1926, which had been paid by Bozeman in 1927.

At the conclusion of the above testimony offered on behalf of the railroad company, the defendant, without offering any testimony, asked that the court, sitting, by consent, as a jury, find in his favor and dismiss the complaint, and this was done.

Upon the case made the court should have found for the plaintiff railroad company. The undisputed testimony shows that McCowan entered as the tenant of the railroad company under a written lease. It is true McCowan testified that he was mistaken as to the land described in his lease, but there was no mistake about his taking possession of the land which his lease described. He therefore became the tenant of the railroad company when he entered into possession of the land under the lease, describing it, although he was mistaken as to the land which the lease described.

In the case of *Dunlap* v. *Moose*, 98 Ark. 235, 135 S. W. 824, it was said:

"The action of unlawful detainer is only to decide the right to the immediate possession of lands and tenements, and not to determine the right or title of the parties to or in them. A tenant cannot dispute the title of his landlord while he remains in possession under him, nor acquire possession from the landlord by lease and then dispute his title, but must first surrender possession and bring his action. *Washington* v. *Moore,* 84 Ark. 220, 105 S. W. 253."

See also *Burton* v. *Gorman,* 125 Ark. 141, 188 S. W. 561; *Garrett* v. *Edwards,* 168 Ark. 243, 269 S. W. 572.

The deed from McCowan to Bozeman could convey no greater interest than McCowan himself possessed,

and, as he was a tenant, the deed, in legal effect, was nothing more than an assignment of the lease.

In the case of *Gee* v. *Hatley,* 114 Ark. 376, 170 S. W. 72, we quoted from 1 R. C. L., § 68, of the article on "Adverse Possession," and under the sub-title, "Whether Tenant May Hold Adversely," as follows:

"As a general rule, the possession of a tenant is that of his landlord, and will be so deemed until the contrary appears. This rule affects all who may succeed to the possession, immediately or remotely, through or under the tenant. Therefore, so long as the relation of landlord and tenant exists, the tenant cannot acquire an adverse title as against his landlord. This is merely one application of the rule that the tenant cannot deny his landlord's title. It is equally well settled that one who enters as tenant is not, merely because of that fact, precluded from subsequently holding adversely to his landlord. To do so, however, it is necessary to renounce the idea of holding as tenant, and to set up and assert an exclusive right in himself. It is also essential that the landlord should have actual notice of the tenant's claim, or that the tenant's acts of ownership should be of such an open, notorious, and hostile character that the landlord must have known of it."

There is nothing here to show that McCowan repudiated the tenancy and that the railroad company had knowledge of that fact. The undisputed evidence is to the contrary, as is evidenced by the unbroken tax payments of the railroad company from the date of the original lease to 1927, when Bozeman paid the 1926 taxes.

The judgment of the court below must therefore be reversed, and the cause will be remanded.

BASSETT *v.* MUTUAL BENEFIT HEALTH & ACCIDENT ASSOCIATION.

Opinion delivered January 21, 1929.

Robert A. Rowe and *John E. Tatum,* for appellant.

Harrell Harper and *Evans & Evans,* for appellee.

SMITH, J. Appellant, as administrator of the estate of R. S. Boyd, brought suit to recover the amount of an accident insurance policy issued by appellee insurance company on the life of his intestate. This suit was begun November 27, 1926, by filing a complaint in the circuit court, upon which summons was duly issued and served. The policy sued on was later made an exhibit to the complaint, and it appeared therefrom that the company had insured said Boyd from loss of life through acci-

dental means, which, independently and exclusively of all other causes, should cause the death of the said Boyd, in the sum of $1,500, but that death by suicide, whether the insured was sane or insane, was a hazard not covered by the policy.

On January 3, 1927, the company filed a demurrer to this complaint, which appears never to have been passed upon. On the same day the company filed a complaint in the chancery court, upon which a summons was duly issued and served two days later, in which the issuance of the policy and the death of the insured was admitted. The complaint alleged, however, that the policy had lapsed, but that the insured had later procured its reinstatement for the fraudulent purpose of augmenting his estate by committing suicide, and that the insured did, on November 23, 1925, commit suicide. There was a prayer that the policy be canceled on account of this alleged fraud.

The suit at law was transferred to equity, over the objection of the plaintiff administrator, who, on April 23, 1927, filed in the chancery court a motion to transfer the cause back to the law court, because the chancery court had no jurisdiction and because there was a full, complete and adequate remedy at law. This motion was overruled. The plaintiff administrator then filed a demurrer, which does not appear to have been acted upon. He then filed an answer, and thereafter began an original proceeding in this court to prohibit the chancellor from proceeding with the trial of said cause.

In the opinion rendered upon a consideration of this petition, found reported as *Bassett* v. *Bourland*, 175 Ark. 271, 299 S. W. 13, denying the prayer for a writ of prohibition, we said that the circuit judge had jurisdiction to pass upon the motion to transfer to equity, and that, if the cause had been erroneously transferred to equity, prohibition was not the remedy to correct the error, but the error could be corrected only by appeal. We said:

"Petitioner pursued the proper course in objecting and excepting to the order of the circuit court transferring the case to chancery, and by appearing in the chancery court and moving to transfer the case back to the circuit court."

We said that, upon the motion to re-transfer being overruled, petitioner had the right, if he did not elect to stand upon his motion and refuse to proceed with the trial, in which event his complaint would, no doubt, be dismissed, to go to trial in the chancery court, and from an adverse decree against him he could appeal to this court, "where this court would review the case for all errors appearing in the record *de novo,*" and that "we therefore refrain from a discussion of whether the transfer from the circuit to the chancery court was right, and whether the decision of the chancery court on the motion to re-transfer to the circuit court was right, for, if both of these decisions were wrong, they cannot be corrected by prohibition, and can only be corrected by appeal."

After the rendition of this opinion the chancellor proceeded with the trial of the cause, and found the fact to be that the insured had committed suicide, and, upon this finding, decreed the cancellation of the policy, and this appeal is from that decree.

We think the chancellor was in error in assuming jurisdiction of the cause, and that he should have granted the prayer to re-transfer the cause to the circuit court. If it be said that chancery had jurisdiction upon any allegations of fraud or otherwise to cancel the policy after the death of the insured (which we do not decide), it must also be said that the jurisdiction to grant relief by cancellation was not exclusive, as the circuit court, upon proof of fraud invalidating the policy, could, by refusing to permit a recovery on the policy, have granted, in effect, the same relief. The circuit court certainly had jurisdiction to determine whether the policy was void for the reason that its reinstatement had been procured by fraud, and its jurisdiction was first invoked, and

for this reason, if for no other, the cause should have been re-transferred to the circuit court.

In the case of *Mott* v. *First Natl. Bank,* 171 Ark. 7, 283 S. W. 3, the maker of a note filed, when sued upon it, an answer, in which she alleged that the execution of the note had been procured through mistake, and she moved that the cause be transferred to equity on the ground that the answer presented an equitable defense. The circuit court refused to transfer the cause to equity, and in affirming that order we said:

"Counsel for appellant insist that the cancellation of the note was involved, and that this made it an equitable defense exclusively, but we cannot agree with counsel in this contention. The note was the basis of the action at law, and was, of course, exhibited with the complaint and introduced in evidence. It became a part of the record in this case, and a judgment for the defendant on the issues presented constituted a bar to any future action on the note, and was tantamount to its cancellation."

In the case of *First Nat. Bank* v. *Reinman,* 93 Ark. 376, 125 S. W. 443, 28 L. R. A. (N. S.) 530, it was held that, where timely objection was made to the transfer of a cause from the circuit to the chancery court in a case where the action and defense were purely legal, it was error for the chancery court to entertain jurisdiction, and for that error that decree was reversed. See also *Sledge-Norfleet & Co.* v. *Matkins,* 154 Ark. 509, 243 S. W. 289; *Equitable Mfg. Co.* v. *Thomasson,* 78 Ark. 240, 95 S. W. 459; *Weaver* v. *Ark. Natl. Bank,* 73 Ark. 462, 84 S. W. 510; *Crawford County Bank* v. *Bolton,* 87 Ark. 142, 112 S. W. 598; § 6156, C. & M. Digest.

The allegation that the reinstatement of the policy had been procured in furtherance of the insured's fraudulent purpose to commit suicide constituted no ground conferring jurisdiction on the chancery court to cancel the policy, for the reason that the policy expressly provided that it should be void in the event that the insured committed suicide, whether sane or insane, so that the

intention of the insured to commit suicide, whether to augment his estate or not, was and is immaterial.

It is an elementary principle of remedial procedure that a court of equity will not assume jurisdiction where there is a complete and adequate remedy at law, and such a remedy clearly existed in the instant case.

It is finally insisted that, even though the chancery court was in error in assuming jurisdiction, the error was harmless, for the reason that, had the trial been at law, a verdict in the company's favor would have been directed, as the undisputed testimony shows that the insured committed suicide.

If the fact of suicide is shown by the undisputed evidence, the error is not prejudicial, but the error must be held to be prejudicial if any other inference can be reasonably drawn from the testimony. If the testimony is sufficient to present the issue whether the insured committed suicide, so that fair-minded men might intelligently differ as to whether the death resulted from an accident or from suicide, the case is one for the jury.

The insured was found dead, suspended by a rope around his neck, in the barn of his son-in-law, and the circumstances strongly point to suicide as the cause of death. The majority of the judges are of the opinion, however, that this is not the only inference reasonably and fairly deducible from the testimony.

There is a presumption of law against a man's taking his own life intentionally, even when it is shown that he came to his death at his own hand. *Mutual Life Ins. Co.* v. *Raymond,* 176 Ark. 879, 4 S. W. (2d) 576; *Fidelity Mutual Life Ins. Co.* v. *Wilson,* 175 Ark. 1094, 2 S. W. (2d) 80.

In addition, it is insisted that there is an absence of testimony showing such a state of mind on the part of the insured as would be calculated to lead him to suicide. The insured had certain furniture in the barn loft of his son-in-law, and had borrowed a wagon and team from a neighbor to move the furniture to his farm. There were no stairs or steps to the loft, and the insured took

a plow-line and went to the barn, after stating that he would get the furniture down and load it into the wagon. The furniture consisted of a rocking-chair, bicycle, a boy's wagon, and some other toys. The barn loft was floored with a few scattering planks, and it is the insistence of appellant that the jury would have been warranted in finding from the testimony that the insured, after fastening an end of the rope to a rafter, fell and became entangled in the rope, which looped itself around his neck as he fell, and that in this manner the insured was accidentally killed.

Without further recitation of the testimony showing the circumstances of the insured's death, the majority are of the opinion that the testimony presented a case for the jury.

The decree of the court must therefore be reversed, and it is so ordered.

STACY *v.* EDWARDS.

Opinion delivered January 21, 1929.

[redacted]

Giles Dearing, for appellant.

J. Brinkerhoff and *M. P. Watkins*, for appellee.

HUMPHREYS, J. There is a direct and cross-appeal in this case from a specific finding and judgment rendered in accordance therewith in the circuit court of Cross County, by the trial court, to the effect that, in a final settlement, appellant, as guardian, was indebted to his ward, the appellee, in the sum of $2,001.23. This sum was the balance struck in the statement of account between them by the trial court, after hearing the testimony adduced at the *de novo* trial of the cause in said court, on appeal from the probate court of said county. The trial court's statement of account is as follows:

"W. W. Stacy should be charged with the following amount:

Paid on Turnbow estate voluntarily		$11,315.77
Amount collected through chancery court		5,264.21
Total		16,579.98
Plaintiff is entitled to one-third of this amount		5,526.66
W. W. Stacy should be charged from Dave Turnbow estate		3,307.88
And with United States warrant		117.45
Total		3,425.34
Plaintiff is entitled to one-fifth this amount		685.06
With which the guardian should be charged, and which amount brought forward		35.36
		6,247.08
Guardian is entitled to credit of	$4,783.17	
From which will be deducted an item of board for said minor	197.50	
	4,585.67	4,585.67
		1,661.41

Six per cent. interest on $1,661.41 for a period of four years, or $99.66 per year	398.64
	2,060.05
Credit due guardian for error of $274.10 at first charged against him in item of Dave Turnbow estate, and this credit is one-fifth of the error, $274.10	58.82
Balance due ward	$2,001.23

Appellant contends on the direct appeal that the judgment should be modified by deducting therefrom one-sixth of $940, expenses allowed by the chancery court in a partition suit of the lands inherited by appellee and the other five heirs from their father, W. N. Turnbow, deceased; $398.64 interest for four years on $1,661.40; one-fifth of $411.56 erroneously charged against him in the Dave Turnbow estate; the item of $197.50 disallowed appellant for boarding appellee in his home during her minority and until her marriage, after she became of age; and a reasonable sum as compensation for his services as guardian.

In order to better understand the statement of account between them by the court and the contention of appellant for a modification of the judgment and of appellee for a larger judgment, it will be necessary to set forth the salient facts in the case.

In 1916 appellant was appointed administrator of the estate of W. N. Turnbow, who died seized and possessed of a large amount of real estate and the owner of some personal property, leaving six children as his only heirs, three of whom, including appellee, were minors. At the same time appellant was appointed guardian for the three minors. On February 1, 1919, during the minority of the three heirs, he filed his first and only account current until he filed his final settlement on the 4th day of April, 1927. His first account current showed a balance due his wards of $35.36. The first account current was approved by the probate court,

and no appeal was ever taken from the judgment of approval. Appellee attained her majority on the 24th day of October, 1920. Early in the year 1920 one of the adult heirs brought suit in the chancery court to partition the real estate of which the heir's father died seized and possessed, and made the other five heirs parties thereto. The minor heirs had a homestead interest in the real estate, which was appraised at $2,500. The lands sold at the partition sale for $25,500, leaving a net balance, after deducting the value of the homestead rights of the three minors, of $23,000, to be divided between the six heirs equally, after the costs of $940, including an attorney's fee of $500, should be deducted therefrom. .....Denton, the purchaser at the partition sale, executed interest-bearing notes to the guardian to cover the entire interest of his three wards, for $13,000, when in point of fact he should have executed a note for $14,000 to him. Their homestead interest amounted to $2,500 and their one-half interest in the balance of $23,000 amounted to $11,500. The two items added together make $14,000. The guardian seems to have paid the entire amount, including attorney's fee, amounting to $940, to the commissioners. This he should not have done, as it was the duty of the adult heirs to pay one-half of the amount. The appellee herein was only liable for one-sixth of the total amount of the costs, according to the partition decree. As we understand the record, the guardian, appellant here, claims that the judgment should be modified by deducting therefrom one-sixth of the cost item. The trial court refused to allow him any credit on account of the cost item. The guardian collected from Denton the following amounts on the following dates: January 12, 1921, $400; April 8, 1921, $300; October 15, 1921, $1,000; December 15, 1921, $1,000; January 3, 1922, $1,000; March 28, 1922, $1,000; July 12, 1922, $1,000; October 11, 1922, $2,000; October 16, 1922, $1,000; and on April 26, 1923, $1,000; making in all $11,315.70 received by him voluntarily from Denton, which the trial court charged to him in the statement. Denton stopped

paying, and the guardian was compelled to bring a foreclosure suit to collect the balance due on the note, amounting, when paid, including interest, to $5,264.21, after paying the costs and attorney's fee, which amount the trial court charged to him in the settlement. In the statement made by the court appellee was allowed $5,526.66, being her one-third interest therein. The trial court also charged the guardian $3,425.34 which appellee and the other heirs inherited from their brother, Dave Turnbow, who died intestate during the month of February, 1924. Appellant was appointed administrator of Dave Turnbow's estate, and administered upon it. In the statement made by the court, appellee was allowed $685.06 of said amount, being her one-fifth interest in the Dave Turnbow estate; but later in the statement he was allowed a credit against appellee of $58.82, being one-fifth of an overcharge of $274.10 made against him on account of the Dave Turnbow estate. In the statement made by the court the guardian was allowed $4,783.17 for amounts he claimed to have paid appellee, after deducting therefrom a charge he made against her to the amount of $197.50 for board. According to the debits and credits contained in the statement made by the court, he found that the guardian, appellant here, was indebted to appellee in the sum of $1,661.41 four years before the final account current was adjudicated, upon which he charged the guardian interest in the total sum of $398.64. Appellee testified that she did not receive the entire amount of money her guardian claimed to have paid her. The dates on which he made all the payments, if she received them, are in doubt. Testimony was introduced tending to show that appellee was entitled to a much larger sum than this for interest.

After a careful reading of the record we have concluded that every debit and credit in the statement of the account by the trial court is sustained by substantial evidence, unless it be the court's failure to charge appellant with one-sixth of the additional $1,000 which appellant should have collected from Denton, the purchaser

at the partition sale, and to credit him with one-sixth of the $940 item adjudged as costs in said partition suit. The interest charged was very reasonable, considering the period of time over which the account spread and the uncertainty as to the amount appellant paid appellee. The item of board was properly disallowed. Appellee had lived with appellant as a member of his family during her minority and until she married, without any specific charge for board having been made against her, and we think it was too late to include a charge for board seven years after she attained her majority. If he expected to make a charge for board, he should have filed an annual account current and charged her with board by and with the approval of the probate court. The testimony reflects that during the time she lived in appellant's home she performed the same services any other member of the family would have performed. Appellant was allowed a credit of $58.82 by reason of an overcharge made against him of $274.10 on account of the Dave Turnbow estate. In the state of the record we are unable to say that appellant was entitled to a credit by any greater amount on account of this item. The trial court should have allowed appellant one-sixth of the $940 item adjudged as costs in the partition suit, as he justly paid out that amount on behalf of appellee, but at the same time the court should have charged him with one-sixth of $1,000 which he failed to collect from the purchaser at the partition sale. When these two items are considered together the difference is too small to interfere with the finding and judgment of the court, especially in view of the fact that the court only charged him with $398.64 interest and the further fact that the court did not allow him compensation for his services. Appellant claims that he should have been allowed a reasonable compensation for his services. Had he filed an annual account current he would have been entitled to a fee, but, having been derelict in this respect, the court properly refused to allow a fee for his services.

Appellee argues that she is entitled to a much larger judgment than was allowed her by the court, but the motion filed by her for a new trial failed to point out specifically any error the court made in the statement of the account. The motion for a new trial was upon the ground that the verdict was contrary to the law and the evidence. It was necessary for her to file a motion for a new trial in support of her cross-appeal. *St. L. S. W. Ry. Co.* v. *Alverson,* 168 Ark. 666, 271 S. W. 27. The motion filed by appellant raised the question only of whether the verdict and judgment were sustained by sufficient evidence, or, in other words, whether it was supported by substantial evidence. *Bowen* v. *Cook,* 14 Ark. 202; *Howcott* v. *Kilbourn,* 44 Ark. 213; *White* v. *Beal & Fletcher Gro. Co.,* 65 Ark. 278, 45 S. W. 1060; *Naylor* v. *McNair,* 92 Ark. 345, 122 S. W. 662.

It cannot be said, according to the undisputed evidence, that the court erred in his finding and judgment.

No error appearing, the judgment is affirmed.

HAUGHTON *v.* PIERCE PETROLEUM CORPORATION.

Opinion delivered January 21, 1929.

Murphy & Wood and *R. B. Haughton,* for appellant.

Martin, Wootton & Martin, for appellee.

HUMPHREYS, J. This suit was brought by appellant against appellees in the circuit court of Garland County to recover both actual and punitive damages for an alleged malicious assault and battery committed upon him by three employees of the Pierce Petroleum Corporation while acting in the scope of their authority for said corporation.

Appellees filed answers, denying the material allegations in the complaint.

The cause was submitted upon the pleadings, testimony adduced, and instructions of the court, resulting in a verdict and consequent judgment against appellant, from which is this appeal.

The main contention of appellant for a reversal of the judgment is that the court gave instructions numbers 10, 14, 16 and 19 to the jury, at the request of appellees, which were inherently erroneous, and which were in conflict with instruction number 1 given at the request of appellant, correctly declaring the law applicable to the case.

Appellant resides on the Albert Pike Highway, about one-half mile from Hot Springs. A lane 12 or 14 feet wide leads from the pike to his house. The lane is intersected by a branch about 30 feet from the highway, over which a wooden bridge is constructed. Pierce Petroleum Corporation is vending oil in Hot Springs. Appellant ordered some fifty or sixty gallons of oil, which was delivered in a truck driven by W. N. Johnson, an employee of said corporation. In passing over the bridge the truck broke through. In returning it again broke through, and Johnson could not get it out without help. Another employee by the name of M. E. Rutledge was sent out to assist Johnson. Fred L. Taylor, the manager of the company, went out later to take one of the employees a raincoat. A dispute arose between appellant

and Taylor as to whether the company was liable for the damage which was done to the bridge, which resulted in a fight, in which appellant was badly beaten up. Appellant testified that he was attacked by Rutledge, and before the fight was over he was also assaulted by Taylor and Johnson. His testimony was contradicted by all three of them, who testified, in substance, that appellant first abused and assaulted Rutledge, who fought in self-defense, and that Rutledge was not assisted by either Johnson or Taylor, but, on the contrary, Taylor made every effort possible to prevent Rutledge from striking appellant.

The latter part of instruction number one, given at the instance of appellant, told the jury that: "While so making repairs or so discussing liability (if either of the same is so found by the jury), any one, or more, of said Johnson, Rutledge or Taylor intentionally and maliciously made an intentional, wicked, malicious and violent assault on plaintiff, and thereby (if so found) intentionally, wickedly and maliciously beat and bruised plaintiff in the face and on other parts of his body, and that by reason thereof (if so found) plaintiff was injured in any manner as set forth in the other instructions of the court, then the jury will find a verdict for the plaintiff against such of said defendants as the jury may find (if they do so find) so assaulted and beat plaintiff; and if the jury further believe and find from the evidence that any one or more of said defendants against whom the jury may find a verdict, as aforesaid (if the jury do so find), was at the time of said assault acting in the scope of his authority or duty to defendant, Pierce Petroleum Corporation, then the jury will also find a verdict for the plaintiff against defendant, Pierce Petroleum Corporation."

This instruction correctly presented the law applicable to the facts under appellant's theory of his case. It will be observed that, under this instruction, the jury would not be warranted in returning a verdict for all of the appellees if Rutledge was justified and the others

were not. The contention of appellant is that instructions numbers 10, 14, 16 and 19, given at appellee's request, instructed the jury in effect to return a verdict for all the appellees in case it was found that Rutledge's conduct was justifiable. It will be only necessary to quote instruction number 10 in this opinion, as the same alleged error runs through all the instructions. Instruction number 10 given at the request of appellees is as follows:

"You are instructed that insulting and abusive language will not justify an assault; but, if one is assaulted, he may prove the aggression of his adversary not only in mitigation of damages, but as an absolute defense for any liability for any damage, provided he used no more force in repelling the assault than appeared to him to be reasonably necessary for that purpose; and if you believe from a preponderance of the evidence that the plaintiff assaulted the defendant, Rutledge, and that Rutledge repelled said assault, using no more force than appeared to him, acting as a reasonably prudent person, under all circumstances, to be necessary to prevent bodily harm to himself, you are instructed that your verdict should be for the defendants."

Instruction number 10 and likewise 14, 16 and 19, requested by appellees and given by the court, are inherently wrong for the reason suggested by appellant, and are in direct conflict with instruction number 1, which the court gave at the request of appellant. We do not think that it can be said that instruction number 1 cured the defect in the other instructions. Where one instruction is correct and the other is inherently wrong, and they are contradictory of each other, they necessarily involve the issue, and are misleading and prejudicial.

On account of the error indicated the judgment is reversed, and the cause is remanded for a new trial.

McHaney, J., dissents.

SIMPSON *v.* SMITH SAVINGS SOCIETY.

Opinion delivered January 21, 1929.

[redacted]

Vivion O. Brack, for appellant.

Troy W. Lewis and *Clayton Freeman,* for appellee.

KIRBY, J., (after stating the facts). Appellant insists that the court erred in not holding the transaction usurious and void and rendering judgment accordingly.

The appellee society only deducted from the amount loaned on the $300 collateral note the discount of 10 per cent. for the year, as it had the right to do under our law, and the reservation of or discount of the paper for that sum did not constitute usury. Section 7353, C. & M. Digest; *Newport Bank* v. *Cook,* 60 Ark. 288, 30 S. W. 35, 29 L. R. A. 761, 46 Am. St. Rep. 171; *Vahlberg* v. *Keaton,* 51 Ark. 534, 11 S. W. 878; *Beard* v. *Millwood,* 51 Ark. 548, 11 S. W. 881.

Castleberry v. *Wild,* 142 Ark. 627, 219 S. W. 739, is not an authority to the contrary, the facts being different, and the 10 per cent. for an entire year having been deducted there from the face of the note, which was due in 10 months. Neither are the cases of *Dickinson-Reed-Randerson Co.* v. *Stroup,* 169 Ark. 277, 275 S. W. 520, and *Virgil R. Coss Mortgage Co.* v. *Jordan,* 167 Ark. 34, 267 S. W. 590, in point as authority against this holding.

The contract too provides that no unlawful interest is intended to be charged or paid, and although it is not necessary that there shall be a mutual agreement to give and receive unlawful interest to constitute usury, if it be actually "reserved, taken or secured, or agreed to be taken or reserved," there must be an intent to knowingly take unlawful interest to constitute usury. *Garvin* v. *Lennon,* 62 Ark. 370, 56 S. W. 781; *Scruggs* v.

Scottish Mortgage Co., 54 Ark. 571, 16 S. W. 563; *American Farm Mortgage Co.* v. *Ingraham,* 174 Ark. 578, 297 S. W. 1039.

Usury will not be inferred where, from the circumstances, the opposite conclusion can be reasonably and fairly reached, and the defense should be established by clear and satisfactory evidence. *Leonard* v. *Floyd,* 68 Ark. 162, 56 S. W. 781; *First Natl. Bank* v. *Waddell,* 74 Ark. 242, 85 S. W. 417; *Citizens' Bank* v. *Murphy,* 83 Ark. 31, 102 S. W. 697; *Everett* v. *Hart,* 87 Ark. 534, 113 S. W. 213; *Briggs* v. *Steel,* 91 Ark. 458, 121 S. W. 754; *American Farm Mtg. Co.* v. *Ingraham, supra.*

The burden of proving usury in the transaction rests upon the party alleging or setting it up. *Holt* v. *Kirby,* 57 Ark. 251, 21 S. W. 432; *Citizens' Bank* v. *Murphy, supra;* 13 Clark, Ency. Evidence, page 390; *Hollan* v. *American Bank of Commerce & Trust Co.,* 159 Ark. 141, 252 S. W. 359.

The two contracts were separate and distinct, and if the one for the purchase of the investment certificate had been carried out according to its terms, the interest required on all the transactions, the investment certificate bearing 4 per cent. and agreed to be taken when matured in settlement of the money borrowed upon the collateral $300 note when it became due, would have reduced the amount of interest or discount on the loan below 10 per cent. instead of increasing it. *Reeve* v. *Ladies' Building Assn.,* 56 Ark. 316, 19 S. W. 917, Ann. Cases 1914C, p. 1307.

The note sued on was given for the payment of the purchase money of the investment certificate, and it makes no difference that the amount agreed to be paid was in 10 monthly installments, since the certificate was not matured until the end of 12 months, when the loan note was due, and neither was it the note upon which the money was loaned, but was given for purchasing an investment certificate to be used as collateral thereto.

There is a computation made in the brief showing the result of the whole transaction if the collateral note

given for the $300 borrowed should not be paid when due, but renewed for another 10 months, with the same interest rate with the matured investment certificate and interest, security therefor. The renewal note would be paid in 10 monthly installments, $300; the interest allowed on the certificate for 10 months, $10; interest on the renewal note meantime at 8 per cent., $11, showing $617 paid by the borrower, from which is deducted the amount of the collateral note and interest, leaving a net saving to Simpson, the investor, the certificate and interest amounting to $306. The investor only paid $41 for $300 for one year and 10 months, or 7.92 per cent. simple interest annually, and accumulated $306 for himself while doing so.

This transaction is analogous to the system pursued by building and loan associations in requiring borrowers to subscribe and pay for stock in the association in order to the making of the loans, which are made only to members of the association, and upheld as not usurious on that account. *Reeve* v. *Ladies' Bldg. Assn.*, 56 Ark. 316, 19 S. W. 917; *Taylor* v. *Van Buren B. Assn.*, 56 Ark. 321, 19 S. W. 918; *Black* v. *Thompkins*, 63 Ark. 502, 39 S. W. 553; *Farmers' Saving Assn.* v. *Ferguson*, 69 Ark. 352, 63 S. W. 797; *Bell* v. *Southern Home B. & L. Assn.*, 140 Ark. 371, 27 R. C. L. 210.

It has also been held that the exactment of a collateral advantage additional to the highest rate of interest allowed to be charged as a condition to the loan does not constitute usury, same being a separate and distinct charge from the amount agreed to be paid for the advancement of money. *Citizens' Bank* v. *Murphy, supra.* See also *Cockle* v. *Flac*, 93 U. S. 344, 23 U. S. (L. ed.) 949, and *Union Cent. Life Ins. Co.* v. *Hilliard*, 63 Ohio St. 478, 59 N. E. 230, 53 L. R. A. 462.

It is said in 27 R. C. L., § 31, page 230: "It is very generally held that the circumstance that the lender refused to make the loan unless the borrower would enter into another contract, which, apart from and un-

connected with the lending, would be fair and legal, does not render the agreement for the loan usurious."

We hold that the finding of the trial court in favor of appellee is supported by the testimony, and that the transaction was not usurious, and the judgment must be affirmed. It is so ordered.

LOWMACK *v.* STATE.

Opinion delivered January 21, 1929.

H. W. Applegate, Attorney General, and *Effie Combs,* Assistant, for appellee.

KIRBY, J. This appeal is prosecuted by appellant from a judgment of conviction of murder in the first

degree, with a sentence of life imprisonment imposed for killing his wife, Etta Lowmack.

It appears from the testimony that appellant, who was separated from his wife, had attended an ice-cream supper at the St. Paul Baptist Church, where she was also present on the evening of the shooting. About 10:30 P. M. the deceased, who was rooming with Cora Poe, a block or two distant from the church, left the place, running, one witness said, after Ross Bryant came and told her that Lowmack was going to kill her. Shortly afterwards two pistol shots were heard, at an interval of a minute or two apart, and a woman's voice screaming, "Oh Cousin Mary! Come and get me. Lowmack has shot me!" Witnesses went to the place of the shooting, and brought deceased to Inez Cooper's back porch. She had two bullet wounds. One bullet had lodged in the brain, and she said she was going to die, and was suffering greatly, and asked Inez Cooper to finish killing her, and she knew she was going to die. She was shot Saturday night, and lived until the next Tuesday, July 24. She inquired of this witness later, at the hospital, on the day she died, whether they had got Lowmack, and upon being informed that they had not, said: "Are they going to get him? I wish they would, 'cause he shot me." She said further that Lowmack called her to come to him, and dragged her with him into the bushes by the side of the road, had sexual intercourse with her, and, after getting up, asked if she was going to come back to him, and when she said "No," shot her. That she then called Mary Hodge, her cousin, and told her that Lowmack had shot her. Said she was in front of Cora Poe's house, where she was rooming, when appellant called her to come on with him. This statement was made about 10:30 in the morning, and deceased died at 4 o'clock in the afternoon, and was conscious all the while until her death. Deceased was shot about a half block from Inez Cooper's house, and maintained at all times after she was shot that she was going to die.

Several witnesses heard the shots and heard deceased screaming for "Cousin Mary," and stating that "Lowmack had shot her." The next morning witnesses went to the place of the shooting, and found the hat and shoes of the deceased, Etta Lowmack, a bloody handkerchief, and two empty pistol cartridge shells.

Cora Poe testified that her husband was Etta Lowmack's cousin, and that Etta roomed with them; that she saw the defendant at the ice-cream supper, and a little later Etta got some cream, and that she went home. Did not hear the shots, but, after being informed about it, met the men coming from the woods with Etta. That she said she could not live; asked them not to wash her face, but to finish killing her and get her out of pain; that she knew she could not live. Witness knew that Etta had been afraid of Lowmack, and asked why she went with him. She replied, "He called me, and told me to come there and go with him, that he wouldn't hurt me." When she got there he grabbed her by the hand and dragged her out into the woods. Said she was coming to my house, and was nearly there, was on the grass on the edge of the yard, when he called her. Witness had heard defendant say to her, a week before the killing, "If you don't take me back, I'll kill you."

Appellant testified that, after he left the ice-cream supper at the church, he went up the hill to a dance, where he stayed until about 10 oclock. He came down the hill and met his wife, who had told him before dark she wanted to see him; met her not far from Cora Poe's house, and she told him to wait there a minute. She went into the house, where she was staying, and came back with her hand in the bosom of her dress, and said, "I have got a lot to tell you." She then went over and sat down, and said to him, "Sit down," to which he replied he didn't want to. She then said she wanted $50, and he replied he did not have it. At that time somebody threw a rock and hit close to him, and she sprang up towards him, and he knocked her back, and shot her, threw the pistol down and ran. He thought

she had a gun, and as the rock fell she sprang up, and he shot as she sprang up, and knocked her back, and shot again. Knocked her back with his hand both times. She dropped something, and he turned and ran. Never saw what she had. Said he was afraid of her, as she had shot him once, but was not mad when she shot him, and he lived with her a month and a half after that. Then she went to Cora Poe's. Tried to get her to live with him, but she wanted to stay there, and he and Cora could not get along. He had never had any intention of killing his wife. He followed her because he was afraid of her, and knew she carried a pistol and an ice pick. After the shooting he caught a freight train to Malvern. Went to Gurdon, and from there to Prescott. Stayed with his brother at Prescott two days, and went to the jail and gave up. Ed Johnson told him, a week before the shooting, that deceased had gone to McElroy's, and said she wanted a pistol to kill appellant. Denied saying that he would kill his wife if she would not live with him, and denied Leola Moseby was with her before he met her the night of the shooting.

Leola Moseby had testified that she left the church and started up the hill with Etta Lowmack, going home, when her husband called her, saying, "Come back, I'm not going to hurt you," and she went to him.

The court instructed the jury, giving the usual instructions in murder cases, and giving all the instructions asked by defendant, and from the judgment on the verdict against him this appeal is prosecuted.

No brief has been filed for appellant, who was defended by attorneys appointed for the purpose, and the evidence is sufficient to support the verdict.

The only questions raised were as to the admissibility of the testimony of appellant about a former conviction, and of dying declarations. All the witnesses stated that the declarations made by the deceased were made in the belief of approaching death, and after she had stated she was going to die, and no testimony whatever tended to show that she had made any other statements about or

expected any other result from her wound. Some of the witnesses stated she said she was going to die, before making the statements relative to the shooting and how it came about, without objection made to it. All of the testimony showed, however, that she maintained at all times that she would not get well, and that she had the last conversation with Goldie Danner about 10:30 of Tuesday morning after the shooting on Saturday night, and died about 4 o'clock that afternoon, and remained conscious until her death. The statements were made by deceased after she was shot relative to the circumstances under which she was wounded, and under a sense of certain and impending death, which followed shortly thereafter, and were properly admitted as dying declarations. *Freels* v. *State,* 130 Ark. 189, 196 S. W. 913; *Stewart* v. *State,* 148 Ark. 540, 230 S. W. 590; *Burns* v. *State,* 155 Ark. 1, 243 S. W. 963; *Hudson* v. *State,* 168 Ark. 634, 271 S. W. 3.

The statements of some of the witnesses relative to the matter were made without objection, and objections and exceptions only would not avail, not having been made at the time of the introduction of the testimony. *Vaden* v. *State,* 174 Ark. 950, 298 S. W. 323; *Clardy* v. *State,* 96 Ark. 53, 131 S. W. 46; *Seaton* v. *State,* 151 Ark. 240, 235 S. W. 794.

Neither was error committed by the court in permitting appellant to be asked, on cross-examination, while testifying in his own behalf, if he had not been convicted for disturbing the peace. *Turner* v. *State,* 100 Ark. 199, 139 S. W. 1124; *Hunt* v. *State,* 114 Ark. 239, 169 S. W. 773.

The court gave all the instructions requested by the defendant, and as requested, and after a careful examination of the instructions given we do not find any error in them. No specific objections were made to instructions requested for the State, and in the motion for a new trial error is assigned only in the giving of "instruction Nos. 1 to ..... inclusive," which is not sufficient to require examination and review of any of the instructions but that numbered 1. The case being a capital one, how-

ever, all the instructions have been considered as already stated. It is true there was no instruction given on the question of dying declarations, but none such was asked, and appellant, if he desired an instruction on a particular point he regarded not covered by the instruction given, should have requested a correct instruction thereon. *Lackey* v. *State,* 67 Ark. 416, 55 S. W. 213.

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

WESTERN UNION TELEGRAPH COMPANY *v.* DOWNS.

Opinion delivered January 21, 1929.

Francis R. Stark and *Wooldridge & Wooldridge,* for appellant.

Danaher & Danaher, for appellee.

KIRBY, J., (after stating the facts). It is contended for reversal that the court should have directed a verdict in appellant's favor, and that, in any event, the evidence failed to show that the delay in the delivery of the

telegram was the proximate cause of the damage, which appellant does not deny was sustained by appellee.

It is undisputed that the telegram was sent on the date mentioned and not delivered until August 19 at 4:23 in the afternoon. The testimony on appellee's part showed it was not delivered until a second telegram had been sent him on the 19th, inquiring if the 50 bales would be shipped out this week, and also that appellee's agent immediately began inquiry of the compress company when it would be in operation again and the cotton could be compressed and shipped, and, finding it doubtful whether it could be done at all, the compress running at irregular intervals in the summer, attempted to get an agreement from the railroad company to date the bills of lading back, which the company refused to do.

The testimony is conflicting, that on the part of appellee conducing to show that the cotton could not be sampled and compressed after the delivery of the telegram in time to ship it out on the date specified in the telegram and contract for its sale, and some of the testimony for appellant tending to show that it might have been done. This question was submitted to the jury, however, upon proper instruction, and it determined that the negligent delay in the delivery of the telegram was the proximate cause of the damage resulting from the failure to ship the cotton on time according to the contract and the directions of the telegrams. This concludes the matter, the verdict being supported by substantial testimony, so far as the appellant is concerned.

Certainly no error was committed in refusing to give the appellant's requested peremptory instruction upon the case as made. The message upon its face shows it related to the sale of 50 bales of cotton, the sender and the addressee being cotton buyers residing in Pine Bluff, and well known to be such by the agent of the appellant company receiving the message for delivery. It disclosed on its face that it related to a business transaction of importance and value to the sender,

and the company had notice of any direct or actual damages resulting or that might result from its negligence in the transmission and delivery of the message, and was liable therefor. *Western Union Telegraph Co.* v. *Askew,* 92 Ark. 133, 122 S. W. 107; *Fulkerson* v. *Western Union Telegraph Co.,* 110 Ark. 144, 161 S. W. 168, Ann. Cas. 1916D, 221.

We do not find the instructions complained of open to the objections made against them, nor that any error was committed in the exclusion of the testimony of the witness Chaplin from the record, which he did not claim to have made from information furnished him, nor that it was a correct record of the dates of operation of the compress which he was required by his duties to keep. *Bush* v. *Taylor,* 136 Ark. 554, 207 S. W. 226.

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

EASTERLING *v.* FARRELL.

Opinion delivered January 21, 1929.

J. R. Parker, for appellant.

A. A. Poff, Claude M. Cruce and *W. R. Donham,* for appellee.

KIRBY, J. The undisputed testimony shows that the deceased, after his marriage, had established his home at McGehee, in Desha County, where he and his wife lived and kept house for four years, and where his work as fireman on the railroad required his residence, and where his membership in the order of locomotive firemen was kept until his death. He went down into Louisiana later, following his occupation of a railroad fireman, but never lived with his wife, who had abandoned him, nor established a home there.

The fact that deceased, after leaving McGehee, was down in Louisiana following his occupation of a railroad fireman, would not change his domicile or residence, under the circumstances of this case, from McGehee, in Desha County, where it had been established, it not being shown that he had established a home or residence in Louisiana except as indicated. *Crone* v. *Cooper,* 43 Ark. 552; *State Life Insurance Co.* v. *Ford,* 101 Ark. 521, 142 S. W. 863; *Wheat* v. *Smith,* 50 Ark. 266, 7 S. W. 161.

The testimony shows conclusively that deceased had established his home and residence with his wife at McGehee, in Desha County, where he worked and remained for four years after his marriage, necessarily showing an abandonment of any home or residence he might have had theretofore in Chicot County, and, such being the case, with letters of administration issued on his estate in that county, where the residence was shown to have been established, the burden of proof was correctly declared by the court to be upon the appellant, who attacked the legality of the issuance of letters of administration to appellee on the ground that his intestate was not a resident of Desha County, where the letters were issued.

The verdict of the jury is amply supported by the testimony, and the judgment is affirmed.

ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY *v.* NORRIS.

Opinion delivered January 21, 1929.

[redacted]

E. T. Miller, E. L. Westbrooke, Jr., and *E. L. Westbrooke,* for appellant.

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

KIRBY, J. This appeal comes from a judgment or order of the Pulaski Circuit Court, affirming an order of the Arkansas Railroad Commission requiring the appellant railway company to reinstate its passenger trains Nos. 101 and 102 in operation on its road between the cities of Jonesboro and Mammoth Spring, Arkansas, upon substantially the same schedule as said trains were operated before being discontinued, or to put into operation between said stations a motor-car of sufficient size to accommodate the traveling public and take care of perishable freight and express traffic in the affected territory.

There is a presumption that the rates fixed by the Railroad Commission are reasonable and orders made by it *prima facie* correct, and this presumption in its favor yields only to the probative force of the evidence in the record, the burden being upon the appellant carrier to show that the order or judgment is erroneous.

Ft. Smith Light & Traction Co. v. *Bourland,* 160 Ark. 1, 254 S. W. 481; *Clear Creek Oil & Gas Co.* v. *Ft. Smith Spelter Co.,* 161 Ark. 12, 255 S. W. 903. In the latter case the court said:

"Upon appeal to this court we are called upon to inquire into the weight of the evidence for the purpose of determining whether or not the judgment of the circuit court is against the preponderance of the evidence. In other words, on appeal the findings of fact by the circuit court are allowed to stand unless they are against the preponderance of the evidence when tested by the presumption in favor of the findings of the commission, as outlined above."

The petitioners were residents of the towns or stations of Williford, Imboden, Ravenden, Sedgwick, Black Rock, Bono and Portia, and seven witnesses from three of the places, Black Rock, Portia and Imboden, testified in support of the petitions, and their testimony conduced to prove the allegations of the petitions and support the findings of the commission. Black Rock is two miles north of Portia, and Imboden is nine miles north of Black Rock, and it developed that the necessity for crossing Black River on a toll bridge near Black Rock, in travel on the State highway, influenced somewhat the opinion of witnesses of the necessity for and convenience of additional train service.

Cornatzer, passenger traffic manager for the railroad, testified that, because of the travel or traffic over the hard-surface State roads, the business of the railroad had steadily decreased till it reached a point where each of the trains taken off lost approximately $1,700 a month. Said further: "Prior to construction of the hard roads and institution of bus service, trains 101 and 102 were remunerative. Trucks and privately owned automobiles have gradually depleted the earnings of the trains, and they are not paying. Our heavy decrease in local passenger earnings started on completion of the hard-surfaced roads, which in turn made greater the travel by automobile, and, if there is sufficient business to justify

it, the bus lines immediately start operation; that is typical of the general situation as to local travel not only on the Frisco, but on the other lines. The bus lines run more frequently than the trains can run, and they make lower rates than the railroads are allowed to make; the trucks operate at lower rates and deliver from business house to business house. The shipment of cantaloupes is by refrigerator cars; if they have to go any distance they have to be refrigerated, and they and watermelons are shipped by freight. Some strawberries move by express, but the season is short. May is a typical month. The loss in operating these trains, 101 and 102, is $1,776.70." Made no statement showing operating expenses and revenues for the year. Stated also that if fast through trains should be required to stop it would convert them into local trains and prevent their carrying long distance competitive traffic, which would go to competitors.

The Railroad Commission made findings that appellant company had wrongfully, on about the 20th day of June, 1926, and without notice to the commission, and in violation of § 7 of act 124 of the General Assembly of 1921, discontinued the operation of its trains Nos. 101 and 102, theretofore operated between the cities of Memphis, Tennessee, and Thayer, Missouri, serving the various towns between Jonesboro and Mammoth Spring, Arkansas; that the appellant company was not operating enough trains to reasonably accommodate the traffic, passenger, freight and express, between the said Arkansas towns; that the traveling public was greatly inconvenienced on account of it, and that the exhibit introduced by Cornatzer in his testimony showed a deficit in revenue for passenger traffic only for the operation of trains 101 and 102; that the time for which the deficit was shown travel was the lowest during the year, and that it believed statistics covering the operation of said trains for the period of one year would show a substantial gain rather than a deficit in operation; that respondent did not offer to furnish the commission with the amount

of revenue derived from express and freight handled on such trains, which, it was believed, would overcome the deficit in the operation shown by the exhibit made.

We are unable to say, after careful examination of the record, that the findings of the circuit court, which approved and affirmed the findings and order of the Railroad Commission, are against the preponderance of the testimony, when tested by the presumption in favor of the findings of the commission, and the judgment must be affirmed. It is so ordered.

ARKEBAUER *v.* FALCON ZINC COMPANY.

Opinion delivered January 21, 1929.

Dave Partain, for appellant.

E. L. Matlock and *C. M. Wofford,* for appellee.

MEHAFFY, J. The appellee, Falcon Zinc Company, owns and operates a zinc smelter located near the city of Van Buren, in Crawford County, Arkansas. Each of the appellants brought a separate suit against the appellee, each of them alleging that he owned a farm in the immediate vicinity of appellee's smelter. The suits were filed in August, 1927. The smelter had been built for several years, and appellants had alleged that the appellee had operated this smelter for a period of something more than three years, smelting large quantities of ore in its furnaces each day; that their lands, before the location and operation of the said smelter, were fertile and productive farming lands of great value, but that the appellee, during and throughout the past three years immediately preceding the filing of the suits, by and with the operation of said smelter has thrown great quantities of noxious gases, sulphur and sulphates, oxide of lead, carbon dioxide gases, and other poisonous products, the exact character being unknown to the appellants, but well known to appellee, upon and over said lands, and thereby killed the crops and vegetation growing thereon, so that, when appellants grazed stock on said lands and stock ate the grasses on which these poisonous deposits had fallen, the stock became ill and injured; and that, by reason of the conduct of the appellee, the said appellee has rendered the lands of the appellants barren and unproductive, and has greatly injured the appellants, and that plaintiffs have been damaged in the amount sued for.

The smelter filed answer, denying the material allegations in the complaint, and alleging that it began operation in March, 1923, and operated the smelter continuously up to the time of the commencement of the suits; that, if it had damaged plaintiff's land, the injury was original, and plaintiff's right of action, if any ever existed, accrued immediately, and the statute of limitations began to run against the same at said time, and that the right of action was barred because not begun within three years after they began the operation. Appellee also asked for damages in the sum of $500 for wrongfully suing out of an attachment.

There was come conflict in the testimony, but there was ample testimony to authorize the court to submit the question to the jury as to whether the operation of the smelter caused injury. While the evidence was in conflict, it was a question for the jury as to whether the smelter caused the damage. It would serve no useful purpose to set out the testimony at length.

At the request of the appellee the court gave to the jury the following instruction:

"The defendant in these cases pleads the three-year statute of limitation as a bar to recovery. If you find from a preponderance of the evidence that plaintiff's lands have been damaged by the operation of defendant's smelter and that the injury to the land began when defendant started the smelter in operation in March, 1923, and continued as long as the smelter was in operation, and if you further find that the damage to plaintiff's lands was original, then your verdict must be for the defendant, as plaintiff's causes of action would be barred because these suits were not commenced within three years after defendants commenced to operate said smelter."

The court also gave instruction number two, requested by appellee, which is as follows:

"If you find from a preponderance of the evidence that plaintiff's lands have been damaged by the operation of defendant's smelter, then you will find whether

each tract has been permanently rendered unfit for all reasonable natural uses by the operation of said smelter, and if you find that said lands have been completely and permanently destroyed for all reasonable natural uses, you will find the difference between the market value of the lands before they were permanently damaged and the present market value of the same after being so damaged, taking into consideration the general conditions affecting the market values then and now, and your verdict should be for each of the plaintiffs for such sum as you find that each has been so damaged. If you find from a preponderance of the evidence that plaintiff's lands have been permanently damaged in part for all reasonable natural uses by the operation of defendant's smelter, then you will find the difference in the market value of each tract before it was so damaged and the present market value of the same, taking into consideration the partial permanent damage to the same, and your verdict will be for each of the plaintiffs for such sum as you find their respective lands to be damaged. If you find from a preponderance of the evidence that plaintiff's lands have been damaged only temporarily, wholly or in part, by the operation of defendant's smelter, and that, if the operation of the smelter should not be resumed, the injury to their said lands has ceased, then you will find the difference, if any, in the rental value of each of their said tracts of land before and since the injury occurred, and your verdict will be for each of the plaintiffs for such sum as you so find each has been so damaged in the rental value of their respective tracts of land. If you find from the evidence that plaintiff's lands have not been damaged, wholly or in part, permanently or temporarily, by the operation of defendant's smelter, then your verdict must be for the defendant."

There was a verdict for the defendant, and the plaintiffs prosecute this appeal to reverse said judgment.

It is first insisted by appellant that instruction number one was erroneous. That instruction, it will be ob-

served, told the jury, if they found that plaintiff's land had been damaged by the operation of the smelter and that the injury to the land began when the defendant started the smelter in operation in March, 1923, and continued as long as the smelter was in operation, and if they further found that the damage to plaintiff's land was original, then they must find a verdict for the defendant, as plaintiff's cause of action would be barred because these suits were not commenced within three years after defendant commenced to operate the smelter.

This court has in numerous cases held that, notwithstanding the damage or injury might be original, the action was not necessarily barred. The rule announced by this court and followed by many cases, in speaking of the construction of a plant alleged to have caused damage, is as follows:

"If it is of such a construction as that damage must necessarily result, and the certainty, nature and extent of this damage may be reasonably estimated and ascertained at the time of its construction, then the damage is original, and there can be but a single recovery, and the statute of limitations against such cause of action is set in motion upon the completion of the obstruction."

But the court has uniformly held that, if it was known merely that damage was probable, or even if it is known that some damage is certain, and the nature and extent of that damage cannot be reasonably known and fairly estimated, but would be only speculative and conjectural, then the statute of limitations is not set in motion until the injury occurs. In other words, where a plant is constructed, even though it may be known that some damage will be caused by its operation, still the action is not barred within three years from the time of the construction of the plant unless the nature and extent of the damage can be reasonably known and fairly estimated.

The instruction complained of, while it stated that, if the damage was original, there could be no recovery, also stated that, if the jury find that the damage to plain-

tiff's lands was original, they should find for the defendant, because the plaintiff's cause of action would be barred. The court told them that the suits would be barred because not begun within three years after the defendant commenced to operate said smelter. There is no contention that the appellee was negligent, either in the construction or the operation of its smelter; but the contention is that the fumes and deposits on the land killed the vegetation and injured and destroyed the value of the land, but that the nature and extent of the damage was not known at the time of the construction of the smelter.

This court recently approved an instruction as follows:

"You are instructed that, if you find from a preponderance of the evidence that the defendant caused the plaintiff to suffer damage from the operation of its plant within three years prior to the date of the filing of the complaint herein, plaintiff's cause of action is not barred by the statute of limitations, unless you further find that the construction and operation of said plant was such that damage must necessarily result in such manner that the certainty, nature and extent of the damage could have been reasonably estimated and ascertained at the time of its construction and the beginning of operations. In other words, if it was known merely that damage was probable, or that, even though some damage was certain, the nature and extent of that damage could not be reasonably known and fairly estimated, but would be only speculative and conjectural, then the statute of limitations was not set in motion until injury occurred, and in such case there may be as many successive recoveries as there are injuries." *Brown* v. *Arkansas Central Power Co.*, 177 Ark. 1064, 9 S. W. (2d) 325.

Original, as used in the instructions, means original construction. That is, the damage results or is caused by the operation of the plant as it was originally constructed. And therefore all the damage that resulted or was caused by the operation of the plant was in that

sense original. There was no charge of negligence in the construction or the operation. Original damage means that damage that was caused by the operation of the plant as it was originally constructed. An "original construction" is defined by Bouvier's Law Dictionary, vol. 3, 2427, as follows: "This term, as distinguished from repairs, has a technical meaning in relation to railroads, and is that construction of bridges, etc., that is necessary to be done before the railroad can be opened, not such structures as are intended to replace wornout counterparts."

Instruction number one was erroneous as given. *Brown* v. *Ark. Central Power Co.,* 174 Ark. 177, 294 S. W. 709; *C. R. I. & P. Ry. Co.* v. *Humphreys,* 107 Ark. 330, 155 S. W. 127, and cases there cited.

"Original means pertaining to the beginning or origin. An original damage here means damage by the operation of the smelter as originally built." The appellee contends that the instruction given in the case of *Brown* v. *Ark. Central Power Co.,* above referred to, differed only in verbiage from instruction number one in the instant case, and insists that instruction number one clearly conveyed to the jury appellee's plea of limitations. And the question as to whether the evidence showed appellant's damage, if any, was original, was a question of fact to be determined by the jury. It is true that, whether the damage was original or not, if there is any dispute about it, it would be for the jury, and it is also a question for the jury, under the facts in this case, whether the nature and extent of the damage could be reasonably known and fairly estimated, and this question was not submitted to the jury. Instruction number one ignored this question, which is a question of fact and which should have been submitted to the jury.

"When the original act or cause of injury is paramount in its nature and the damages, both present and prospective, may be recovered in one action, the statute will generally be regarded as attaching at the time the act complained of is done. But, where a wrongful act

results in a recurring or continuing injury, there is a cause of action not only for the injury consequent upon the original act but also for such successive ones as may result in the future, in which case the statute attaches at the time of the occurrence of the injury." 17 R. C. L. 785; *Bartlett* v. *Grasselli Chemical Co.,* 92 W. Va. 445, 115 S. E. 451, 27 A. L. R. 54.

It is also contended by appellee that a general objection to this instruction is not sufficient. We do not agree with appellee in this contention. If an instruction is inherently wrong, an incorrect statement of the law, as instruction number one in this case is, a general objection is sufficient. *First National Bank* v. *Peugh,* 160 Ark. 517, 255 S. W. 4; *M. P. Ry. Co.* v. *Johnson,* 167 Ark. 464, 268 S. W. 31; *Yaffee* v. *Ft. Smith Light & Traction Co.,* 153 Ark. 416, 240 S. W. 705; *Missouri Valley B. & I. Co.* v. *Malone,* 153 Ark. 454, 240 S. W. 719.

Appellant also contends that the court erred in refusing to permit the appellant to cross-examine expert witnesses. It is true that an opportunity ought to be given for a thorough cross-examination, and especially is this true where witnesses are testifying as experts, but the trial court has much discretion in conducting the examination and cross-examination, and we cannot say that its discretion was abused in this case, and this question will probably not arise in another trial.

For the error in giving instruction number one the judgment is reversed, and the cause remanded for a new trial.

Mr. Justice Smith dissents.

WATTS *v.* TIDWELL.

Opinion delivered January 21, 1929.

[redacted]

Bush, Bush & Bush, for appellant.

H. B. McKenzie, for appellee.

MEHAFFY, J. On the 31st day of March, 1928, Mattie Bowman made a will, and afterwards, on the 12th day of May, died. On the 16th day of May, 1928, the will was filed in the probate court of Nevada County, and admitted to probate and record. On the 25th day of May, J. A. Zackery was appointed executor under the will, and his letters issued and recorded. On the 6th day of July, 1928, John Tidwell and Sid Tidwell perfected an

appeal to the circuit court of Nevada County. On the 10th day of July, 1928, they filed their objections as follows:

(1) They deny that Mattie Bowman signed the alleged will. (2) They deny it was witnessed as therein stated. (3) They allege that the said will was fraudulently prepared and executed. (4) They allege that Mattie Bowman, at the time said will was executed, was mentally incapable of making a will.

The case was tried on the 10th day of July, 1928, before a jury, and a number of witnesses testified that Mattie Bowman was incapable of making the will, and others testified that she was mentally capable of making the will.

James Stevens and W. A. Stevens, witnesses to the will, testified that Mattie Bowman signed the will in their presence, and requested them to sign it, and they did sign it in her presence and in the presence of each other.

This testimony of James Stevens and W. A. Stevens is not contradicted by any direct testimony, but Virgil Alexander testified that he knew Mattie Bowman; that she lived at his house from the Monday after the fourth Sunday in November until just before the 14th of January, 1927. She had a stroke of paralysis, and was there alone, and he got her to come and stay with him. She was not able to take care of herself. This witness also said that Mattie Bowman asked his daughter to do her writing, and said that she could not write on account of the paralysis.

Annie Alexander testified that Mattie Bowman told her that, before she had the stroke, she could write a little, and witness wrote letters for her. This witness testified that Mattie Bowman said she could not write.

The testimony showed that, after the time mentioned by the witnesses when Mattie Bowman said she could not write, her condition gradually grew worse.

Leola Alexander also testified that Mattie Bowman could not write. In addition to this, it is undisputed

that the will was signed "Mattie Bomama," and not Mattie Bowman.

Appellant's first contention is that the court erred in giving instruction No. B, which reads as follows:

"If you find from the evidence in this case that the deceased, Mattie Bowman, did not sign the instrument of writing which has been introduced in evidence as her will, then you will find against the will."

It is argued that the undisputed evidence shows that she did sign the will, and it is therefore contended that it was error to submit that question to the jury.

Appellant cites the case of *High* v. *Sharp,* 166 Ark. 424, 265 S. W. 638. The court in that case instructed the jury as follows:

"I give you in charge § 10494 of Crawford & Moses' Digest, which I here read to you: 'Section 10494. Every last will and testament of real or personal property, or both, shall be executed and attested in the following manner: (1). It must be subscribed by the testator at the end of the will, or by some person for him, at his request. (2). Such subscription shall be made by the testator in the presence of each of the attesting witnesses, or shall be acknowledged by him to have been so made to each of the attesting witnesses."

There were other instructions in that case, but it is unnecessary to set out the others, except number three, which is as follows:

"You are to determine from all the facts and circumstances in evidence whether a compliance with these requirements has been shown by a preponderance of the evidence."

The court said: "Instruction No. 2 declares the statutory requirements of the modes in general for the execution of wills. The appellants offered a general objection to the giving of this instruction. The instruction was in five paragraphs. The undisputed evidence showed that the instrument had been subscribed by the testatrix and that it was made by her in the presence of the attesting witnesses. Therefore there was no issue

to submit to the jury on the first and second paragraphs of the instruction. There was likewise no contention that the entire body of the will was written by the testatrix, and therefore there was no issue to be submitted to the jury under the fifth paragraph. There was an issue on the third and fourth paragraphs, and the court correctly submitted these issues in its instructions Nos. 4 and 6. But the court erred in telling the jury, in its instruction No. 3, that they were to determine, from all the facts and circumstances in evidence, whether the requirements of the statute as set forth in its instruction No. 2 had been shown by a preponderance of the evidence. The appellants duly excepted to the giving of this instruction, and the effect of it was to allow the jury to determine from the evidence whether the requirements in the first, second, and fifth paragraphs of instruction No. 2 had been complied with, when, under the evidence, there was no issue of that kind to be submitted to the jury. The instruction, in this form, authorized the jury to speculate concerning matters about which there was no dispute."

If appellant was correct in his statement that the undisputed evidence shows that she did sign the will, it would, of course, have been error to submit this question to the jury.

In the case relied on by appellant there was no proof, no issue as to whether she signed the will, and there was no evidence introduced tending to show that she did not sign the will. If that were true here, appellant's contention would be correct. But we do not agree with appellant in this contention. The appellees denied that she signed the will, and witnesses testified that she could not write, and, if she could not, she could not sign the will. And while there is no direct evidence that she did not sign it, there is evidence that she could not write, and this evidence tends to show that she did not sign the will. She certainly knew her name, and, if she could write at all, the presumption is that she could write her name, and spell it correctly. But she did not

spell the name correctly, if she wrote it, and the fact that her name was misspelled and that witnesses testified that she could not write, was sufficient evidence to submit the question to the jury.

"The courts need not discredit what the common experience of mankind relies upon. Judge Cooley once said that 'courts would justly be the subject of ridicule if they should deliberately shut their eyes to the sources of information which the rest of the world relies upon.' Lastly, wherever there is any serious doubt in the law as to whether certain proof is or is not permissible, a safe rule to pursue is to permit the testimony to go to the jury." 10 R. C. L. 862.

If a person should sign an instrument by mark, then evidence that such person could not write would be no evidence that he did not sign the instrument. But, when the instrument is alleged to be signed by the party, and that she wrote her own name, then proof that she could not write is admissible to show that she did not write her name.

Other testimony that tends to prove that she did not sign the will is the physician's testimony that she gradually grew worse after her stroke of paralysis.

"Ofttimes it is necessary to weigh the probative force of evidence offered, compare it with the practical inconvenience of enforcing a rule to admit it, and decide whether, as a matter of good policy, it should be admitted. But to exclude relevant evidence by any positive and arbitrary rule must be not only absurd in a scientific view, but, what is worse, frequently productive of absolute injustice. It may safely be laid down that the less the process of inquiry is fettered by rules and restraints, founded on supposed considerations of policy and convenience, the more certain and efficacious will it be in its operation. * * * The admission of every light which reason and experience can supply for the discovery of truth, and the rejection of that only which serves not to guide but to bewilder and mislead, is the great principle that ought to be the foundation of every

system of evidence. Common experience rather than technical rules should be adopted as the test." 10 R. C. L. 861.

It was therefore proper to submit to the jury the question of whether Mattie Bowman signed the will, and this instruction was justified by the evidence of her physical condition, that she could not write, and that the testimony of the physician showed that her condition was gradually growing worse after the time witnesses testified she could not write and before the date of the will.

Appellant next contends the argument of counsel for appellees was improper and prejudicial. It is stated by appellant that the attorney for appellees, in his closing argument, said that Mattie Bowman did not sign the will; that, if she did, she did not know how to spell her name, and if her mental condition was such that she did not know how to sign her name, she was not competent to make a will. Attorney for appellees then said: "If this is her signature, why did they not bring witnesses to prove her handwriting?" and "They should have had letters or other writing showing her signature to compare with the signature to the will." This was simply an argument to the jury, and was a proper argument, based on the testimony. *Hall* v. *Jones,* 129 Ark. 18; *Ark. Central Ry. Co.* v. *Goad,* 136 Ark. 437, 195 S. W. 399; *Des Arc Oil Mill* v. *McLeod,* 137 Ark. 615, 206 S. W. 655; *Booth* v. *Racey,* 171 Ark. 561, 285 S. W. 29.

The appellant contends that the appellees' exceptions to the will did not say that Mattie Bowman could not write, but it is admitted that the first exception is a denial that the said Mattie Brown signed the alleged will. Doubtless they expected to prove that she did not sign it by proving that she could not write. At any rate, that was a sufficient allegation that she did not sign it and a sufficient allegation to admit the evidence that she could not sign it because she could not write.

The judgment for costs should not have been against J. A. Zackery personally. He was not a party to the suit in any way except in a representative capacity. But Della Watts was a party to the suit, and the cost will be charged against her and against Zackery as executor.

Except as to the charging the administrator with the cost personally, the judgment is affirmed, and the costs charged against appellants. It is so ordered.

BRUNSWICK-BALKE-COLLENDER COMPANY *v.* CULBERSON.

Opinion delivered January 21, 1929.

Silas W. Rogers, for appellant.

MEHAFFY, J. Appellant brought this suit in the Union Circuit Court in replevin, alleging that it was the owner and entitled to the possession of certain described property of the value of $1,317.58; that Culberson had possession and unlawfully detains same, after demand

for the property. Prayer was for the recovery of the property, costs, etc. Proper affidavit was made for the delivery, bond was filed, and thereafter appellee filed bond to retain the property.

Appellee filed an answer, denying the allegations of the appellant's complaint, and also filed a counterclaim. In his answer and counterclaim appellee stated that he made a contract for certain pool tables and equipment, agreeing to pay $2,616.80, that he paid cash thereon the sum of $695.80, and then paid a number of installments. He also alleged that the appellant was to carry fire insurance, and was to have it written and taken out for a period of 17 months, the time in which appellee was to pay for the property; that appellee was to pay the premiums, and that the change of agreement for the appellant to take out the policy was indorsed on the policy and appellee charged with the first year's premium. He alleged that he relied on the appellant keeping the insurance in force, and that appellant, without notice to him, failed to keep the insurance in force, and that the property was destroyed by fire, resulting in a loss to appellee of $2,600; that the fire occurred and said property was destroyed within the time in which appellant had agreed to keep the property insured against loss by fire. Appellee prayed judgment against appellant for $2,600, and that, if appellant secured judgment against appellee, such judgment or claim against him be set-off against any sum due the appellant.

To this cross-complaint appellant filed a reply, and admitted that the contract was entered into between the parties, but denied that an oral contract was entered into varying the terms of the written contract, and appellant denied all the material allegations in appellee's cross-complaint.

The case was tried by the jury, and a verdict returned in favor of the appellee, and judgment was entered accordingly. Motion for a new trial was thereafter filed by appellant, which was overruled by the

court, and the case is here on appeal. Appellee has filed no brief.

The evidence showed that the parties entered into a written contract by which the appellant sold to the appellee certain property described in the contract for the sum of $2,616.80, and that of this amount $695 was paid at the time the contract was entered into, and that the balance was to be paid in monthly installments, with interest, and that said payments were evidenced by seventeen promissory notes of even date with the contract. It was agreed in the contract that the title to the property sold should not vest in the vendee until paid for in full. The contract also provided for appellant repossessing itself of the property, and that, when this was done, it should advertise and sell said property. It was further provided that the amount realized from the sale should be applied first to the remaining indebtedness and the expenses of sale, and that whatever remained should be turned over to the appellee, or sufficient to equal the amount he had paid to the appellant. It also provided that the appellant might purchase at the sale. It was also provided in the contract that the injury or destruction of the property would not operate to release the appellee from the payment nor from any conditions in the agreement. The contract provided also that the appellant might take any legal action which it deemed fit for the recovery of the money agreed to be paid under said contract. It was also stipulated that the appellee agreed to insure said property promptly against loss or damage by fire, in the sum of $2,500, and that the policy should be payable to appellant as its interest might appear, the policy to be delivered to it as soon as the insurance was effected. It was also provided that, in case appellee neglected to insure said property within ten days after the receipt of the property, appellant might effect such insurance and charge it to the appellee, and that it should be payable on demand.

After the suit was begun and appellee had given bond to retain possession of the property, after he had filed his answer and cross-complaint, but before the trial of the case, the property was destroyed by fire.

Appellee testified that, at the time of the sale, the insurance was discussed, and that he told the representatives of appellant that he wanted the contract of insurance to be a long contract, that is, he wanted the insurance to be for the life of the contract, and he testifies that this was the agreement. He also told the appellant's representatives that he could not get insurance at Norphlet, and that they were to carry it, that this was the understanding, and that appellee was to pay the premiums, but appellant was to procure the insurance, and appellee says that appellant was to carry the insurance for as long as the contract went, for seventeen months, and that before the seventeen months had expired the property was destroyed by fire.

The appellant contends that the insurance was to be for twelve months only, and not for the life of the contract, and it did procure a policy of insurance for twelve months, and the property burned after the expiration of twelve months. Appellant also disputes the testimony of appellee with reference to the insurance.

Appellant's first contention is that the court erred in refusing to direct the jury to find for the appellant, and bases its contention upon the following reasons: First, in permitting the appellee to present oral testimony to alter or vary a written contract. We cannot agree with appellant in this contention. The oral testimony did not alter or vary the terms of the written contract in any way. The written contract itself provided, of course, that the purchaser should have the property insured, but that, if he did not have it done, then the vendor might have it insured and the purchaser pay the premiums; but the oral testimony shows that appellee could not get insurance on the property in Norphlet, and that it was agreed between the parties at the time that the appellant would have the property

insured under a blanket policy, and that appellee would pay the premium. The parties had the right to make this agreement, and it did not vary the terms of the written contract. The written contract provides:

"Vendee agrees to insure said property, promptly upon receipt thereof, against loss or damage by fire, in one or more solvent insurance companies, to be approved by the vendor, in the sum of $2,500, paying the expenses thereof, and making them payable to appellant as its interest may appear, the said policy or policies to be delivered to the vendor as soon as said insurance is effected. In case the vendee fails or neglects to procure such insurance within ten days after the receipt of the property above described, then vendor may effect such insurance, and any premiums therefor shall be and become a debt payable under this contract on demand."

The vendee not only failed to procure the insurance, but told the vendor at the time of the contract that he could not procure the insurance. He then failed to procure the insurance, and the appellant itself procured it. In fact, the written contract, instead of being altered or contradicted by the oral contract testified about, provided for the very thing the parties did. It provided for the insurance policy to be taken out by the appellant, and be paid for by the appellee.

Appellant calls attention to the case of *Harrower* v. *Insurance Company of North America,* 144 Ark. 279, 222 S. W. 39, and quotes from that opinion. In that case, however, the court holds that prior oral agreements and antecedent writings forming a part of the negotiations for a contract become merged in the subsequent written contract, and are incompetent as evidence for the purpose of enlarging the scope of the written contract. But the parol contract did not enlarge the scope of the written contract. It did not alter or vary its terms in any way.

It is next contended by appellant that the court erred in permitting appellee to interpose a set-off or counterclaim in a replevin suit, where damages were not

asked. The cases, however, referred to by appellant are cases where the only issue was the title to the property. Appellant calls attention to a number of authorities to the effect that a counterclaim is not allowable in actions for replevin, but only in actions for money. This is the doctrine announced by this court in the case of *Smith* v. *Glover,* 135 Ark. 531, 205 S. W. 891, where the court said:

"We do not, however, share the views of learned counsel for defendants in the contention that the statute allows a counterclaim in an action other than one for the recovery of money. In the very nature of the subject the term 'counterclaim' means a cross demand which may be asserted in liquidation or reduction of the claim made by the plaintiff, and this is necessarily limited to actions for the recovery of money, for there could be no such thing as a cross demand asserted against a cause of action for the recovery of specific property. A counterclaim is defined to be 'a claim presented by a defendant in opposition to or deduction from the claim of plaintiff."

Appellant's action in this case was in form an action in replevin, but it was in reality an action to recover the balance due on the purchase price of the property, which appellant alleged to be $1,317.58. It sued to recover the property for the sole purpose of selling it to pay this debt. The contract itself provides that, if the appellant takes the property, he shall sell it, and first pay the balance of the indebtedness and the expenses and then turn the balance over to the appellee.

Again, in suits in replevin for property under conditional sales contracts the plaintiff must show a balance due on the contract to entitle him to recover. Our statute provides:

"In any action in a justice court or circuit court of this State, where it is attempted to foreclose any mortgage, deed of trust, or to replevy under such mortgage, deed of trust, or other instrument, any personal property, the defendant or defendants in said action shall

have the right to prove or show any payment or payments or set-off under such mortgage, deed of trust or other instrument, and judgment shall be rendered for the property or the balance due thereon, and the defendant may pay the judgment for the balance due and costs within ten days, and satisfy the judgment and retain the property." Crawford & Moses' Digest, § 8654a.

It will be noticed that the statute itself authorizes a set-off. The reason for this is that the plaintiff is seeking to recover the balance due on the property rather than the property itself, although the form of his action is replevin. If one brings a suit in replevin claiming to be the owner of the property, and the defendant claims the property, and it is not a question of indebtedness from the defendant to the plaintiff for the purchase price of the property, the issue is simply the possession of the property. Then, under the decisions of this court, a set-off is not allowable. But, where replevin is brought for the purpose of collecting the balance of the debt due, either under a mortgage or other instrument, the defendant has a right to set-off any claim he may have against the plaintiff. The statute expressly so provides. So we hold that, under the statute, wherever one seeks to replevin property under a mortgage or other instrument like a conditional sales contract, the purpose being to collect a debt, the defendant may set-off any claim he has against the plaintiff, or may file a counterclaim, while in actions of ordinary replevin, as this court has already said, a counterclaim is not allowed. But, if the statute did not authorize a set-off or counterclaim, it would be admissible in a case of this kind, for the reasons we have mentioned; that is, if it is a suit to recover a debt, and replevin is brought for that purpose, the party bringing the suit must show indebtedness, and if the other party has a claim against the party bringing the suit, equal to or greater than the plaintiff's claim, then the plaintiff would not be entitled to recover the property.

In a suit in a Virginia court, where a distress warrant had been issued and levied and a forthcoming bond had been given, the Virginia court said:

"It having been agreed between said plaintiff and said defendants that any such debt might be urged by way of offset to the said bond, if evidence of such debt should be admissible, and the plaintiff thereupon objecting to the admissibility of the said evidence, the court rejected it, upon the ground that the defense of such offset was inadmissible in a motion upon a forthcoming bond taken under a warrant of distress. To this ruling of the court a bill of exceptions was taken, which presents the only question which we have to decide in this case. The question, as already shown, is whether an offset, or a set-off, as it is more commonly called, is a good defense to a motion on a forthcoming bond taken under a distress warrant."

The court then discusses the action of replevin and the statutes and the English cases which hold that a set-off could not be pleaded to an avowry for rent. The court continued:

"In a suit for any debt the defendant may, at the trial, prove and have allowed against such debt any payment or set-off which is so described in his plea, or in an account filed therewith, as to give the plaintiff notice of its nature, but not otherwise."

"The reasons on which the English decisions, that a set-off is not a good defense to an avowry for rent in an action of replevin, were founded, is that the statutes make mention only of mutual debts; therefore the demand, as well of the plaintiff as of the defendant, must be a debt; and a set-off is not allowed in actions for torts, as upon the case, trespass, replevin, or detinue. In other words, the action of replevin was regarded in this respect as an action *ex delicto,* as it certainly is in form, and so not within the terms of the statutes. Our courts, on the other hand, regarded the action, after the defendant's avowry for rent, as in substance an action *ex contractu* by the defendant against the plaintiff for

the rent, and as therefore coming within the true intent and meaning, if not the literal terms also, of the act." *Allen* v. *Hart,* 18 Grattan's Reports (Virginia), 722.

The action in the instant case, as we have said, is in form an action in replevin, but in substance it is an action in debt.

In a case decided by the Supreme Court of Pennsylvania it was held that the defendant could not interpose a counterclaim in an action because the property in question was rented to the defendant, with certain stipulations in the contract, among others, providing that, at the end of the term for which the boiler and engine were rented, it should be restored to the owners, and that, if the defendants would comply with all the conditions of the contract and make all the payments therein stipulated when due, they might, and not otherwise, purchase at their option said boiler and engine at the end of the time for which it was rented. The law is well settled in Pennsylvania that a set-off cannot be pleaded and allowed in replevin. The court said:

"The transactions between the knitting company and Deibert, and the latter and Sprenger, did not involve a sale of a chose in action. The legal title to the boiler and engine, with the right to the rental and to take possession in case the defendants failed to pay, was what each of the purchasers in turn acquired." *Eureka Knitting Co.* v. *Snyder,* Penn. Superior Court, vol. 30, p. 336.

It will be observed upon reading the above case that the court expressly distinguished the above case from a case where there was a conditional sale. Of course a replevin of property the defendant had not purchased but had merely rented would not be such a case as would entitle the defendant to file a counterclaim. The plaintiff in the above case was the absolute owner of the property, had never sold it. The party was not seeking in any way to recover the debt, but the property. In the instant case the contrary is true. While replevin is prayed to recover possession of the property, it is only for

the purpose of collecting the debt, and we therefore conclude the counterclaim was proper.

Again, if the defendant has a counterclaim, whether growing out of contract or tort, and could not file a counterclaim or set-off in a case like this, then there would necessarily be at least two suits, when the whole matter could be settled in one. There is no reason why a counterclaim is not proper in a replevin suit where it is simply replevin in form and is an action in debt in reality.

We find no reversible error, and the judgment of the circuit court will be affirmed.

REPUBLIC POWER & SERVICE COMPANY *v.* CONTINENTAL CREDIT CORPORATION.

Opinion delivered January 21, 1929.

G. E. Garner and *Rose, Hemingway, Cantrell & Loughborough,* for appellant.

Thompson, Tyrrell & Chambers and *George A. McConnell,* for appellee.

MEHAFFY, J. The Continental Credit Corporation filed an intervention in the case of A. J. Silver *et al.* v. Republic Power & Service Co. *et al.,* in the Pulaski Chancery Court, alleging that the Republic Power & Service Company entered into a written contract with the Howe Ice Machine Company for the purchase of certain machinery, agreeing to pay therefor $28,000, and executed notes to said Howe Ice Machine Company for the purchase price. The notes provided that the title to the machinery should remain in the vendor until the purchase price was paid. It was alleged that certain payments had been made, but that two of the notes were unpaid and past due, one for $14,000 and the other for $3,833, and that there was a balance due upon both notes of $15,852.45; that the notes were indorsed to the intervener before maturity, and that it was a holder in due course. The machinery sold was one 87-ton refrigerating system, including compressors, tanks, coils and connections complete, two 50-ton compressors, and one 125 horse-power electric motor. Said machinery was being used in the plant of the Republic Company in North Little Rock. That it was depreciating in value, and was the only security the intervener had for its indebtedness. It was alleged that it was depreciating in value so rapidly that it would soon become worthless. The intervener demanded possession of the machinery, which was refused, and it asked for immediate possession or payment of the amount due.

All of the material allegations in the intervention were denied, and it was alleged that the notes were given for a patented article and no reference was contained in the notes, as required by statute.

It was also alleged in the answer that the Howe Ice Machine Company agreed to pay $100 a day as liquidated damages for delay in delivery. The Morgan Utilities Company succeeded to the contract of Republic Power & Service Company. The seller failed to deliver

some parts of the machinery, and the Morgan Utilities Company had to go into the open market and buy them at a cost of $3,500. It was also alleged that the interveners sent agents to North Little Rock and stole parts of the machinery, and that it was impossible to operate it without these parts, and that in an effort to recover the parts it was out the sum of $4,000; that this damaged the Morgan Utilities Company in the sum of $4,000. That the Morgan Utilities Company was forced to suspend business for several days, to its damage in the sum of $2,500. The statements and allegations of the answer to the intervention were denied.

It would serve no purpose to set out the testimony. There was a sharp conflict in the testimony on all the disputed points in the case. There is no controversy about the contract nor about the seller retaining title, and there is really no controversy about the fact that some of the parts were not delivered, and had to be purchased in the open market.

Appellant's first contention is that the credit corporation is not an innocent purchaser of the notes. It is contended that, because the notes were not assigned simply by indorsement in the ordinary course of business, and because the note and contract were both assigned to it, this makes the credit corporation stand exactly in the shoes of the Howe Ice Machine Company. The assignment is as follows:

"For value received, the undersigned hereby sells, assigns and transfers to Continental Credit Trust at Chicago, Ill., its successors or assigns, all right, title and interest in and to the within note or agreement, the amount payable thereunder and the property therein described. The undersigned warrants that this note or agreement was executed in connection with the sale of merchandise described in the within sales contract, said merchandise having been delivered to and accepted by the buyer named therein, and that there is now owing thereon the amounts as set forth therein, the payment of which, in accordance with all the terms and conditions herein

mentioned, is hereby guaranteed by the undersigned, together with interest, attorney's fees, court costs or other expenses in connection therewith, and the undersigned hereby waives notice of default of payment and notice of acceptance by Continental Credit Trust.

"Howe Ice Machine Co.,
"H. B. Howe, President."

The intervener is the successor of the Continental Credit Trust. It is argued that this assignment of the contract, together with the indorsement of the note, being one transaction, they must be construed together, and that they are all parts of the same contract, and that the purchasers of the note, with notice and knowledge of the relation of the contract to the note, is bound by it the same as if it were attached to the note or written upon the same piece of paper. In other words, that the assignee of the contract became obligated for the performance and acquired notice of everything that the contract contained, and that, this being true, it is not an innocent purchaser.

Appellant quotes a part of § 273, in 3 R. C. L. 1028. The part of the section immediately preceding that part quoted by appellant reads as follows:

"The courts universally hold that knowledge that a note was given in consideration of the executory agreement or contract of the payee, which has not been performed, will not deprive the indorsee of the character of a holder in due course, unless he also has notice of the breach of that agreement or contract. So knowledge of a warranty on a sale in which a note was given is held not to affect the rights of a purchaser of the note for value before maturity, if he had no knowledge of the breach of the warranty. A recital in the instrument respecting such agreement or warranty is not sufficient of itself to advise him that there was, or would necessarily be, a failure of consideration. The presumption of law would be that the contract would be carried out in good faith and the consideration performed as stipulated. Of course, if the transferee had knowledge of the breach of

contract or warranty before taking the instrument, the defense may be interposed."

The part quoted and relied on by appellant immediately follows the above, and is as follows:

"And on the principle that several instruments made at one and the same time, and having relation to the same subject-matter, must be taken to be parts of one transaction, and construed together for the purpose of showing the true contract between the parties, it has been held that an agreement made at the time of the execution of a note, forming its real consideration, and to be performed before its maturity, is a part of the same contract, and, between the original parties to the note, cannot be enforced until maturity, and before the time of performance of the agreement, with notice and knowledge of its relation to the note, is bound by it the same as if it were attached to the note or written upon the same piece of paper."

The agreement made at the time that these notes were executed is unquestionably a part of the same contract, but there is no complaint or argument that that contract was not performed, except as to the failure to furnish some of the parts, and these parts were purchased by the vendor in the open market, and he is allowed credit for them. But it is the things that were done after the contract was entered into that the purchaser complains about, the delay in shipping material. The evidence on the part of the intervener shows that the delay was caused by the purchaser's failure to pay the amount due. While there is some conflict in the testimony with reference to this issue, the preponderance of the evidence shows this to be true. Therefore, construing the note and the contract together, we do not think there is anything in the contract or note or the evidence that would disentitle even the original vendor to recover.

A person is an innocent purchaser when he purchases without notice, actual or constructive, of any infirmity, and pays a valuable consideration and acts in good faith, and in this case there is no evidence tending to

show that the intervener did not act in good faith. The proof conclusively shows that it paid a valuable consideration, and the evidence fails to show that it had any notice, either actual or constructive, of any defect or infirmity in the contract. The intervener was therefore an innocent purchaser, and if it had actual notice of everything that is contended for by appellant in this case, it would not affect its right to recover, because the failure to deliver parts and the delay in delivering parts of the machinery was caused by the failure and delay of the purchaser to pay the indebtedness it owed the vendor. At least there was evidence tending to show this, and the finding of the chancellor on this issue is supported by a preponderance of the evidence.

It is next contended by the appellant that the notes are void because they were given for patented articles. Section 7959 of Crawford & Moses' Digest provides: "This act shall not apply to merchants and dealers who sell patented things in the usual course of business."

In the first place, the evidence shows that this was not a patented machine, but the parts that had been patented, which were a part of the machinery, are not now and were not at the time of the sale patented machine, because the patents had expired. Moreover, this court has held that the sale of an article that may have some minor portions of it patented is not such a machine as is referred to in the section quoted, and the vendor in this case was a dealer, and sold the machine in the usual course of business, and, for that reason, the section relied on by appellant does not apply.

It is next contended by the appellant that it is entitled to damages for delay in complying with the contract. We agree with the appellant that the rule is that one who first breaks a contract cannot maintain a suit to recover upon it, and that such breach releases the other party from the performance, and this unquestionably means, in the sense it is used, the same contract. In this instance, however, there seems to have been a failure not only to pay on other contracts or for other pur-

chases, but a failure to meet the obligations of this contract by payments. However, there was no claim in the pleadings for this item, and all these matters were submitted to the chancellor on the evidence, and the decree of the chancellor will not be disturbed unless it is against the preponderance of the evidence.

We have reached the conclusion that the decree of the chancellor is supported by a preponderance of the evidence, and the decree is therefore affirmed.

ARKANSAS POWER & LIGHT COMPANY *v.* LEWIS.

Opinion delivered January 21, 1929.

Robinson, House & Moses, for appellant.

Dave Partain, G. C. Carter and *Patterson & Patterson,* for appellee.

McHANEY, J. In June, 1921, appellant, being the owner of the Denning Coal Company properties, entered into a lease agreement with W. H. Lewis and G. A. Sly, by which it leased to them "its coal mine located in Franklin County, near the town of Denning, known as the Denning Coal Company's mine, and all accessories, equipment, and appurtenances thereto, including engines, boilers, machinery, two mules, and such other equipment of every nature now used in the operation of said mine." The lease agreement made no reference to any particular mining lease it owned, and it and its precedessors had mined coal from the Russell & Butts lease, the Bourland lease and the Western Coal & Mining Company lease,

near Denning. Its lease to Lewis & Sly required them to operate the mine and to produce not less than one thousand tons of coal per month.

In 1922 appellee James A. Lewis, father of appellee W. H. Lewis, bought out the interest of Sly, and the property was thereafter operated by them. Appellees became delinquent in the payment of royalties of 15 cents per ton on coal mined from the lease of the Western Coal & Mining Company, and also delinquent in the payment to appellant of the stipulated sum of 35 cents per ton for the use of its mining equipment. In the latter part of November, 1924, on account of the alleged negligence of the appellees in the mining of coal from their lease, the Western Coal & Mining Company gave notice to appellant and appellees that, at a later date, they would ask for a temporary injunction restraining them from the further operation of their lease. Some time later, after their respective attorneys had consulted, a compromise agreement was reached between appellant and the Western Coal & Mining Company, whereby appellant would pay all back royalties due by appellees, and would agree to save the Western Coal & Mining Company harmless from improper or negligent operations of appellees in the future.

The Western company agreed to make a new lease, and appellees were notified that a new lease would be made, and to go ahead with the work of mining, which they did until the early spring of 1925, but neglected to pay any royalty to the Western company or appellant on the coal mined, and apparently ceased operations. Beginning in the latter part of 1923, and running through 1924 and up until May or June of 1925, the appellees were almost constantly complaining that they were losing money on their operations, asking for reduction in the royalties provided for in their lease contract, complaining of the bad price they were getting for coal, and asking appellant to come up, check them out and stop operations. For instance, in a letter dated November 10, 1924, they wrote appellants as follows: "Now, Mr. Garrett,

I think it would be better for you to send some one up here and set a price on your equipment, look the situation over and see what you have here, and put a price on it, so we can dispose of it when we mark what we can get, for we will be compelled to close down as soon as the price of coal goes down, as we have lost too much money already. I lost a thousand dollars last run, and we sure cannot lose any more."

On April 4, 1925, they wrote appellant as follows: "You will please find inclosed royalty report for February and March, but not any money. It does seem like that when we pay the labor and expense we have nothing left. Now, Mr. Baker, I don't see why we cannot get some adjustment on this royalty. If we cannot, we would be better to shut down and move the equipment. We cannot sell coal with the other mines in the field. * * * We think you all could cut your royalty to fifteen cents and the Western to fifteen and insurance five would make thirty-five cents, the highest in the field. But that will give us a chance to get into the market with other coal dealers. Now, Mr. Baker, think this over, and tell us now just what you are willing to do. If we cannot get some relief, we will be compelled to close down and find relief, or close down and get other work. Let me know right away, so as I can get out and hunt some business."

Again, on April 6, they wrote appellant in part as follows: "I am going to take another trip tomorrow and see what I can do, and if I cannot get some business, I will be compelled to seek other work and let the mining go, as we cannot afford to stay and lose any more money now."

Under date of May 8, 1925, they wrote appellant in part as follows: "Since arriving home I have been working to get some one to lease the mines. I have not got any one yet that wants to go in the mining business right now, as it is so dull there is not very much coal going out of this field at this time, only some very cheap coal, cheaper than we can produce it. * * * Now, Mr. Garrett, you all can use your best judgment about what

to do with your property here, as most coal men think that there will not be very much coal business for this field for some time. * * * Now, Mr. Garrett, let me hear from you as soon as you can, and I will keep trying to get some men to take the mines over and keep trying to get some business, and then I will have a better chance to work on a lease, as no one wants to lease a mine if he cannot work it."

Under date of May 9 they wrote appellant in part as follows: "Not hearing from you in regard to coming or sending some one here to check this mine equipment and assess the value of it, I will write you again. Now, Mr. Garrett, I don't know why you have not attended to this matter, as I think it is of importance to both of us, as I have told you in my last letter that I was not going to operate the Denning Coal Company any more, and have informed the Western Coal & Mining Company to that effect, as you have not got any coal here that can be worked at this mine. Now I have been staying here all of this week thinking you would be here or send some one to check me out, but have not heard from you."

On May 20 he wrote appellant that: "I am very sorry to say that I have not got the money to pay up this back royalty. The longer I try to run this property the further I get behind, and I cannot waste any more time with it, and have asked you to send some one to check it up so you can dispose of it or junk it, whatever you want to do with it. * * * Now, Mr. Garrett, you have not got any coal leased here that can be worked without a high cost, and the mine run coal is too cheap to try to work it any more, and I want you to get your mines back in your hands right away."

He wrote many other letters to the same effect.

In June, 1925, appellant's witness, Shores, was sent to Denning, and made a check and inventory of the property turned over to Lewis & Sly, and the property turned back to appellant, and the valuation placed on the property that was missing and not returned by appellees totaled $4,229.93, and both appellees signed the list attest-

ing its correctness. Appellant's traveling auditor testified that appellees were indebted to it for unpaid royalties and other obligations, exclusive of the unreturned property above mentioned, in the sum of $3,757.15.

The case was tried to a jury on the complaint of appellant and the cross-complaint of appellees, which resulted in a verdict and judgment for the appellees on their cross-complaint in the sum of $6,750.

Appellant requested the court to instruct the jury that appellees were not entitled to recover any damages on their cross-complaint in this action, and that their verdict on this point should be in favor of appellant. The court refused to grant this request, and this is the first assignment made by appellant for a reversal of this case. We think the court should have granted this request, for the reason that the undisputed testimony of appellees shows a voluntary surrender and abandonment of the property and their rights under the lease with appellant. The appellee James A. Lewis admits that he wrote all the letters heretofore set out and many others too numerous to set out herein, but attempts to explain the meaning of them. However, their meaning is obvious, and needs no explanation. They show conclusively that appellees have not been damaged, but, on the contrary, were losing money in the operation of the mines. We are therefore of the opinion that there was nothing to submit to the jury on appellees' cross-complaint, for the reason that they had already abandoned the mine long before they claimed to have been evicted by virtue of an injunction issued in June, 1925. The junior Mr. Lewis had quit the mines and gone to work on the highways, and the other Mr. Lewis was constantly begging to be relieved.

For this error the judgment will be reversed, and the cause remanded for a new trial on the issue as to the amount of appellees' indebtedness to appellant on its complaint.

WILDWOOD AMUSEMENT COMPANY *v.* STOUT LUMBER COMPANY.

Opinion delivered January 21, 1929.

Mahony, Yocum & Saye, for appellant.

Marsh, McKay & Marlin, for appellee.

McHANEY, J. This appeal questions the correctness of the decree of the Union Chancery Court enforcing a mechanic's lien against the surface lease and the improvements on certain suburban real estate some two or three miles north of the city of El Dorado. The facts, briefly stated, are as follows:

On May 28, 1925, William Goodwin and wife executed the lease in question to Dave Reid for a term of five years, beginning June 1 thereafter, which lease was properly recorded. On June 6, 1925, Reid and his wife assigned the same lease to appellant, Wildwood Amusement Company, a corporation, which assignment was duly recorded. Certain improvements were placed on the lease for amusement purposes. Thereafter, on April 7, 1926, the Wildwood Amusement Company entered into a contract of sale thereof with Stell & Chapman for a con-

sideration of $20,000, evidenced by 27 notes, the last of which matured on July 1, 1928. The contract and notes provided that, if default should be made in the payment of one note, all remaining notes should become due and payable at the option of the holder. The contract of sale also obligated the purchasers to erect a dancing pavilion on the lease, at a cost of approximately $2,000, and to make certain expenditures for other purposes. Title to the property was retained by the seller until all notes were fully paid, and the purchasers contracted that they would not permit any liens of any nature to be incurred on the property. The purchasers went into possession, and proceeded to make the improvements required by the contract, and, in doing so, became indebted to appellee, the balance of which, at the time this suit was brought, amounted to the sum of $1,094.06, for which the chancery court entered a decree, together with interest at 6 per cent. from July 3, 1926.

Appellant challenges the correctness of this decree on two grounds: First, that no notice of a mechanic's lien was served on the Wildwood Amusement Company, the corporation, and second, that the title of the Wildwood Amusement Company is superior to the lien of the appellee.

Relative to the first proposition, it appears from the evidence that the notice that appellee claimed a lien on the property was served on each of the stockholders of the corporation, there being only three, and necessarily on all of the officers of the corporation, and the notice itself was addressed to and served on the persons operating under the name of the "Wildwood Amusement Company." While no notice addressed to the Wildwood Amusement Company was served upon it as a separate, distinct entity, the notice was served upon the stockholders and officers, and the corporation could only take notice through them if a notice had been addressed to it personally. We hold this to be a substantial compliance with § 6917, C. & M. Digest, requiring such notice. This court has many times held that the mechanics' lien stat-

ute should be liberally construed in favor of the lien claimant, and that a substantial compliance with its terms is all that is necessary. *Conway Lumber Co.* v. *Hardin,* 119 Ark. 43, 177 S. W. 408, and the cases cited therein.

The next contention as to the priority of rights, we think the court correctly held that the lien of appellee on the lease and the improvements thereon was superior to the title of appellant. As we have already stated, the contract of sale required the purchasers to make the improvements which were made, and at their own expense. The title to the whole property was retained in appellant, including all improvements to be erected on the lease by Stell & Chapman, the effect of which was to constitute Stell & Chapman the agents of the Wildwood Amusement Company for this purpose, as it required them to make these improvements to their property, and which was to remain their property until all the purchase money notes had been paid in full. Under these conditions we think it would have been no different had the Wildwood Amusement Company itself erected these improvements before the sale and required the purchasers to pay therefor in the contract of sale. This court has held that, where property is leased under a contract with the lessee to make certain improvements, to be paid by the lessor, the property itself is subject to the lien for materials furnished. *Whitcomb* v. *Gans,* 90 Ark. 469, 119 S. W. 676; *Langston* v. *Matthews & Lawton,* 117 Ark. 626, 173 S. W. 397; *Davis* v. *Osceola Lumber Co.,* 168 Ark. 584, 270 S. W. 960. In the last case mentioned the court said:

"While the materials were charged on the books of appellee to the lessee, they were bought by him under authority from the lessor, to be used for making permanent improvements on her property, which had the effect of constituting him her agent in law for the purchase of the materials. The principle announced in the case of *Whitcomb* v. *Gans,* 90 Ark. 469, 119 S. W. 676, is applicable in the case at bar."

While it is true in the cases cited that the lessor agreed to pay the cost of the repairs or improvements made by the lessee, still we think the same principle is applicable to the case in hand, for the reason that the seller required the purchaser to make the improvements, which were to be his until the purchase money was fully paid.

Counsel for appellants cite the cases of *Fine* v. *Dykes Bros.*, 175 Ark. 672, 300 S. W. 375, and *Morrilton Lumber Co.* v. *Groom*, 176 Ark. 520, 3 S. W. (2d) 293, in support of their contention in this regard, but the principle announced in those cases can have no application here. In those cases they merely permitted the improvements to be made, or had knowledge that they were being made, but had no contract obligating the purchasers to make them.

We find no error, and the decree is affirmed.

ROSE *v.* STATE.

Opinion delivered January 28, 1929.

[redacted]

[redacted]

J. C. Brookfield, for appellant.

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

HART, C. J. This appeal is prosecuted from a judgment of conviction for the statutory crime of selling intoxicating liquor.

The only ground relied upon for a reversal of the judgment is based on the ruling of the trial court with reference to summoning a special venire to try appellant before the regular panel of the jury was exhausted. When the case was called for trial, twelve of the regular panel had been selected to try a companion case to the present one. The case in question was based on the same facts as was the case at bar. The trial of that case was temporarily suspended to take up the present one. The other regular panel of the jury had also been selected in part to try another case. Five members of the regular panel had been selected in the case, and seven of them had been excused. When the present case was called for trial, the court first called a special venire, and a part of the jury was selected from it. Before the jury was completed, however, all of the seven of the regular panel which had not been selected in the other two cases referred to were examined by the court and excused for cause. Another special venire was summoned, from which the jury in the present case was completed. No objection was made to any of the special venire except that it was not regularly selected.

Appellant had no right to have a jury exclusively selected from the rest of the regular panel of jurors. Such a rule would impede the progress of the court in the

trial of cases and would result in unnecessary delay both in the trial of civil and criminal cases. Frequently such a rule would subordinate the business of the entire court to the demands of the defendant in a particular case, and we do not think such was the intention of the Legislature in passing our statute with reference to the selection of a special venire to try cases.

Upon the practice of impaneling a trial jury under our statute, this court is committed to the rule that the trial court should be possessed of a large measure of discretion in such matters, in order that the business of the court may be dispatched expeditiously, and this court will not interfere with its action where it is not in violation of some mandatory provision of the law, unless it is shown to operate to the prejudice of the party complaining. *Mabry* v. *State,* 50 Ark. 492, 8 S. W. 823; *Pate* v. *State,* 152 Ark. 553, 239 S. W. 27; and *Sullivan* v. *State,* 163 Ark. 11, 258 S. W. 643.

Appellant was not entitled to have any particular jury to try his case. It does not appear that he challenged any of the jurors for cause, nor does he make it appear that any of them were prejudiced against him. Hence, he was in no attitude to complain of the manner in which the jurors necessary to complete the full panel were selected, in the absence of any showing that the members of the special panel were prejudiced against him. *Johnson* v. *State,* 97 Ark. 131, 133 S. W. 596; and *Rogers* v. *State,* 133 Ark. 85, 201 S. W. 845. In this connection it may be stated that the presumption must always be, until the contrary is shown, that the trial court did not abuse its discretion in the manner of impaneling the jury. *Bennett* v. *State,* 161 Ark. 496, 257 S. W. 372.

In the application of the rule announced in the above cases, and others which might be cited, we are of the opinion that the trial court did not err in the manner of selecting the jury. As we have already seen, twelve members of the regular panel had been selected to try a case dependent upon the same facts as the present one.

This case had been temporarily suspended by the trial court, and no abuse of its discretion in so doing has been shown. Five members of the other panel of the jury were engaged in the trial of another case at the time the present case was called for trial. It is true that there were seven members of this panel present in the courtroom, but these were all examined and excused for cause by the trial court before the jury was completed in the case at bar. While some of the special venire were examined before the members of the regular panel, this amounted to an irregularity merely. All the members of the regular panel not engaged in the trial of other cases were examined, and excused for cause by the trial court before the jury in the present case was completed. No abuse of discretion in excusing these members of the regular panel is shown; and we hold that no prejudice resulted to appellant from the action of the court in the premises. Therefore the judgment will be affirmed.

SHARP *v.* OATES.

Opinion delivered January 28, 1929.

[redacted]

[redacted]

Edward Gordon, and *Colvin & Sellers,* for appellant.

Strait & Strait, for appellee.

HART, C. J., (after stating the facts). The record shows that the appellants are the collateral heirs of Lela Van Winkle, deceased, and are entitled to whatever estate she left. At the outset it may be stated that the right to cancel a deed obtained from the grantor by mistake,

fraud, duress or undue influence descends to the heirs, if it exists in the ancestor, unimpaired at the time of his death. *Reaves* v. *Davidson,* 129 Ark. 88, 195 S. W. 19; case-note to 2 A. L. R. at p. 431; and note to 33 A. L. R. at p. 53.

This brings us to a consideration of the merits of the case. To invalidate a deed on the ground of the grantor's mental incapacity, the evidence must show that the grantor did not have sufficient intelligence to comprehend and act upon the affair in question, and that he did not understand and comprehend the nature and consequences of his act. *Bilyeu* v. *Wood,* 169 Ark. 1181, 278 S. W. 48.

Counsel for appellants rely upon two grounds to avoid the deed of Lela Van Winkle at the time she executed it. One is that she was mentally incapacitated on account of the excessive amount of narcotics which had been given her in her treatment for tuberculosis. On this point the divorced husband of Lela Van Winkle testified that she was addicted to the use of drugs on account of having tuberculosis, and that this rendered her mentally incompetent to comprehend any business transaction of an extended character. We do not attach much importance to his testimony, for he is not shown to have been a man of any decided character himself. The parties did not live together long, and the record shows that Lela Van Winkle was a woman of as much or more intelligence than her divorced husband. Appellants also introduced the testimony of two experts, who examined the chart of the last illness of Lela Van Winkle, showing the amount of narcotics given her during the last few months of her life. Judging from the amount shown from the chart, they testified that she could not have been mentally competent to comprehend the nature of the transaction which she entered into with Dr. Oates on the Sunday morning in question, and that she was not mentally competent to execute the deed on the following morning. On the other hand, several physicians for appellee testified that the amount of narcotics given

her at that time was not excessive, and that she fully understood the nature of the transaction, and was mentally capable of executing the deed on the next morning after she had agreed upon the terms of the trade with Dr. Oates. Dr. Laws was one of these witnesses. He testified that Lela Van Winkle was a young woman of an unusually bright mind, and that she was only weakened physically by disease. She had contemplated selling the land in controversy for some time, and wished to do so in order to set her mind at rest concerning her future finances. She knew that she would have to remain in the sanatorium near El Paso, and her land was situated more than 1,000 miles away, in Conway County, Arkansas. She wished to sell it in order that she might invest the proceeds in such a way that she might invade the principal at any time she deemed it advisable for her physical and mental comfort.

Several business men of Conway County of acknowledged good repute testified that appellee gave an adequate consideration for the land. A careful consideration of the testimony leads us to the conclusion that $20,000 was a fair value for the land, instead of $36,000 as testified to by witnesses for appellants. These disinterested witnesses placed the value of the land at about $20,000, and gave their reasons for so doing.

Dr. Oates is not contended to have practiced any fraud on Lela Van Winkle, but it is contended that, by reason of his relationship to her, he unduly influenced her in the premises. There is nothing in the record tending to show that he said or did anything to cause her to sell the land against her will. While he had gone there for the purpose of purchasing the land for his wife, he did so after receiving a letter from the financial adviser of Lela Van Winkle, informing him that she wished to sell the land. There was no relation of trust or confidence between the parties, and no reason why Lela Van Winkle should have been unduly influenced by the mere presence of Dr. Oates.

As we have already seen, the land was sold for an adequate consideration, and Lela Van Winkle had evidently made up her mind in advance of seeing Dr. Oates that she wished to sell the land. It was not a jumped-up transaction, in which she acted hastily and without any advice upon the subject. She had contemplated selling the land for some time, and the sale was made to one of the parties to whom she had written concerning the purchase of the land. The burden was upon appellants to establish mental incapacity upon the part of the grantor, or that she was induced to execute the deed by undue influence. *Atwood* v. *Ballard,* 172 Ark. 176, 287 S. W. 1001.

It is well settled in the cases above cited, and in many others that might be cited, that, if a person has mental capacity to execute a deed, in the absence of fraud or undue influence, mental weakness, whether produced by old age or other physical infirmities, will not invalidate the deed. *Pledger* v. *Birkhead,* 156 Ark. 443, 246 S. W. 510; *McCulloch* v. *Campbell,* 49 Ark. 367, 5 S. W. 590; and *McDonald* v. *Smith,* 95 Ark. 523, 130 S. W. 515.

It cannot be said that the findings of fact by the chancellor are against the preponderance of the evidence, and therefore, under the settled rule of this court, the decree will be affirmed.

CLAY COUNTY BANK *v.* FIRST NATIONAL BANK.

Opinion delivered January 28, 1929.

Frank Weldin and *W. E. Spence,* for appellant.

M. P. Huddleston, for appellee.

SMITH, J. The First National Bank of Paragould brought this suit against the Clay County Bank of Piggott, and for cause of action alleged that, on or about December 20, 1926, A. & S. Bertig Company had on deposit with the Clay County Bank, hereinafter referred to as the defendant, the sum of $857.88, which belonged to the plaintiff bank, and was deposited by A. W. Hanf, manager of the Bertig Company, without the knowledge or consent of the plaintiff. It was further alleged that the said Bertig Company, for the purpose of transferring said funds to the plaintiff, issued to plaintiff against said deposit numerous small checks, and while said deposit remained with the defendant bank in the name of the Bertig Company, Hanf, its manager, notified defendant that he had so issued said checks to the plaintiff, and furnished defendant a list thereof. Hanf, at the time of leaving the list with the defendant, notified it that $857.88 of the Bertig Company's deposit with defendant was for the purpose of paying said checks.

It was further alleged that, on or about December 24, 1926, when the checks so drawn to plaintiff's order were presented to defendant for payment, the checks were dishonored, for the reason that the deposit of the Bertig Company had been appropriated and applied to the payment of a past-due note of the Bertig Company to the defendant bank.

In support of these allegations Hanf testified as follows: Bertig & Company owned a store in Piggott, which witness ran as manager. Witness made deposits in the defendant bank daily of moneys belonging to Bertig & Company, and drew checks against these deposits, signed "A. & S. Bertig Company, by A. W. Hanf."

The Bertig Company furnished plantation supplies to numerous persons in and around Piggott, from whom

notes were taken covering the accounts, and these notes had been sold to the plaintiff bank. Hanf kept copies of these notes, which he called "dummy" notes, and as he made collections he would make indorsements on the dummy notes, and when a note was paid in full he would remit to plaintiff bank the amount thereof and secure the original note for surrender to the maker. These collections were made in the fall of the year.

In June, 1926, the Bertig Company borrowed $5,000 from the defendant bank, without security, so far as the record before us shows.

Hanf began the collection of these notes owned by the plaintiff bank on November 11, and it was his practice, when he made a collection, to draw a check for the amount thereof on defendant bank in favor of plaintiff bank, but, instead of remitting the check to plaintiff, it was placed in a drawer and kept with similar checks until December 20, when he had accumulated 41 checks, totaling $857.88. On this date Hanf presented to the cashier of the defendant bank a list of the checks so drawn, and directed the cashier to take care of these checks when they were presented. The account of the Bertig Company with the defendant bank exceeded the amount of the checks shown on the list left with the cashier. The defendant bank did not know that Hanf had made collections from the makers of notes owned by the plaintiff bank.

On December 22, 1926, and on December 24, 1926, before the checks were presented by plaintiff bank for payment, the defendant bank credited the note of the Bertig Company to its order with the sums of $856.98 and $750, respectively, and, after these sums had been so appropriated, there did not remain to the credit of the Bertig Company's account sufficient funds to pay the checks held by the plaintiff, and they were dishonored upon presentation, whereupon this suit was commenced.

The cashier of the defendant bank testified that he did not know that Hanf had collected and deposited money belonging to the plaintiff bank, and that fact

appears to be undisputed. He further testified that Hanf brought the list of checks to the window and said: "There is a list of checks I want protected," and gave as his reason for the request that "Hurt Grocer Company had a trade acceptance for seven or eight hundred dollars that they had sent there for collection, and they had been calling every day to know about its acceptance, and Mr. Hanf presented that list of checks for us to protect, and asked us to tell Hurt Grocer Company that they had no funds, that there were checks out to cover it." The witness was not asked to certify the checks; indeed, only a list of the checks was presented to him. Hanf was accustomed to make requests of this kind, and witness did not pay much attention to him, and "We always told Mr. Hanf that we would do the best we could, and that if he had the money in there we would pay for him, and if he didn't, we couldn't," and that the witness did not make any agreement at all. The testimony of the cashier, in its entirety, makes it clear that he understood Hanf was anticipating a garnishment proceeding on the part of the grocer company, and desired to defeat it by having the cashier answer that he had no funds belonging to Bertig Company without actually withdrawing the funds, and witness did not enter into the agreement. He testified that "We would not make any agreement at all."

The testimony of the cashier and that of Hanf cannot be reconciled upon the controlling question of fact whether the cashier agreed to pay the checks upon presentation. The cashier's denial of this agreement, and his statement that he understood Hanf was endeavoring not to pay plaintiff but to defeat the garnishment of the grocer company, finds substantial corroboration in the cross-examination of Hanf himself. Upon being interrogated about the garnishment, Hanf testified as follows: "Q. But the moving cause was that the funds were about to be tied up, wasn't it? A. I suspected it; yes sir. Q. Did you at that time say one thing to that bank that this was a trust fund and belonged to the First National Bank? A. I don't remember. Q.

Don't you know you didn't tell them that? A. I don't think I ever mentioned a trust fund. Q. Or that it belonged to the First National Bank? A. I told them I had collected it for them. Q. That was after it was all gone? A. (No answer)."

In the case of *Causey* v. *Eiland,* 175 Ark. 929, 1 S. W. (2d) 1008, 56 A. L. R. 529, we held that, where a check is certified by a bank, the funds of the drawer are, in legal contemplation, withdrawn from his credit and appropriated to the payment of the check, and the bank becomes the debtor of the holder, and is absolutely liable for the payment of the check when presented. In deciding the instant case in favor of the plaintiff, the chancellor applied this principle, in effect, holding that the direction of Hanf to the cashier of the defendant bank constituted the funds of the Bertig Company a special deposit to the extent of the amount of the checks contained in the list filed with defendant's cashier.

We do not, however, find the facts as the court below did. We accept the statement of the defendant's cashier as the correct version of the transaction, and therefore find that no special deposit was created. Although Hanf claims, in effect, that the collections which he made for the benefit of the plaintiff, beginning in November, and which were deposited with defendant, were in the nature of a trust fund, the account was overdrawn from November 16 to November 29 and from December 8 to December 17, 1926, so that practically all of the alleged trust fund had been withdrawn before the list of checks was delivered to defendant's cashier, at which time, it is true, there were sufficient funds derived from other sources to have paid the checks mentioned on the list had the existing balance of the Bertig Company been made a special deposit. But, as we have said, we find the fact to be that there was no agreement to that effect.

A bank has the right to set-off against an overdue note of a depositor so much of the deposit as is required to discharge the note. *Carroll County Bank* v. *Rhodes,*

69 Ark. 43, 63 S. W. 68; *Boone County Bank* v. *Byrum*, 68 Ark. 71, 56 S. W. 532.

In the annotator's note to the case of *Arnold* v. *San Ramon Valley Bank*, 13 A. L. R. 320, it is said that: "The decided weight of authority is to the effect that, where the bank in which funds in which third persons have an interest are deposited in the individual name of the depositor, has neither actual knowledge nor notice of facts sufficient to put it upon inquiry as to the true character of the deposit, it may apply the deposit to the individual debt of the depositor."

The court below found the fact to be that defendant bank had no knowledge of the wrongful acts of Hanf in checking against deposits which had been, in fact, for the benefit of plaintiff bank, but which collections had been deposited in the name of the Bertig Company. But, as has been shown, these funds had been practically consumed by checks drawn by Hanf in the name of the Bertig Company, as he had authority to do, before the list of checks was filed with defendant bank.

In the case of *Covey* v. *Cannon*, 104 Ark. 550, 149 S. W. 514, it was held (to quote a syllabus): "Where a bank has mingled trust money with its own funds, money paid from such fund for its own purposes will be presumed to have been paid from its own money and not from the trust funds; but where the mingled fund is at any time reduced below the amount of the trust fund, the latter must be regarded to that extent as dissipated, and sums subsequently added from other sources cannot be treated as a part of the trust fund."

We conclude therefore that the court below was in error in holding defendant liable for the conversion of a special deposit by the payment of a past-due note payable to its own order, for the reason that there was no special deposit, and the decree appealed from will therefore be reversed, and the cause of action dismissed.

AUSTIN BRIDGE COMPANY *v.* VAUGHAN.

Opinion delivered January 28, 1929.

Buzbee, Pugh & Harrison, for appellant.

SMITH, J. Appellee brought suit against the Austin Bridge Company, without allegation as to defendant's character as being the business of some individual, or a copartnership, or a corporation. As an incident to the suit a writ of garnishment was served on the White & Black Rivers Bridge Company. The garnishee filed an answer, admitting that it was indebted to plaintiff in a sum exceeding the amount sued for; but the defendant made no answer, and judgment was rendered against both the defendant and the garnishee for the amount sued for.

The return upon the summons reads as follows:

"State of Arkansas, County of Prairie—ss. I have this 30th day of March, 1928, duly served the within

by handing a copy of the same to the within named Austin Bridge Company, by Shannon Miller, eng. and agt., in charge of Austin Bridge Company's business in Des Arc, Ark., as therein commanded. * * * Geo. J. Screeton, sheriff, by E. J., deputy sheriff."

This appeal is from the judgment rendered upon the return of service above set out.

It obviously appears that the instant case is substantially identical with that of *Moreno-Burkham Const. Co.* v. *Thorpe,* 152 Ark. 550, 237 S. W. 427, and the instant case may be decided by quoting from what was there said as follows:

"The return of service on the writ of garnishment in this cause shows no sufficient service on the garnishee, Moreno-Burkham Construction Company. It does not appear from the record whether the Moreno-Burkham Construction Company was a foreign or domestic corporation, or a partnership. If it was a domestic corporation, the return is not sufficient, because it does not show that service was had on the agent of the corporation during the absence of the president of the company, as required by § 1147 of Crawford & Moses' Digest. If appellant was a foreign corporation, the return is not sufficient because it does not show that service was had upon the agent designated by the corporation in the manner provided by § 1829 of Crawford & Moses' Digest. See *Arkansas Construction Co.* v. *Mullins,* 69 Ark. 429, 64 S. W. 225, and *Southern Building & Loan Association* v. *Hallum,* 59 Ark. 583, 28 S. W. 420. Neither does the return show that the summons was served upon the agent, servant or employee in charge of a branch office or other place of business of the corporation in Washington County, Arkansas. Hence the return is not sufficient as covering the matter of service of process on domestic and foreign corporations who keep or maintain a branch office or other place of business in any of the counties of this State. See *Fort Smith Lbr. Co.* v. *Shackleford,* 115 Ark. 272, 171 S.

W. 99, and *Terry Dairy Co.* v. *Parker,* 144 Ark. 401, 223 S. W. 6.

"If appellant was a partnership, service must have been had upon the individual members composing the partnership, and the return is insufficient because it does not show that fact.

"The effect of the above decisions is that no presumption can be indulged upon an appeal from a judgment by default that there was some other and different service had from that which appears in the record."

The judgment appealed from must therefore be reversed, and the cause remanded with directions to proceed in the cause, the appellant having entered an appearance by appealing.

As the judgment against the defendant debtor falls, that against the garnishee must fall also.

STAFFORD *v.* FIRST NATIONAL BANK.

Opinion delivered January 28, 1929.

William M. Hall, Brewer & Cracraft and *J. C. Brookfield,* for appellant.

Ogan & Shaver, for appellee.

HUMPHREYS, J. This suit was brought by appellants in the circuit court of Cross County, against appellees, to recover $1,346.37 alleged to be a partnership fund, which appellees appropriated to pay an individual debt due them by appellant, H. H. Stafford, and to recover damages for the alleged misappropriation of said fund. The individual debt was in the form of a judgment which appellees procured against H. H. Stafford on the 28th day of April, 1921, and which they have been unable to collect.

It was alleged that appellants were partners, doing a general building business under the firm name of H. H. Stafford; that on July 17, 1924, they opened an account with appellee bank in the name of H. H. Stafford for the purpose of depositing school warrants advanced to them by Special School District No. 4 of Barton, Arkansas, for the express purpose of paying for material and labor in the erection of a school building for said district, which appellants had contracted to build; that on December 22, 1925, appellees procured a writ of garnishment in their favor against H. H. Stafford, and had the sheriff serve same upon appellee bank, and paid the amount specified in the writ out of their deposit to appellee bank in satisfaction of said judgment; that the name of the clerk of said court was signed to the writ of garnishment, in his absence, by a lady stenographer under twenty-one years of age, who had not been regularly deputized, and, for that reason, the writ was illegal and void; that, on account of the issuance and service of the garnishment, they were unable to pay for material and labor, and lost their contract, to their damage in the amount of 15 per cent. on the contract price, and expenses in the sum of $25 in going from Helena to Wynne in order to raise money to take up the dishonored checks on account of the misappropriation of their deposit.

Appellees filed an answer, denying that appellants were partners and that said fund was partnership money, that the fund was a special deposit, or that the writ of garnishment was void.

The cause was submitted upon the pleadings, the testimony introduced by the parties and the instructions of the court, resulting in a verdict against appellants and a consequent judgment dismissing their complaint, from which is this appeal.

It will be unnecessary to set out the substance of the testimony relative to the validity of the writ of garnishment, as the court did not submit that issue to the jury on his own motion, and no request was made by appellants for him to do so.

The trial court refused to submit the issue of whether the money garnished was a special deposit, although requested to do so by appellants. The requested instruction of appellants upon that issue is as follows:

"If you find the money in question was a special deposit for the purpose of paying labor or material, or for any other payment, and that the bank and C. B. Bailey so understood it, then the fund was not subject to garnishment."

This instruction should have been given, as appellant's testimony, corroborated by the school warrants, furnished a sufficient basis to submit the issue to the jury for determination. He testified relative to this issue, in substance, as follows:

"When I put the money there it was deposited in warrants of this school district, and the bank cashier and C. B. Bailey all knew that I was giving checks down at Barton and then bringing these warrants or sending them on to the bank before the checks got there. I know Bailey and the cashier knew all about this money being turned over to our firm to pay for the material and labor, because we had been doing this all along through this contract; and one time some of the checks beat the warrants there and they held the checks until I got the warrant on in. And Bailey was the active vice

president, and knew all about it. I also understand that Mr. Ellis, the assistant cashier, knew beforehand of this plot to garnishee our account, as Mr. Ellis stated that he asked Dr. Hare not to garnishee same if he deposited the school warrants to our account, and, with his assurance that he would not, placed same to our credit.

"Q. Did the defendant bank refuse to honor your checks at a time when there was a greater amount on deposit than the garnishment herein was for? A. They did, and later they gave me the money, and I took up some of the checks they had turned down with it. The school district had not issued warrants enough to pay up everything due. All the money on deposit was partnership money in so far as it was any of our money. But it was money turned over to us to pay up claims for which liens could be filed against the building. Our profit would have come out of the per cent. held back until the completion of the building, which we did not get on account of the garnishment. Lost money on the school job and other jobs. The school district got sued for some of these debts which weren't paid, and refused to pay us the balance on the job, which would have been our profit."

In submitting the issue of whether funds on deposit were partnership money, the court instructed the jury as follows, over appellant's objection and exception:

"A partnership is a collection of two or more individuals who enter into a mutual agreement to conduct a joint venture or enterprise and share in the profit and losses arising therefrom, as may be agreed upon."

This instruction was an erroneous declaration of law, because it is not essential to every partnership that each man share in the losses. By agreement it may be otherwise. Bearing upon this point, appellant testified that he and his two sons formed a partnership, but that one of his sons furnished necessary money to begin their business, with the understanding that he should participate in the profits, if any, but should not suffer any part

of the losses they might sustain. The court subsequently withdrew the instruction, and submitted the issue whether there was a partnership in the form of an interrogatory propounded to the jury, for it to answer either in the affirmative or negative, without defining a partnership other than the definition first given and afterwards withdrawn. In withdrawing the definition of partnership, the court did not tell the jury he had withdrawn it because it was erroneous. In answering the interrogatory the jury may have labored under the impression that the definition of a partnership as first announced by the court was correct, notwithstanding the fact that the instruction had been withdrawn. In stating and submitting the issue of partnership the court should have correctly defined a partnership, in view of the fact that he had theretofore incorrectly defined the same as applicable to the testimony introduced.

On account of the errors indicated the judgment is reversed, and the cause is remanded for a new trial.

BAKER *v.* HARRIS.

Opinion delivered January 28, 1929.

[redacted]

Robert Bailey and *Robert F. Smith,* for appellant.

H. W. Applegate, Attorney General, *Troy W. Lewis,* and *Adrian Williamson,* for appellee.

HUMPHREYS, J. This suit was brought in the circuit court of Faulkner County against appellees to enjoin them from enforcing three orders issued from the office of the Adjutant General of the State of Arkansas and Chief of Staff of the Governor as Commander in Chief of the Arkansas National Guard. The first order was issued on April 26, 1928, and is as follows:

"1. A detached officers' list and a detached enlisted men's list is hereby created for the Arkansas National Guard. Officers and enlisted men not assigned to duty with any branch or bureau shall be carried on the detached officers' list and the detached men's list, respectively. Officers and enlisted men may be transferred from duty with any branch and assigned to the detached officers' list and the detached men's list respectively.

"By order of the Governor:

"Joe S. Harris,
"Brig. Gen. A. G. D. Ark. N. G.
"The Adjutant General."

The second order was issued on April 27, 1928, and is as follows:

"1. Colonel James H. A. Baker, infantry, Arkansas National Guard, is hereby relieved as commanding officer 153rd Infantry, Arkansas National Guard, and is transferred and assigned to the detached officers' list.

"2. Upon his request, the resignation of Brigadier General Heber L. McAlister, adjutant general's department, Arkansas National Guard Reserve, is hereby accepted.

"3. Heber L. McAlister is appointed colonel infantry Arkansas National Guard, and assigned to com-

mand the 153rd Infantry, Arkansas National Guard, vice James H. A. Baker, transferred to the DOL.

"By order of the Governor:

"Joe S. Harris,
"Brig. Gen. A. G. D. Ark. N. G.
"The Adjutant General."

The third order was issued on April 28, 1928, and is as follows:

"1. Regimental headquarters, 153rd Infantry, Arkansas National Guard, is hereby transferred from Russellville, Arkansas, to Conway, Arkansas.

"By order of Governor:

"Joe S. Harris,
"Brig. Gen. A. G. D. Ark. N. G.
"The Adjutant General."

The gist of the complaint is that the orders, if not enjoined, will deprive appellant of his command as colonel in the Arkansas National Guard, after being recognized by the Federal Government, and will effect his discharge from the Arkansas National Guard without a trial by court-martial or an efficiency board.

In addition to filing a demurrer attacking the jurisdiction of civil courts in military matters, appellees filed an answer, denying that the orders will have the effect alleged, but, on the contrary, their only effect will be to relieve appellant of his assignment to duty as commander of the 153rd regiment infantry, without a trial by court-martial or an efficiency board.

The chancery court heard the cause upon the pleadings and testimony adduced, and upon his own motion transferred the case to the circuit court. There the appellees filed a motion to dismiss appellant's complaint, which was submitted and heard upon the pleadings and documentary evidence filed in the chancery court and transmitted to the circuit court, from which the trial court found:

"That the Governor of Arkansas, as commander-in-chief of the Arkansas National Guard, through the adjutant general as his chief of staff, had and has authority

to issue and to enforce the orders complained of by plaintiff, creating the detached officers' list for the Arkansas National Guard, and relieving plaintiff from command of the 153rd infantry regiment, and commissioning the defendant, Heber L. McAlister, as colonel in the Arkansas National Guard and assigning him to duty as commanding officer of said regiment, and transferring the headquarters of said regiment from Russellville, Arkansas, to Conway, Arkansas; and that defendant's motion should therefore be sustained."

Pursuant to the findings, the court dismissed appellant's cause of action, from which he has duly prosecuted an appeal to this court.

Appellant contends for a reversal of the judgment upon the alleged grounds that the Governor of the State, as commander-in-chief of the State forces, does not have discretionary power to create a detached officers' list for the officers of the national guard, and to place active federally recognized officers upon said detached officers' list.

There can be no doubt that the Governor, as commander-in-chief of the Arkansas National Guard, is vested with discretionary authority to create a detached officers' list for the Arkansas National Guard, under State and Federal statutes providing as follows:

"The Governor is hereby authorized, and it shall be his duty, to prescribe such regulations as he may see fit for the organization of the 'Arkansas National Guard', and he shall from time to time, as he may deem for the best interests of the service, change such regulations, which shall be in accordance with this act, and shall conform as near as practicable to the organization of the army of the United States." Section 7171, Crawford & Moses' Digest of Arkansas.

"Organization of National Guard Units. Except as otherwise specified herein, the organization of the national guard, including the composition of all units thereof, shall be the same as that which is or may hereafter be prescribed for the regular army, subject in time

of peace to such general exceptions as may be authorized by the Secretary of War." Section 60 National Defense Act.

"Composition of the Regular Army. The regular army of the United States shall consist of the infantry, the cavalry, the field artillery, * * * detached officers; detached enlisted men; the officers and enlisted men of the retired list;" etc. Section 2 National Defense Act.

"Detached Officers and Enlisted Men. All officers and enlisted men authorized by law and not assigned to duty with any branch or bureau herein provided for shall be carried on the detached officers' list and detached enlisted men's list, respectively." Section 25, National Defense Act.

There is also no doubt that the Governor, as commander-in-chief of the Arkansas National Guard, is vested with discretionary authority to transfer officers from one command to another or from any command to the detached officers' list in the Arkansas National Guard, although such officers have been federally recognized, without a trial by court-martial or before an efficiency board, provided no attempt is made to relieve them of their office. The only constitutional or statutory inhibition is that officers in either the army or national guard cannot be removed from office without a trial, either before a court-martial or an efficiency board. By reference to general orders numbers 7 and 67, heretofore quoted, it will be observed that the Governor did not attempt to deprive the appellant of his office and commission as colonel in the Arkansas National Guard. The only thing he did was to relieve the appellant of his assignment to duty as commanding officer of the 153rd regiment infantry, and to assign him to the detached officers' list. It is stated at page 676, 40 C. J., that: "The Governor may, in the exercise of the discretion vested in him, relieve officers (of the national guard) from command." And on page 1058, par. 52, 18 R. C. L., that: "In disbanding a part of the organized militia and placing officers on the supernumerary or retired list there is no

violation of the constitutional provision which forbids removal from office of any commissioned officers of the militia except through the sentence of the court-martial." In the case of *Grove* v. *Mott,* 46 N. J. Law 328, 50 Am. Rep. 424, the court stated:

"The argument that the section of the act under which Major General Mott placed the officers of the disbanded company on the retired list is in conflict with the Constitution of the State, is fallacious. It is contended that it violates article 7, § 1, paragraph 6, which forbids the removal from office of commissioned officers of the militia, except through a sentence of court-martial. The answer is that the officers of the disbanded company have not been removed from office. The framers of the national guard act knew the difference between taking away an officer's commission and placing him on the retired list. This court not having jurisdiction over the subject-matter brought here by the writ, it is dismissed."

The Governor, as commander-in-chief of the national guard of Arkansas, is invested with authority to relieve officers (of the national guard) from any particular command and place them on the detached officers' list under the following constitutional and statutory provisions, to-wit:

"The Congress shall have power: * * * To provide for the organization, arming and disciplining of the militia, and for governing such part of them as may be employed in the service of the United States, reserving to the States, respectively, the assignment of the officers, and the authority of training the militia according to the discipline prescribed by Congress." Art. 1, § 8, of the Constitution of the United States.

"The militia shall consist of * * * and shall be organized, officered, armed and equipped and trained in such manner as may be provided by law." Art. 11, § 1, of the Constitution of Arkansas.

"The Governor shall be commander-in-chief of the military and naval forces of this State, except when they

shall be called into the actual service of the United States." Art. 6, § 6, of the Constitution of Arkansas.

"The Governor of this State, by virtue of this office, shall be the commander-in-chief of the military forces of this State." Section 7169, Crawford & Moses' Digest.

"The Governor is hereby authorized, and it shall be his duty, as soon as practicable after the passage of this act, to establish and prescribe such rules, regulations, forms and precedents, not inconsistent with the Constitutions of the United States and of this State, as he may deem proper and necessary for the organization, government, discipline and instruction of the Arkansas National Guard and reserve militia. He shall from time to time issue such general and special orders as may be requisite to render the military forces of this State efficient and its organization complete, * * * and shall have full control and authority over all matters touching the militia, its organization and discipline." Section 7173, Crawford & Moses' Digest.

"All officers in the military service of this State shall be appointed and commissioned by the Governor, at his discretion." Section 7193, Crawford & Moses' Digest.

No error appearing, the judgment is affirmed.

FORT SMITH-SPADRA MINING COMPANY *v.* SHIRLEY.

Opinion delivered January 28, 1929.

T. D. Wynne and *Pryor, Miles & Pryor,* for appellant.

Jesse Reynolds, for appellee.

HUMPHREYS, J. This suit was brought against appellant to recover damages for a personal injury to his hand and arm, received while engaged in applying a dressing to a circular conveyor belt 20 inches wide and 70 feet long, which carried coal in preparation for market, upward at an angle of 30 degrees to receptacles or bins. In order to keep the belt from slipping on the driving pulleys around which it circled it was necessary to apply a dressing, which was in the form of a stick, by rubbing the stick over the lower part of the belt, on the inside thereof. Appellee alleged in his complaint that the injury resulted from appellant's negligence in failing to furnish him a safe place to work and safe instrumentalities with which to work, due to the worn condition of the belt, which had threads hanging down, that entangled appellee's hand and pulled it between the belt and pulley, which was not covered by a guard.

Appellant filed an answer, denying the allegations of the complaint, and pleaded as an affirmative defense that appellee assumed the risk.

The cause was submitted upon the pleadings and testimony, which resulted in a verdict and judgment against appellant for $2,500, from which is this appeal.

The testimony was conflicting as to the condition of the belt. According to the undisputed evidence there was no guard over the pulley, but none had ever been over it. The testimony does not reflect just how one could have been put over it nor that, in the proper construction of the plant, one should have been put over it.

Appellant contends for a reversal of the judgment because the court gave instruction number 5 as follows:

"The court tells you that the coal mining company is not an insurer of the safety of its employees, but it is obligated to furnish them with safe instrumentalities and a reasonably safe place to do their work, and if they fail to do that, they are guilty of negligence, and if their negligence caused the injury, they are responsible in damages to the plaintiff. I say they are not the insurer of the safety of the employees, but they are required to furnish them a safe place and safe instrumentalities with which to do their work."

This instruction is inherently wrong, because it placed the absolute duty on appellant to furnish appellee a safe place in which to work and safe instrumentalities with which to do his work. It in so many words told the jury that appellant was not an insurer of the safety of appellee, yet, in effect, instructed that it was. The instruction was conflicting within itself. Appellant was only required under the law to exercise ordinary care to furnish appellee a reasonably safe place in which to work and reasonably safe instrumentalities with which to do the work.

Appellant also contends for a reversal of the judgment because the trial court refused to give its requested instruction number 2 as follows:

"You are instructed that, on the allegation of negligence that there was no guard to prevent plaintiff's hand from being drawn between the belt and the pulley, your verdict must be for the defendant."

This instruction should have been given, because the failure to cover the pulley with a guard was alleged as an act of negligence, and appellee testified that it

had no guard over it. It is true that appellee abandoned the absence of a guard as an act of negligence by failing to request an instruction to that effect, yet it was in the case by allegation and proof of the fact, and appellant had a right to have that issue effectually eliminated by a declaration of the court.

Appellant also contends for a reversal of the judgment because the court refused to admit the written statement made by appellee to the claim agent of the Home Accident Insurance Company as to the manner of his injury. There was a slight conflict between his testimony in the trial and the written statement he made, and the court should have admitted it in evidence on that account for what it might have been worth in weighing the evidence.

Appellant also contends for a reversal of the judgment because the attorney for appellee referred to the liability insurance company in the case as the real party in interest. This remark was improper, but we would not reverse the judgment for that reason alone, as appellee testified, without objection on the part of appellant, to having made the written statement to the agent of the liability insurance company. The remark should not be repeated on a retrial of the cause.

As the judgment must be reversed and remanded for a new trial on account of giving and refusing the instructions mentioned, and the refusal to admit appellee's written statement concerning the manner of receiving his injury, we refrain from passing upon the sufficiency of the testimony relative to the assumption of the risk by appellee.

The judgment is reversed, and the cause is remanded for a new trial.

SMITH, J., concurs.

MCHANEY, J. I dissent on the ground that the undisputed proof shows there was a space of eight feet from the pulley in which appellee could have applied the dressing to the belt, and that, in choosing a place so close to the pulley as to make it dangerous, he assumed

the risk. The danger was perfectly obvious, and on this question the case is ruled by *Ward Furniture Mfg. Co.* v. *Weigand,* 173 Ark. 762, 293 S. W. 1002. On the authority of that case the judgment should be reversed and the case dismissed. I therefore dissent on the order reversing and remanding. I concur otherwise.

McCulla *v.* Brown.

Opinion delivered January 28, 1929.

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G. L. Grant and *Starbird & Starbird,* for appellant.

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

KIRBY, J., (after stating the facts). It is insisted that the circuit court erred in transferring the cause to equity, and likewise that the chancellor erred in not remanding to law, and also in sustaining the demurrer to the complaint. The relief sought was purely legal, an action for damages upon the statute allowing the injured party double damages for violation thereof. *Rinehart & Gore* v. *Rowland,* 139 Ark. 90, 213 S. W. 17. There was no ground for equitable relief alleged in the complaint nor in the defenses set up in the answer, consisting of specific denials of the allegations contained in the complaint.

The second alleged defense, that the order of the probate court directing the guardian to invest the minor's funds in real estate was null and void, constituted no defense for appellee Brown, if the order was void, the deed conveying the lands from Brown to Nettie M. McCulla was not affected by the invalidity of such order, so far as Brown was concerned, and certainly a deed from her to appellant conveyed the title to the lands, regardless of his infancy and the fact that the deed was not recorded, as was directed should be done. Tiedeman on Real Property, § 561; 3 Washburn, Real Property, 591.

The third ground of defense alleged that the minor's guardian had never made a final settlement with the probate court of the estate, and that no suit had been brought against the guardian and her bondsmen to determine their liability, and that the bondsmen should have been made parties to the suit and an accounting had, pleading same as a complete bar to the suit. The liability

of Brown, under the facts alleged in the complaint, if he was liable at all, was without regard to any liability of the guardian and her bondsmen. A tort-feasor cannot allege the liability of another as justification for his act nor for the purpose of contribution, each being jointly and severally liable for the tort, plaintiff having the right to join them all in his suit for damages for the injury or to sue them separately. *Myers* v. *Linebarger,* 134 Ark. 231, 203 S. W. 580; *Coats* v. *Milner,* 134 Ark. 311, 203 S. W. 701.

The bondsmen would have been liable only, in any event, *ex contractu,* while the liability of Brown was *ex delicto* for a tort, and they could not have been held for an accounting to appellee in the same action where appellee was held liable for the tort, and the plaintiff could sue either of the tort-feasors without joining the others, notwithstanding he was entitled to but one satisfaction. C. & M. Digest, § 1076.

The allegation that the final purchasers of the land were guilty of the same kind of offense charged to Brown did not constitute their action a part of the transaction for which it was alleged he was liable, and could have constituted no defense to the suit against Brown.

It follows that error was committed in transferring the cause to equity and also in not remanding it to the court of law. The chancellor likewise erred in sustaining the demurrer and dismissing the complaint after allowing the answer to be withdrawn. The allegations of the complaint were sufficient to constitute a cause of action under the sections of the statute, and the special demurrers were not well taken.

It appears, however, that, after part of the evidence had been heard, the cause was continued, and the sureties upon the guardian's bond were ordered to be made parties to the action, and summons issued against them, and, the plaintiff refusing to amend his complaint to allege a cause of action against the new parties, the court sustained the demurrer and dismissed the complaint. Plaintiff had the right to select the defendants in this

litigation against whom he would proceed, and if the court, at the instance of the party sued, decided that the cause could not be finally determined without joining these other parties, it could not require the plaintiff to proceed against them in any event, even though it held that they should be made parties in order to protect the defendant in any right the court thought him entitled to in the final determination of the cause. The court erred in sustaining the demurrer and dismissing the complaint.

The decree is accordingly reversed, and the cause remanded with directions to remand it to the circuit court for all further proceedings in accordance with law and not inconsistent with this opinion. It is so ordered.

FIDELITY UNION CASUALTY COMPANY *v.* POSEY.

Opinion delivered January 28, 1929.

John F. Park, for appellant.

R. W. Wilson, for appellee.

KIRBY, J. Appellant insists that the court erred in not giving its requested peremptory instruction directing the jury to find in its favor, the policy excluding

recovery on account of accidents suffered by insured while driving a motor truck.

The undisputed testimony shows that appellee was injured while cranking the car or truck—was out on the ground attempting to start it by turning the crank when the injury was sustained. The policy expressly insures against accidental injuries sustained while operating, driving, riding in or on, demonstrating, adjusting or cranking an automobile. This language necessarily covers and insures against the risk attending upon cranking an automobile, unless it is so limited by said part 4, § E, as not to do so. This exception relates only to injuries received while driving or riding in or on any motorcycle, automobile truck, tractor or aircraft, and is not in conflict with or repugnant to the insuring clause covering the risk of bodily injury sustained while cranking an automobile. Since the risk from cranking an automobile is covered expressly and since the exemption or exception is not broad enough or sufficiently specific to exempt the company from liability for injury received from cranking an automobile truck, it necessarily follows that the court did not err in refusing the request for a peremptory instruction. *English* v. *Shelby,* 116 Ark. 212, 172 S. W. 817.

We find no error in the other instruction complained of, and the evidence is sufficient to support the judgment, which must be affirmed It is so ordered.

LAMBIE *v.* W. T. RAWLEIGH COMPANY.

Opinion delivered February 4, 1929.

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Jeff Bratton, for appellant.

Horace Sloan, for appellee.

HART, C. J., (after stating the facts). It is first contended by counsel for appellants that the decree should be reversed because the special chancellor who rendered the decree in the foreclosure proceeding was not elected in accordance with the provisions of our Constitution relating to the election of special judges when the regular judge is absent or disqualified. On this point a *nunc pro tunc* decree was entered of record which recited that on the 10th day of March, 1927, the regular chancellor failed to appear at the courthouse, at the time and place prescribed by law and by former adjourning order of the court, for the holding of an adjourned day of said court on March 10, 1927. It further recites that the practicing attorneys met at the courthouse on said day and held an election for special chancellor to preside at such adjourned day, and Gordon Frierson, who possessed the requisite qualifications required by law, received a majority of votes, and was duly declared elected Among other cases tried was the foreclosure proceeding in which a decree of foreclosure was rendered. It was not necessary that the record should affirmatively show that the regular chancellor was absent, sick or disqualified, and that for one of these reasons a special judge was elected.

In *Fernwood Mining Co.* v. *Pluna,* 136 Ark. 107, 205 S. W. 822, it was held that, where the record of the circuit court shows that the regular judge was absent on the first and second days of the term, and that a special judge was elected in accordance with the requirements of the Constitution, such record is impervious to attack on appeal,

unless the facts which would defeat the election are recited in the record itself.

The special chancellor in the present case was elected under the same section of article 7 of the State Constitution, and that case controls here. The *nunc pro tunc* order shows that Gordon Frierson was duly elected special chancellor in accordance with the provisions of the Constitution, and that he entered upon the discharge of his duty as such special chancellor. Therefore it was not necessary that the record show that the regular chancellor was sick or unable to hold the court, or was disqualified to act in the case at bar.

Moreover, as we shall see, this is a collateral attack on the decree, and in such cases it is not necessary that the existence of the causes should appear on the face of the record. If the record is silent on the subject, and such an appointment of a special chancellor could have been made legally under any circumstances, the authority to make the appointment or election, and that the grounds therefor existed, will be presumed. This rule was recognized and approved in the case last cited.

Upon the merits of the case, it may be stated at the outset that there is a marked difference between the effect given a judgment or decree when it is attacked collaterally and when it is directly attacked, as upon appeal or by a complaint filed to set it aside for fraud or unavoidable casualty. If the judgment or decree is void upon the face of the record itself, it may be attacked collaterally; but if its invalidity is not apparent on the face of the record, it cannot be attacked collaterally. In the foreclosure suit the court had jurisdiction of the subject-matter and of the parties when the decree was rendered. Therefore it had jurisdiction; and no mere irregularity in the subsequent proceedings will avail to invalidate the decree and the sale thereafter, except upon appeal, or a motion to set aside the decree during the term it was rendered; or in a direct proceeding to set aside the decree for fraud or unavoidable casualty. An attack upon a judgment upon the ground that it was procured by fraud is

a direct attack, since the establishment of the fraud shows that no judgment or decree has been rendered. Fraud, however, from which such relief may be given, does not include a judgment or decree regularly obtained upon a fraudulent claim or by false testimony, but it is limited to fraud in procuring the judgment. *Cassaday* v. *Norris,* 118 Ark. 449, 177 S. W. 10; *Ruddell* v. *Richardson,* 140 Ark. 198, 215 S. W. 711; *Road Imp. Dist. No. 4* v. *Ball,* 170 Ark. 522, 281 S. W. 5; *Dunn* v. *Bradley,* 175 Ark. 182, 299 S. W. 370; and *Winfrey* v. *People's Savings Bank,* 176 Ark. 941, 5 S. W. (2d) 360.

Within the rule just announced there is no testimony in the record whatever tending to show that the decree was obtained by fraud. Mrs. G. W. Lambie admitted on cross-examination that she was served with summons in the cause, and it was her duty to keep up with the subsequent proceedings in the cause thereafter. G. E. Lambie was also served with summons, and admitted that he knew of the pendency of the suit in the chancery court.

Neither does the record show any unavoidable casualty or misfortune that prevented the defendants from appearing and defending the action. As we have just seen, both parties were served with summons, and must thereafter take notice of the pendency of the suit. No misrepresentations were made by the attorneys for the plaintiffs in foreclosure proceedings. G. E. Lambie does state that it was understood between him and the attorneys for the plaintiff in the suit that no decree was to be taken until the 15th day of May, 1927. He did not attend court on that day, however, or give any excuse for not doing so. He does state that his boy was killed in a storm in the month of May, but he does not state that the death occurred on or about the day he thought the case was to be called for trial. He does not present any legal excuse for not attending court on the day he understood the decree was to be taken if no defense was made to the action. Neither of the appellants make any show of merit or give any reason whatever why judgment should

not have been rendered against them for the amount sued for in the foreclosure proceeding. A party seeking relief against a judgment or decree on the ground of unavoidable casualty or misfortune must show that he himself is not guilty of negligence. *Farmers' Mutual Fire Ins. Co.* v. *Defries,* 175 Ark. 548, 1 S. W. (2d) 19.

The commissioner appointed to sell the land gave notice of the time and place and terms of the sale, as required by statute and by the terms of the decree on the 25th day of August, 1927, that the sale would be had on the 17th day of September, 1927. The sale was had on that day, and the plaintiff in the case became the purchaser for $200. No exceptions were filed to the sale, and it was duly confirmed by the court on October 7, 1927. The land was bid in for the sum of $200, and was worth at least $1,500. During all this time the defendant, G. E. Lambie, who was looking after the matter for himself and for his mother, had a sick wife and other sickness in his family. One of his boys had been killed by a storm in the spring, and, if a direct attack had been made on the sale, the confirmation of the sale would have been set aside, under the rule announced in *Chapin* v. *Quisenberry,* 138 Ark. 68, 210 S. W. 341, and other subsequent decisions of this court. In that case it was held that the chancery 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 interest, although the purchaser himself was guilty of no fraud or misconduct.

In the present case, however, no attempt was made to prevent a confirmation of the sale by the defendant. Although G. E. Lambie denied receiving the letter of June 20, 1927, from Penix & Barrett, in which they notified him that they had been lenient with him, and would be forced to sell the land right away, he does admit writing to one of the attorneys on the next day a letter which shows that he knew the land was about to be sold, and that he was trying to borrow money with which

to redeem it. In this connection it may be stated that Joe C. Barrett testified positively that G. E. Lambie knew that a decree of foreclosure would be taken on the 10th day of March, 1927, and that he would be given thirty days within which to pay off the decree before the land would be advertised for sale. However, as we have already seen, no appeal was taken from the decree, and no grounds for setting aside the decree on the ground of fraud or unavoidable casualty has been shown.

Therefore the present suit can only be considered as a collateral attack on the decree. In a case-note to 1 A. L. R. 1446, the general rule is stated to be that, where the sale has been confirmed, matters between the decree and the sale cannot be collaterally attacked, and many cases are cited in support of the rule. It is also said that an order confirming a sale of real estate, where the court has jurisdiction, cures all defects and irregularities in the proceedings, and that the judgment cannot be attacked collaterally. This rule has been recognized by this court. In *Byers* v. *Fowler,* 12 Ark. 399, 54 Am. Dec. 271, the court said that, admitting all the irregularities alleged to exist, they could not be brought up collaterally to affect a sale made under a valid execution. It was said that the parties had a right to question the proceeding, but that they must do it directly, and not collaterally.

In *Lawson* v. *Jordan,* 19 Ark. 297, 70 Am. Dec. 596, there were some irregularities in the sale of the land under execution, and the court said this could only be taken advantage of by the debtor himself in a direct proceeding for the purpose, and not in a collateral proceeding. In *Field* v. *Dortch,* 34 Ark. 399, the court had under consideration a sale under a special execution against the property seized, and the court said that the regularity of the exercise of the power depended upon an entire conformity with the statutory direction. The defects in that case the court held to be merely error, and that they could not be collaterally questioned. In *Webster* v. *Daniels,* 47 Ark. 131, 14 S. W. 550, the court had under consideration irregularities in a case where the execution was alleged to be

based upon an insufficient transcript in the circuit court from the justice court, and the court said that this constituted at most an irregularity, and as such could only be taken advantage of by the defendant in a direct proceeding to quash the process.

Again, in *Stout* v. *Brown,* 64 Ark. 96, 40 S. W. 701, it was held that a sale of attached property under a writ of *venditioni exponas,* after it had been reported to and confirmed by the court, could not be collaterally attacked upon the ground that such writ did not specify the property to be sold, or that the officer sold without authority, or that he sold without giving the notice required by law. Again, in *Stout* v. *Brown,* 64 Ark. 312, 42 S. W. 415, there were some irregularities in the sale that might have been attacked in regard to the price for which the lumber was sold, and the court held that, while the irregularities would not affect the validity of the sale in a collateral proceeding, yet, upon direct attack by appeal from the order confirming the sale, it could be set aside. In that case there was a direct attack by appeal, and the sale was set aside and a renewal order of sale was ordered. The same principle applies to judicial sales where they have been confirmed and are attacked collaterally.

In *Cassady* v. *Norris,* 118 Ark. 449, 177 S. W. 10, the court said that mere errors and irregularities are not grounds for vacating a judgment by way of collateral attack, and that the judgment must be assailed only in a direct proceeding. The court further held that, after a confirmation of a sale has been made by order of the court, all defects and irregularities in the conduct of the sale are cured, and every presumption will be indulged in favor of its fairness and regularity.

Before the confirmation of the commissioner's sale, irregularities may be shown, that the sale was not made in accordance with the provisions of the decree; or any misconduct or unfairness may be shown in order to set aside such sale. All these matters are passed upon by the chancellor when he confirms the sale. After the

confirmation of the sale by the court, all defects and irregularities in the conduct of the sale are cured, and every presumption will be indulged in favor of its fairness and regularity. *Bank of Pine Bluff* v. *Levi,* 90 Ark. 166, 118 S. W. 250.

In the application of these principles to the case at bar, we are of the opinion that, by the order of confirmation, the chancery court adjudged that the decree and the subsequent proceedings of the sale were executed in conformity with the terms of the decree, and were valid. The proceedings are not impeached by anything apparent on the face of the record, and upon a collateral attack the sale must be regarded as valid in fact and in law. Therefore the decree will be affirmed.

MEHAFFY, J., dissents.

ADDITIONAL OPINION.

HART, C. J. Counsel for appellants, in their motion for rehearing, insist that they have appealed from the foreclosure decree and that this constitutes a direct attack on it. Conceding, without deciding the question whether they have appealed from the foreclosure decree within the time prescribed by the statute, this does not help their case any. On cross-examination Mrs. G. W. Lambie admitted that she had been duly served with summons in the case, and the record shows that fact. The record shows that G. E. Lambie, her son, was duly served with summons, and he admitted that he knew of the pendency of the action. He admitted talking with attorneys for the plaintiff in the foreclosure suit. One who is aggrieved by a judgment rendered in his absence must show, not only that he was not summoned, but also that he did not know of the proceedings in time to make a defense. *Karnes* v. *Ramey,* 172 Ark. 125, 287 S. W. 743. See also *Fore* v. *Chenault,* 168 Ark. 747, 271 S. W. 704; and *C. A. Blanton Co.* v. *First National Bank,* 175 Ark. 1107, 1 S. W. (2d) 558.

Again, this court has held that one who seeks to be relieved from a judgment upon the ground of unavoidable casualty, preventing a defense to the action, must

show that he has a meritorious defense. *Smith* v. *Globe & Rutgers Fire Insurance Company,* 174 Ark. 346, 295 S. W. 388. See also *Minnick* v. *Ramey,* 168 Ark. 180, 269 S. W. 565; and *American Investment Co.* v. *Kennehan,* 172 Ark. 832, 291 S. W. 56.

We adhere to the views expressed in our original opinion, and feel that we cannot grant the relief asked for by appellants without unsettling principles of law which have been uniformly followed and applied by this court. Therefore the petition for rehearing will be denied.

CHILDERS *v.* POLLOCK.

Opinion delivered January 28, 1929.

D. H. Howell and *C. M. Wofford,* for appellant.

Starbird & Starbird, for appellee.

McHANEY, J. This case was submitted to the circuit court on appeal from the probate court on the following agreed statement of facts:

"(1) The plaintiff was the wife of the decedent at the time of his death, and he left one child, a boy, James Perry Childers, his only heir at law, who is now about ten years of age. (2) That said Perry Childers, before his death, was a soldier in the World War, and, as such soldier, carried a policy of insurance in the War Risk Insurance Department of the United States Government, for $10,000. (3) That Perry Childers departed

this life intestate about the 13th day of October, 1918. That the insurance was payable as follows to the following beneficiaries: To Dess Pollock, then Dess Childers' wife, one-half; to James Perry Childers, his son, one-fourth; and to his mother, Mrs. James Childers, one-fourth. (4) That Mrs. Childers, his mother, died upon the 19th day of February, 1927, and this plaintiff and said son, James Perry Childers, survived her. (5) That at the time of her death Mrs. James Childers had not drawn nearly all of the payments provided for her in said policy, and the United States Government paid the balance of said payments, $1,650, to James Childers, as administrator of the estate of Perry Childers, deceased. (6) That plaintiff was married to Wib Pollock four or five years after the death of her husband, the said Perry Childers, and continues to draw one-half said insurance in monthly payments. (7) That Mrs. James Childers, mother of the deceased, held a life estate only in one-fourth of said insurance, and at her death the commuted value of the remainder, amounting to $1,650, reverted to the estate of the said Perry Childers, deceased. (8) The question to be decided by the court is whether or not the estate reverted to the estate of Perry Childers, deceased, is such an estate as would entitle plaintiff to a dower interest therein."

Appellant is the administrator of the estate of Perry Childers, deceased, and appellee is his widow. The court held that appellee is entitled to dower in this part of decedent's estate. We agree that this is correct. At common law the widow took dower in the real estate of her husband only, but the term 'real estate' included both corporeal and incorporeal hereditaments. R. C. L., p, 578. Under our statute, § 3535, C. & M. Digest, "a widow shall be entitled, as part of her dower, absolutely and in her own right, to one-third part of the personal estate, including cash on hand, bonds, bills, notes, book accounts and evidences of debts, whereof the husband died seized or possessed." This court has held that a widow is entitled to dower in a gift *causa mortis* of the husband.

Hatcher v. *Buford,* 60 Ark. 169; and in *Tatum* v. *Tatum,* 174 Ark. 110, it was held that "the inchoate right of dower is more nearly like the interest of a contingent remainderman," and that "the inchoate rights of the wife are as much entitled to protection as the vested right of the widow." In that case it was held that, where the husband had conveyed land by deed, in which the wife did not join to convey her inchoate right of dower, and the grantees had discovered oil therein, the wife had a contingent interest which should be protected. Here the husband died leaving a policy of insurance, one-fourth of which was made payable to his mother in installments so long as she might live, and at her death the balance, if any, to his estate. On his death his estate was immediately seized of the possibility that a portion of that fund would come to his estate, not as a remainder or reversion, but as a certainty, provided the fund was not consumed by the payment of installments during the lifetime of the mother. In other words, this possibility was an asset of the estate—personal property belonging to the estate, in which the widow was entitled to her dower interest when realized. If the mother had predeceased her son, and no change had been made in the beneficiary, it could hardly be said that appellee would not be endowed in that part going to the estate. Or, had she died one day thereafter, before any installments had been paid to her, the result would be the same. Being personal property of the estate, the appellee is entitled to dower, and the judgment is affirmed.

BARTON LUMBER & BRICK COMPANY *v.* CARAWAY.

Opinion delivered January 28, 1929.

[redacted]

Caraway, Baker & Gautney, for appellant.

Smith & Blackford, for appellee.

McHANEY, J. This is a suit by appellant to enforce a mechanic's lien for $618.30 on the building and improvements located on land described in the complaint against appellees, E. A. Caraway and wife, and Mrs. Bell Townsend. Caraway was the owner of the land. The Federal Land Bank, not a party to this suit, held a first mortgage, and Mrs. Townsend a second mortgage. A house insured for $600 was destroyed by fire, and that sum was paid to the Federal Land Bank and by it turned over to Caraway to erect a new house. He bought the material from appellant for the new house, and filed an answer to this suit, admitting that he purchased the material therefor from appellant, and that the balance due as claimed was correct.

There was a decree for appellant against Caraway and wife, but the court refused to declare and enforce a lien on the improvements.

No lien was sought upon the land, and correctly so, for both mortgages were filed prior to the furnishing of material. Only a lien on the new building or dwelling house was claimed, and it was superior to the second mortgage of appellee, Mrs. Bell Townsend, by virtue of

§ 6909, C. & M. Digest. Her mortgage lien covered the land and improvements at the time the mortgage was filed, but, when the dwelling house was destroyed by fire, her security was decreased by the value of the house. The erection of a new house thereafter would have been additional security had it been paid for. But the erection of a new house entitled the material furnisher to a mechanic's lien superior to the mortgage, in so far as the house was concerned, but not as against the land. See *Judd* v. *Rieff,* 174 Ark. 362, 295 S. W. 370, where it was held that a mechanic's lien for material furnished to build a garage was superior to a vendor's lien in so far as the garage is concerned. This court there said:

"In *Imboden* v. *Citizens' Bank,* 163 Ark. 615, 260 S. W. 734, we held that, under § 6909, *supra,* a mechanic's or materialman's lien is superior to a prior mortgage only on a separate building constructed with the labor and material furnished or such addition as is separable from the original building, without injury thereto. And in *Gunter* v. *Ludlam, supra,* we held that § 6911 of C. & M. Digest 'gives priority to liens for labor or material only against other incumbrances created after the commencement of the improvement, and in effect subordinates the lien to prior incumbrances by way of mortgage or otherwise.' "

It makes no difference, so far as Mrs. Townsend is concerned, that the house was burned and the insurance money used in part to erect a new house. She is in the same position she would have been had there never been a house on the property prior to the erection of the new one. The Federal Land Bank is not a party, and no priority is claimed as to it.

The court erred in not decreeing a lien on the building for the material bill. Reversed, and remanded with directions to enter a decree in accordance with this opinion.

CONNELLY *v.* BEAUCHAMP.

Opinion delivered January 28, 1929.

J. A. Tellier, for appellant.

Wallace Townsend, for appellee.

MEHAFFY, J. The appellees brought suit in the Pulaski Circuit Court, alleging that they had entered into a contract with appellant Connelly to construct certain improvements in said district; that said contract provided for the appellant laying a sheet asphalt surface on certain streets, and provided for him to give a maintenance bond, guaranteeing said work. Connelly completed the improvement on the 13th day of June, 1924, and on the 27th day of June, 1924, gave a maintenance bond which mentioned the construction contract, and provided for keeping the street in repair for a period of five years, and that, if repairs became necessary, the contractor was required to make good any damage to the work, or any defect in the workmanship, materials or condition of the work which may have occurred during that period. The guaranty period was to date from the final acceptance of the work by the board. The bond also provided that the contractor should keep the work in good repair during the time of the guaranty period and make all repairs at such times as directed by the board. The bond also provided that it should make all repairs growing out of the imperfection or unsuitability of material or composition, all defects in workmanship, and should cover all other excessive deterioration more especially described as follows: Any holes or cracks in the pavement, and any defects resulting from the deterioration of the wearing surface or foundation. It also provided that the pavement, at the expiration of the guaranty period, should be in good condition, etc. It was stipulated that the determination of the necessity for repairs should rest entirely with the board.

The bond was in the sum of $5,000. It was provided in the bond that Connelly should not be liable for damage due to the defects in old base used by the district.

Within the five-year period it was alleged that a part of the work was defective; notice was given to the contractor to make the repairs, which he declined to do, and the repairs were made by the district in accordance with the terms of the bond, and the repairs amounted to $5,000, and the district had paid this sum for repairs. Judgment was prayed against Connelly and the Maryland Casualty Company, surety.

The defendants filed answer, denying that the work was defective, and denying any liability on the bond. They also stated in their answer that if any defects appeared, or if any of the material used was imperfect or unsuitable, or defective in composition, or if any defects in workmanship appeared, or if there had been any excessive deterioration in the wearing surface, or holes had developed, or ridges, or if the material had not worn as contemplated, all of the said defects, imperfections, etc., were due to and were occasioned by the acts of the plaintiffs themselves, their agents, employees and servants, in doing things contrary to the judgment and advice of Connelly. They also alleged that any damages that were caused were due to defects in the old base, and that they were expressly absolved from liability therefor by reason of the terms of the maintenance bond.

The parties entered into the following stipulation:

"It is stipulated and agreed by and between Wallace Townsend, attorney for plaintiffs, and J. A. Tellier, attorney for defendants, in the above entitled cause, as follows:

"(1) That the plaintiffs and defendants entered into a work contract on the 7th day of December, 1923, by the terms of which defendants agreed to construct certain street improvements in the city of Little Rock; that a true copy of said contract, which included a proposal and plans and specifications, is hereto attached, and marked Exhibit A to this stipulation. (2) That the defendants carried out said contract in accordance with the plans and specification contained in said con-

tract, Exhibit A, and said defendants furnished the materials of the quality and kind as required by said specifications, and performed the work of said improvement in accordance with said specifications. (3) That a construction bond was executed by defendants in connection with said improvement, a true and correct copy of which is attached to this stipulation, and marked Exhibit B and made a part hereof. (4) That on the 27th day of June, 1924, the defendants executed a maintenance bond in connection with said improvement, with surety thereon; that said maintenance bond was executed in accordance with the provisions of the work contract, Exhibit A hereto, at the request of the plaintiffs, their agents or attorneys; that a true copy of said maintenance bond is hereto attached, marked Exhibit C and made a part of this stipulation. (5) That the improvement, when completed by the defendant, was accepted by the plaintiffs on June 14, 1924, and paid for in full by the plaintiffs. (6) That the contract was carried out by the defendants under the supervision of the Pittsburgh Testing Laboratory and an engineer, both of whom were employed by the plaintiffs, and the defendants, in all respects, complied with every requirement demanded of them by said laboratory and said engineer. (7) That no demands were made upon defendants by the Pittsburgh Testing Laboratory or the engineer employed by the district to do anything other than in accordance with the terms of the contract, Exhibit A to this stipulation. (8) That the extent and precise locations of the defects in the streets of the district, as claimed by plaintiffs, are correctly stated in paragraph 2 of plaintiff's response to defendants' motion to make more definite and certain. (9) That plaintiffs have in fact expended the sum of $5,000 in making repairs where said defects have occurred. (10) That paragraphs numbered 8 and 9 above shall be construed only as admitting the extent and cost of repair of defects, and not that said defects have been caused by the defendants or that said defendants are liable therefor under the contract, Exhibit A, bond,

Exhibit B, or maintenance bond, Exhibit C, referred to in this stipulation."

The construction contract and bond and maintenance bond were all introduced in evidence, and the defendant Connelly offered to prove certain things, to which attention will be called later.

The appellants asked the court to make certain declarations of law, which were refused, and the court, sitting as a jury, by agreement of parties, found for the plaintiff in the sum of $5,000.

Motion for new trial was filed and overruled, exceptions saved, and this appeal is prosecuted to reverse the judgment of the circuit court.

Appellant's first contention is that the court erred in refusing to grant its declaration of law No. 2. That declaration was to the effect that the burden was on plaintiffs to show by a preponderance of the evidence that the damage was occasioned by defects in the materials, etc. The bond itself provides that the determination of the necessity for repairs shall rest entirely with the board, or, after it has turned the street over to the city of Litttle Rock, with the city engineer of said city, whose decision upon the matter shall be final and obligatory upon the contractor. That necessarily means a determination by the board of the necessity of repairs, which, under the contract and bond, appellants were required to make. And defendant agreed, in the stipulation filed, that "the plaintiffs have, in fact, expended the sum of $5,000 in making repairs where said defects have occurred."

Appellants call attention to the case of *District of Columbia* v. *Clephane,* 110 U. S. 212, 3 S. Ct. 568. In that case, however, the contract provided that: "Unless the pavement becomes defective from the causes mentioned, within three years, no liability arises." In that case there was no evidence offered that any of the material was imperfect or improper or that the construction was improperly or defectively done. And the bond in that case did not provide for maintaining the street for three years; and,

among other things, the court said: "It is too plain for argument that the defendant did not agree that, if this pavement should need repairs within three years, the authorities of the District, because he failed to repair, could change the entire character of the pavement from wooden to stone, or concrete, or vulcanite, or any other pavement, and place it where it once had been constructed by him, and charge the entire cost of the new and better class of pavement to him."

We have no such question in the instant case. On the contrary, the construction contract expressly provided for a maintenance bond for five years. And the maintenance bond in the instant case provided, among other things: "Said contractor shall keep said work in good repair during the time of the guaranty period, and shall make all repairs at such times as directed by the board or city engineer of the city of Little Rock."

The bond also provided: "It is understood and agreed that this guaranty shall cover all repairs growing out of the imperfection or unsuitability of material or composition, all defects in workmanship, and shall cover all other excessive deterioration more especially described as follows: Any holes or cracks in the pavement, and any defects resulting from the deterioration of the wearing surface or foundation. The pavement, at the expiration of the guaranty period, shall be in good condition, present a surface so true and even that it will in no way be an obstruction to travel."

And then the bond provides that the determination of the necessity shall rest entirely with the board. Necessity, of course, in making repairs required by the contract and bond to be made by the contractor. The determination of the board, according to the agreement of the parties, was final.

Appellant does not contend that there was any fraud or bad faith in the determination or decision of the board, and, having agreed that the decision should rest with the board, that is final, unless there was some fraud or

bad faith. *Hayes Grain & Commission Co.* v. *Federal Grain Co.,* 169 Ark. 1072, 277 S. W. 521; *Hot Springs Ry. Co.* v. *Maher,* 48 Ark. 522, 3 S. W. 639; *Blytheville Courier* v. *McCall,* 169 Ark. 148, 273 S. W. 368.

Since the parties agreed that the determination of the board was final, and there is no allegation of fraud or bad faith, there was no burden on the board, as suggested in appellant's declaration of law. The determination of the board settled the question.

Appellant's contention that the contract must be construed as a whole is correct. 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. The parties should always be bound for what they intended to be bound for, and no more. The intention of the parties means, however, the intention as shown by the contract, and not what they may have had in mind but did not express. The law presumes that the parties understood the import of their contract and that they had the intention which the terms of the contract manifest. If there are conflicting clauses in a contract, the intention of the parties is ascertained by a consideration of the whole contract.

"It has been laid down as elementary law that, if two clauses of a contract are so totally repugnant to each other that they cannot stand together, the first shall be received and the latter rejected. It has also been declared that, while clauses in a contract apparently repugnant must be reconciled if this can be done by any reasonable construction, yet a proviso utterly repugnant to the body of the contract and irreconcilable with it will be rejected, and that the rule that a proviso limiting a previous clause of a contract, without destroying it, is not void, but must be considered as incorporated into and forming a part of the clause which it limits, applies only where the proviso is not repugnant to the previous clause." 6 R. C. L. 847.

To be sure, words in a contract are to be given their ordinary meaning, but the original contract provided for a maintenance bond. That meant that a bond should be given to maintain the street, and the maintenance bond, when given, contained the provisions which necessarily meant that the street should be kept in repair for a period of five years. Among other things, the bond stated:

"The work shall be done in such a substantial manner that no repairs will be required for the period of five years. Should repairs become necessary, however, during any such period, then the contractor will be required to make good any damage to the work, or any defect in the workmanship, materials or condition of the work which may have occurred during that period, and which made such repairs necessary."

That expresses the intention of the parties. The proviso relied on by the appellant, we do not think, is in conflict with that; the proviso is merely that Connelly shall not be held liable for damage due to defects in the old base used by the district. Neither in the argument nor in the evidence offered in the circuit court is it claimed that there was any defect, in the sense that it is used in this contract, in the old base. The testimony is to the effect that the old base was smooth, and that, for that reason, the damage occurred to the surface. But certainly that was not a defect in the base meant by the parties when they made the contract. It is perfectly plain from a reading of the entire contract that the parties meant if the old base gave way, or a defect appeared in it, that the contractor would not be liable for damages caused by this defect. Of course, all the parties knew at the time they made the maintenance bond exactly what the condition of the old base was.

We agree with the appellant that it is proper to consider both the construction contract and the construction bond together with the maintenance bond. And, when so considered, it is too plain for argument that the parties meant in the maintenance bond a defect occurring in

the old base after the completion of the road. It is true the witnesses testified that the damage was caused by putting the asphalt surface on a smooth base, but the contractor knew all about this before and at the time he executed the maintenance bond. He testifies that he talked to the engineer of the district and to some other parties. There is no evidence, however, showing that he ever suggested to the commissioners that the old base should not be smooth, and, so far as the record discloses, they knew nothing about it. But, if they had known about his suggestions, it would not relieve him from liability on the bond. If appellant's contention is true, the maintenance bond is practically meaningless. The construction bond provided for the proper sort of material and the proper construction, and it is agreed by all parties that the construction contract was performed. But the evident intention of requiring a maintenance bond was that the contractor should keep the street in repair for five years, unless some defect not then known appeared in the old base, and it is not contended by appellant that there is any defect, except he contends that the base being smooth was a defect.

We think it clear from an examination of the contract and bonds that the defect mentioned in the maintenance bond did not mean the smooth surface of the base, but it meant a defect thereafter happening. There is no ambiguity about the bond or any of its terms, and no evidence was necessary as to what was meant. But, even if it were doubtful when the bond was considered alone, taken in connection with the construction bond, and the condition of the street, and the circumstances surrounding the making of the bond, there can be no question about its meaning.

This court has said: "In the construction of any instrument, where doubt arises as to its meaning, we may consider the contemporaneous agreements of the parties with respect to the same subject-matter, and, when that is done in the instant case, we find that the bond sued on was executed in compliance with the con-

tract under which the improvement was constructed. The material part of that contract is set out in the statement of facts, and there appears to be no doubt as to the character of the bond then contemplated. The language there employed appears to be susceptible of only one construction. And if, in fact, such a bond was executed as that contract required, then we may be assured of the proper construction to give it. There was no other purpose in executing this bond. When the work was completed there was no controversy about its having been done as required by the plans, and there is no such controversy now, and if this bond is to be given a construction which makes its execution of value to the district, we must hold that it intended to guarantee the work against the necessity for repairs for a period of five years. The trouble with the street was that holes and cracks appeared in it, and there was a wearing away of its surface, and its foundation was defective. These defects appear to be covered by the terms of the guaranty. Appellees insist that no liability should be imposed upon the contractor, because the foundation used was approved by the engineer. The foundation was, indeed, thus approved; but it was within the terms of the contract, and was used without protest on the part of any one." *English* v. *Shelby,* 116 Ark. 212, 172 S. W. 817.

The language of the above case is peculiarly applicable to the facts in this case. The bond would be absolutely of no value if the construction contended for by appellants was put on the bond. Such was not the meaning or intention of the parties, as gathered from the bond itself and the construction contract.

Appellant testifies that he wanted the engineer to change the plans, but the engineer declined to do so. Nothing was said to anybody connected with the district except the engineer. After the engineer declined to do so, appellant continued and completed the work on the old base, and, so far as the proof in this case is concerned, there is no defect now in the old base. It is exactly as it was when the work was completed. The work having

been completed in that way, and the maintenance bond given, the appellants are liable for the amount paid out by the district for repairs.

We find no error, and the judgment of the circuit court is therefore affirmed.

COVINGTON *v.* LITTLE FAY OIL COMPANY.

Opinion delivered February 4, 1929.

[redacted]

J. B. Milham, for appellant.

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

HART, C. J., (after stating the facts). The modification complained of by the plaintiff in instruction No. 1 is shown by the brackets as the instruction is copied in our statement of facts. The first modification consists in the addition of the words in the brackets, "to exercise ordinary care," in defining the duty of the defendant to furnish plaintiff a reasonably safe ladder. There was no error in this. It is well settled that a master is only required to exercise ordinary care to supply a safe place for the use of his servants, and in the discharge of his duty is bound to exercise reasonable diligence in informing himself that the working place is safe. *St. L. S. W. Ry. Co.* v. *Gant,* 164 Ark. 621, 262 S. W. 654; *Western Coal & Mining Co.* v. *Burns,* 168 Ark. 976, 272 S. W. 357; and *St. Louis-San Francisco Ry. Co.* v. *Rogers,* 172 Ark. 508, 290 S. W. 74.

The second modification "[that rendered it defective and dangerous]" was also proper. As we have already seen, the defendant would not be guilty of negligence unless he failed to exercise ordinary care to furnish his servant a safe working place, and this carried with it the duty to make proper inspection to satisfy himself as to whether or not the working place continued to be safe. The words contained within the brackets made plain the meaning of the instruction, and there was

no error in adding them. *Texas Pipe Line Co.* v. *Johnson,* 169 Ark. 235, 275 S. W. 329.

It is equally well settled that, unless the negligence of the defendant is proved to be the proximate cause of the injury to the plaintiff, there can be no recovery. *Meeks* v. *Graysonia N. & A. Rd. Co.,* 168 Ark. 966, 272 S. W. 360; and *Standard Pipe Line Co.* v. *Dillon,* 174 Ark. 708, 296 S. W. 52.

The court also correctly instructed the jury that the burden of proof was on the defendant to establish contributory negligence or assumption of risk, unless this was shown by the plaintiff's own evidence. *Sun Oil Co.* v. *Hodges,* 173 Ark. 729, 293 S. W. 9; *Central Coal & Coke Co.* v. *Lockhart,* 161 Ark. 97, 256 S. W. 37; and *Eureka Oil Co.* v. *Mooney,* 168 Ark. 479, 271 S. W. 321.

Counsel for the plaintiff also ask for a reversal of the judgment on the ground that the court refused to give instruction No 5 requested by him. This instruction is copied in our statement of facts, and need not be repeated here. The matters embraced in the first part of the instruction are covered by instructions Nos. 1 and 2, given as modified by the court, which are also copied in our statement of facts. The last part of instruction No. 5 was properly refused by the court. It was calculated to mislead the jury. There was no contention by the defendant that the plaintiff was required to inspect the ladder for the purpose of ascertaining that there was no danger in climbing it. It is well settled in this State that the court is not required to give abstract instructions or instructions which tend to confuse or mislead the jury because they are argumentative in form.

Counsel for the plaintiff also asks us to reverse the judgment because of the action of the court in giving several instructions for the defendant. We do not deem it necessary to set out these instructions or to review them at length. We have examined them carefully, and, for the most part, they contain matters which had already been submitted to the jury in the instructions given at

the request of the plaintiff. They cover practically the same ground, and differ only in the language used. The court might have refused them, because the matters contained in them were already covered by other instructions given, but there was no error in giving them.

Finally, it is insisted that the judgment should be reversed because the court allowed the foreman of the defendant to testify that the plaintiff had told him that the reason he fell was that his gloves were oily, and this caused his hand to slip when he grasped the rung of the ladder. The record shows that the workmen carried two pairs of gloves, because one of them would become oily in doing their work, and the dry pair then could be used by them in going up and down the ladder. There was no error in allowing the testimony complained of to go to the jury. The plaintiff had a right to speak for himself, and the jury might have found that he was bound by the declarations he made. It is well settled that any statements made by a party to a suit against his interest, bearing on material facts, are competent as original testimony. *Collins* v. *Mack,* 31 Ark. 684; *St. L. I. M. & S. R. Co.* v. *Dallas,* 93 Ark. 209, 124 S. W. 247; *Jefferson* v. *Souter,* 150 Ark. 55, 233 S. W. 805; and *McCormack-Reedy Lumber Co.* v. *Savage,* 169 Ark. 192, 273 S. W. 1028.

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

NIMMO *v.* SIMS.

Opinion delivered February 4, 1929.

Emmet Vaughan, for appellant.

J. R. Linder, O. E. Williams and *Guy E. Williams,* for appellee.

HART, C. J. Frank Nimmo prosecutes this appeal to reverse a judgment of the circuit court against him in a proceeding to affiliate a bastard child and to compel him to aid in the support of said child. The proceeding was begun in the county court, and appealed to the circuit court. The record shows that the trial in the circuit court was had on the 7th day of September, 1928.

Gladys Sims was the prosecuting witness. According to her testimony, she was twenty years of age in January, 1928, and was a single woman. She was the mother of a child, which she held in her lap, and which was born near Cabot, in Lonoke County, on October 4, 1927. His father was the defendant, Frank Nimmo, who was a married man. He began going with the prosecuting witness in March, 1926. She had sexual intercourse with him on the 29th day of December, 1926, and on the first, second, third and fourth days of January, 1927. He slept with her during all these nights, and was the father of her child. She had never had intercourse with any other man during her whole life.

The defendant admitted having intercourse with the prosecuting witness in December, 1926, but denied such intercourse on the first, second, third and fourth days of January, 1927. He also admitted writing to her three love letters during the early part of 1927, which letters had been introduced in evidence as exhibits to the testimony of the prosecuting witness.

Harry Eaton was also a witness for the defendant. According to his testimony, he went to the room of the prosecuting witness two different times during the latter part of December, and had intercourse with her. He paid her two dollars each time, and the last time was right close to Christmas.

The evidence of the prosecuting witness was sufficient to warrant the jury in rendering a verdict against the defendant. No corroboration of her testimony was necessary. Proceedings to affiliate a bastard child are of a civil nature, and the jury may find that the accused is the father of the child upon the testimony of the mother alone. *Qualls* v. *State,* 92 Ark. 200, 122 S. W. 498; *Belford* v. *State,* 96 Ark. 274, 131 S. W. 953; and *Scott* v. *State,* 173 Ark. 625, 292 S. W. 979.

It is urged that the judgment should be reversed because the circuit court erred in allowing the prosecuting witness to exhibit her child to the jury. The child was sitting in her lap during the time that she was testifying, and she was asked if the child in her lap was the one which she accused the defendant of being the father of. She replied in the affirmative, and, before the case was submitted to the jury, the child was formally exhibited to it, that they might examine it to see if there was any resemblance between it and the defendant. As we have already seen, the child was born on the 4th day of October, 1927, and the trial was had on the 7th day of September, 1928. This court has held that it is not error in a bastardy case to permit the child to be exhibited to the jury. This is done for the purpose of enabling the jury to view the child and determine whether there is any resemblance between the features of the child and

those of the putative father, or whether there may be other corporal traits of sufficient development to permit a comparison between them and those of the defendant. *Land* v. *State,* 84 Ark. 199, 105 S. W. 90, 120 Am. St. Rep. 25, and *Hogan* v. *State,* 170 Ark. 1143, 282 S. W. 984. This rule seems to be supported by the weight of authority, and is admissible for what the jury may think it may be worth in attempting to fix the responsibility for the paternity of a bastard child. Case-note to 40 A. L. R., at page 97.

It is next urged that the court erred in refusing to permit the introduction of testimony tending to prove acts of intercourse of the mother of the child with others than the defendant. The court did permit the introduction of the testimony of Harry Eaton, the only witness who was offered by the defendant, to testify that he had intercourse with the prosecuting witness on or about the time of conception. This court has held that the introduction of such testimony is admissible when confined to a period of time when, in the course of nature, the child could have been begotten, but that testimony as to acts of intercourse had at other times was not admissible. The court also said that such testimony was not competent to impair the credibility of a witness by proof of specific acts of immorality. *Belford* v. *State,* 96 Ark. 274, 131 S. W. 953, and *Thomas* v. *State, ante,* p. 381. Testimony as to acts of intercourse with other men at the time not within the period of conception would lead to an investigation of collateral matters, and might take the jury away from the real issue to be determined by it, which is the paternity of the child.

Finally, it is insisted that the court erred in allowing the prosecuting witness to exhibit to the jury the love letters which had been written by the defendant to her. The record shows that, after the prosecuting witness had testified that the defendant was the father of the alleged bastard child, and that he had first commenced going with her two years before, she was asked if he was not a married man, and had not made love to her. Objection was made to this last testimony, and counsel for the de-

fendant then admitted that the defendant was a married man and that he had intercourse with the prosecuting witness within the period of gestation. The defendant denied having intercourse with her on the four days in January, 1927, testified to by the prosecuting witness, or that he slept with her on these nights. Under these circumstances we think the testimony was admissible. His love letters might be considered by the jury for what they were worth as affecting the credibility of the prosecuting witness as to the number of times the defendant had slept with her on or about the time of conception, and as shedding some light as to the paternity of the child.

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

PHILLIPS *v.* PHILLIPS.

Opinion delivered February 4, 1929.

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Combs & Johnson, for appellant.

HART, C. J., (after stating the facts). It is earnestly insisted by counsel for appellants that the decree should be reversed because, under our statute of frauds, parol evidence could not be introduced to create an express trust in a deed absolute in form, and that there could be no trust *ex maleficio* in favor of A. J. Phillips against Charles M. Phillips. On this latter proposition we cannot agree with counsel for appellants. It is true that in order to establish a trust *ex maleficio* there must be an element of positive fraud accompanying the promise, by means of which the acquisition of the legal title is wrongfully obtained. Fraud in the procurement of the conveyance for the benefit of the grantor takes the case out of the statute of frauds. The reason is that a rule intended as a protection against fraud ought not in a court of equity to be changed into an instrument for the procuration of the fraud. Of course, the misrepresentation which will create a trust *ex maleficio* must be made before or at the time the legal title is acquired by the promisor. *Barron* v. *Stuart,* 136 Ark. 481, 207 S. W. 322; *Bray* v. *Timms,* 162 Ark. 247, 258 S. W. 338; *Davidson* v. *Edwards,* 168 Ark. 306, 270 S. W. 94; and *Coleman* v. *Wigman,* 172 Ark. 132, 288 S. W. 376.

Now, it is the contention of A. J. Phillips that the conveyance made by him to Charles M. Phillips and his other four children, in 1913, subject to the Kelso mortgage, was for the purpose of preventing his creditors from levying on the land in question. On the other hand, it is the contention of Charles M. Phillips that the deed was an advancement to him and to the other children. The conclusion we have reached makes this immaterial.

On the 8th day of June, 1920, a written contract was entered into between Charles M. Phillips and two of his brothers and A. J. Phillips relative to the land. In that contract it was agreed that the children should convey

to their father their undivided interest in the land and that he should dispose of it for a consideration of not less than $13,000, out of which he would pay all indebtedness against the land and also some indebtedness against his home place, and that the balance of the proceeds of the sale should be divided equally between A. J. Phillips and three of his children, including Charles M. Phillips. Pursuant to this agreement, the parties entered into possession of said land and sold the products of the orchard annually for the purpose of paying off the Kelso indebtedness. Their testimony is in irreconcilable conflict as to the amount of work and money contributed by each of them for this purpose. Be that as it may, the testimony shows that all the parties did some work towards cultivating the orchard and gathering and marketing the apples and peaches grown thereon. Charles M. Phillips seems to have had charge of marketing the products. A. J. Phillips is shown to have worked in the orchards, to some extent, at least. This shows that the parties were continuing to operate under their agreement of June 8, 1920, and that Charles M. Phillips and his brothers recognized that their father had an interest in the land under their written agreement. This continued until 1924, at which time, according to the testimony of Judge Lee Seamster, Charles M. Phillips and A. J. Phillips employed him to bring a suit in the chancery court to have the deed to Kelso declared a mortgage. A. J. Phillips and Charles M. Phillips both consulted him about the matter and gave him directions about the conduct of the suit. It was finally agreed that the legal title under the decree should be taken in the name of Charles M. Phillips for the benefit of all interested parties. This was done in order to enable him to borrow money from a bank with which to pay off the Kelso indebtedness, which was a lien on the land. The money with which to pay the greater part of the indebtedness had been secured by the sale of the crops from the orchard on the land in question and from the one which is known as the Ed Smith orchard, in which the undisputed proof shows

that A. J. Phillips had an equal interest with his son, Charles M. Phillips.

A. J. Phillips in all respects corroborates the testimony of Judge Lee Seamster. On the other hand, his testimony is flatly contradicted by that of Charles M. Phillips and Jay Phillips.

While the rule is well settled in this State that, in order to impose a trust *ex maleficio,* the evidence must be clear, convincing and satisfactory, we think that requirement has been met in the present case. Judge Seamster had no interest whatever in the matter. He was employed by A. J. Phillips and Charles M. Phillips. Both of them consulted him about the management of the case. His testimony is strongly corroborated by the attendant circumstances. As we have already seen, the parties admitted the execution of the agreement of June 8, 1920, and the evidence clearly shows that all the parties at that time considered themselves interested in the orchards and the land itself as tenants in common. Charles M. Phillips and his brothers are shown by a preponderance of the evidence to have recognized that their father had some sort of an interest in the land. He could have had none except through this agreement.

We are of the opinion that the parties recognized that the agreement was entered into for the purpose of enabling them to make some kind of arrangement to pay off the Kelso indebtedness and to divide the land or the proceeds thereof equally between A. J. Phillips on the one hand and Charles M. Phillips and his brothers on the other.

It is claimed that A. J. Phillips never had any money at all during this period of time, but it is shown that he executed a mortgage on the land to a bank for $1,300, and that he paid off this mortgage. It seems clear to us that the parties, when they brought the suit in the chancery court against Kelso and his wife to have their deed declared a mortgage, recognized the binding force of the agreement of June 8, 1920. It is true that A. J. Phillips was not made a party to the suit, but this was not neces-

sary, because the legal title was in Charles M. Phillips and his brothers from 1913 until their conveyance to Kelso and wife. No doubt A. J. Phillips thought that, as soon as the title was vested in his children, they would carry out their agreement with him, made on the 8th day of June, 1920, and give him an undivided one-half interest in the land. It was contemplated under that agreement that the children should deed the land to A. J. Phillips, who had a prospective purchaser for it, and that the proceeds should be divided between them according to the terms of the agreement, after paying off the mortgage indebtedness. The verbal agreement made during the pendency of the suit against Kelso and his wife was that the title should be vested in Charles M. Phillips for the purpose of enabling him to borrow money from a bank with which to pay off the balance of the Kelso mortgage, the greater part of which had already been paid by the proceeds arising from the sale of the crops of the orchards on the land in question and on the orchard on the Ed Smith land, owned jointly by A. J. Phillips and Charles M. Phillips. Thus it will be seen that the greater part of the consideration had been paid by Charles M. Phillips and A. J. Phillips at the time the legal title was acquired by Charles M. Phillips, and the chancellor was justified in finding a trust *ex maleficio* in favor of A. J. Phillips against Charles M. Phillips.

Therefore the decree will be affirmed.

BARNETT *v.* BANK OF MALVERN.

Opinion delivered February 4, 1929.

Oscar Barnett, for appellant.

Glover, Glover & Glover, for appellee.

SMITH, J. This is the second appeal in this cause, the suit being one brought under §§ 7395 and 7396, C. & M. Digest, to recover damages for the alleged refusal and failure of a mortgagee to cancel the mortgage lien upon request so to do after the payment of the debt secured by the mortgage. *Barnett* v. *Bank of Malvern,* 176 Ark. 766, 4 S. W. (2d) 17.

The mortgagee, the defendant bank, had brought suit to foreclose a mortgage upon a lot which appellant bought subject to the mortgage. There was a decree of foreclosure, but, before the sale, appellant paid the mortgage debt, and the attorney for the bank caused a notation of that fact to be made upon the margin of the record of the chancery court in which the decree of foreclosure had been entered. When sued for the failure to satisfy the mortgage lien, under the provisions of the above numbered sections of Crawford & Moses' Digest, the bank defended upon the ground that the cancellation of the decree of foreclosure by entering satisfaction on the margin of the record thereof was a substantial compliance with the requirements of the statute, and the court so instructed the jury, and, under the directions of the court, the jury returned a verdict in the bank's favor.

Upon the appeal from the judgment of the court rendered upon the verdict of the jury returned as aforesaid, we held that the statute had not been substantially complied with, and that the mortgagor, or his successor in interest, had the right to demand the indorsement of satisfaction of the mortgage upon the margin of the record where the mortgage was recorded, although satisfaction of the decree of foreclosure had been previously entered.

Upon the remand of the cause the bank defended upon the ground that it entered satisfaction of the mortgage upon the margin of the mortgage record within sixty days after being requested so to do, and that no request to satisfy had been made prior to the institution of the suit for damages for the failure to satisfy.

The case appears to have been submitted at the trial from which this appeal comes under proper instructions. The testimony on the part of the plaintiff was to the effect that the request to satisfy was made, and not complied with; while that on the part of the bank was to the effect that the request was not made until after the suit for damages had been commenced. The instructions made the determination of this issue of fact decisive of the question of liability.

Appellant insisted in the court below, and insists here, that he was entitled to a judgment upon the pleadings for the reason that the opinion on the former appeal is decisive of the issues joined at the trial from which this appeal comes. Appellant is mistaken in this contention. We did not undertake to decide any issues of fact raised in the case on the former appeal, but, inasmuch as a verdict had been directed at the first trial against plaintiff, we said on the appeal that, in determining whether he had a cause of action, we gave to the testimony in his behalf its highest probative value, and we merely decided that this testimony was legally sufficient to support a verdict in his favor.

We would therefore be constrained to affirm the judgment from which the present appeal comes, but for the fact that counsel for the defendant bank, in the course of his argument before the jury, said: "The satisfaction of the judgment record of the chancery court, where the mortgage was foreclosed by the defendant, and as Mr. Robert Smith (the cashier of the bank) told you, was a full and complete satisfaction of any and every claim that the Bank of Malvern had against that property by reason of that mortgage; and plaintiff should not ask for any further satisfaction here." An objection to this

argument was overruled by the court, and exceptions duly saved.

The argument of counsel was an improper one, as it was directly contrary to the law as declared in the opinion on the former appeal and to the instructions given at the request of the plaintiff. It was expressly decided on the former appeal that, notwithstanding the satisfaction of the decree of foreclosure, plaintiff had the right to demand that the mortgage record be satisfied also, yet counsel asserted plaintiff had no such right.

In the case of *Briggs* v. *Jones,* 132 Ark. 455, 208 S. W. 118, it was held (to quote a syllabus) that "the refusal of the trial court to correct counsel, where he has made an improper statement of the law in his argument, is tantamount to the giving of an erroneous instruction on the subject." The cases of *Bird* v. *State,* 154 Ark. 297, 242 S. W. 71, and *Davie* v. *Padgett,* 117 Ark. 551, 176 S. W. 333, are to the same effect.

For this error the judgment must be reversed, and it is so ordered.

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LONDON *v.* KENNEDY.

Opinion delivered February 4, 1929.

[redacted]

I. S. Simmons and *L. E. Lister,* for appellant.

George W. Dodd, for appellee.

SMITH, J. Appellant seeks by this appeal to reverse a judgment against him, and the assignment of error relied upon for that purpose is that the court improperly denied his motion for a change of venue.

There appears in the body of the transcript a motion for change of venue in proper form, but the bill of

exceptions contains no reference to it. It will therefore be conclusively presumed that the court properly disposed of this motion.

In the case of *Estes* v. *Chesney*, 54 Ark. 463, 16 S. W. 267, it was said: "The appellants insist that the judgment should be reversed because the court improperly denied their motion for a change of venue. This is a question which we cannot consider, for the reason that the petition for a change of venue and supporting affidavits are not brought upon the record by bill of exceptions."

The case of *Adkisson* v. *State,* 142 Ark. 34, 218 S. W. 167, is to the same effect.

The judgment must therefore be affirmed, and it is so ordered.

MONCRIEF *v.* MILLER.

Opinion delivered February 4, 1929.

G. W. Botts, for appellant.

J. M. Brice, for appellee.

SMITH, J. Appellant brought suit at law against appellee to recover the possession of a certain two-acre tract of land upon which there stands a store building and a residence. Appellant claims title to the property through a deed to her from appellee, which she made an exhibit to her complaint. The deed recites that: "I, B. N. Miller, single, for and in consideration of the sum of $1, and the love and affection that I have for Sallie Miller, formerly my wife, do hereby grant, sell and convey unto the said Sallie Miller a life interest in and to the follow-

ing lands" (describing them). The deed further recites that: "The intention of this deed is to convey a life interest only to the said Sallie Miller, with the remainder vesting in my son, Charles Miller."

Appellee filed an answer, in which he alleged that she and appellant were formerly husband and wife; that she obtained a divorce from him, and in the decree she was awarded as alimony $1,500, of which $500 was cash, and certain specific articles of personal property. Appellee gave appellant a note for $1,000 to cover the portion of the alimony not paid in cash. This note was indorsed by C. P. Vittitow, an uncle of the appellee's first wife. Later, according to the allegations of the answer, the parties entered into an agreement as follows: A copartnership was formed to conduct a mercantile business in the building on the above-described lot, the thousand-dollar note was to be canceled, and the above-mentioned deed was executed and delivered. This agreement was evidenced in part by a paper writing, which reads as follows:

"This is to certify I, Sallie Bitner Miller, to me well known, came before me, a justice of the peace for Point DeLuce Township, in and for Arkansas County, Arkansas, to sign this agreement, giving B. N. Miller the right to conduct a mercantile business together with hers at the place which it is now located, without the paying of rent or compensation from the said B. N. Miller. And the said B. N. Miller agrees to give to the said Sallie Miller, after all debts are paid, one-half of the net proceeds of the mercantile business.

"G. W. Trussell,
"Justice of Peace."

"B. N. Miller,
"Sallie Bitner Miller."

The defendant moved that the cause be transferred to equity, and prayed that the deed be canceled as having been executed without consideration, inasmuch as appellant had failed to perform the conditions in consideration of which the deed had been executed. After the cause had been transferred to equity, appellant filed an amend-

ed complaint, in which she asked a settlement of the partnership accounts.

The parties were married in 1916, and divorced in September, 1919, and the deed was executed in December thereafter.

The court found the facts to be "that the deed, upon its face, is without sufficient consideration, there being no relationship between the parties," and that "the contract of partnership has never been carried out." Upon these findings the complaint was dismissed as being without equity, and the deed was canceled as having been executed without consideration, and this appeal is from that decree.

The testimony on the part of appellant was to the effect that, after she obtained a divorce from appellee, he urged her to remarry him, but she declined to do so. Appellee had a small child by a former marriage, and he requested appellant to keep the child for him, and, as a consideration for her agreement so to do, he executed to her the deed conveying, not only the store building, but the residence thereon, and a part of the agreement was that appellee should remain away from the home. The contract set out above evidenced the agreement covering the copartnership, which appellee by his misconduct towards her forced her to dissolve. She testified that there had been no agreement to cancel the thousand-dollar note given her in part payment of the alimony allowance. She made proof of the fact, on the contrary, that, in a suit on the note which she was compelled to bring to collect it, appellee had defended upon the false ground that the note had been paid by the execution of the deed, the satisfaction of the note being the consideration for the deed.

The testimony on appellee's part was to the effect that, after appellant had obtained the divorce, a single agreement was entered into between them, of which the writing relating to the copartnership and the deed were parts. This agreement contemplated the surrender of the thousand-dollar note, and that appellant should operate

the store for the joint benefit of the contracting parties, but she refused to surrender the note. On the contrary, appellant enforced its collection by suit, and abandoned the partnership contract without cause.

The court was in error in decreeing the cancellation of the deed. It was not contended that the execution of the deed was procured by fraud; the contention is that the consideration which induced the execution of the deed failed. It may be said that the testimony shows clearly that the consideration for the deed was not that expressed in the deed, to-wit, the sum of a dollar and the grantor's love and affection for his former wife; but this fact cannot be shown for the purpose of canceling the deed.

Similar relief was sought in the case of *Green* v. *Mulkey,* 142 Ark. 124, 218 S. W. 20. The grantor in that case, as in this, sought to show that the real consideration for the deed was an unperformed agreement not recited in the deed, but we said:

"Waiving the question whether or not appellant has proved his alleged ground for cancellation by a preponderance of the testimony, the law is well settled against his contention. He is not permitted to show, for the purpose of defeating the conveyance, failure to perform a consideration not expressed in the writing itself. (Citing authorities)." See also *Tandy* v. *Smith,* 173 Ark. 828, 293 S. W. 735; *Tribble* v. *Tribble,* 173 Ark. 561, 293 S. W. 705; *Texas Co.* v. *Snow,* 172 Ark. 1128, 291 S. W. 826; *Sutton* v. *Sutton,* 141 Ark. 93, 216 S. W. 1052; *Sims* v. *Best,* 140 Ark. 384, 215 S. W. 519; *Hampton* v. *Haneline,* 125 Ark. 441, 189 S. W. 638; *Wallace* v. *Meeks,* 99 Ark. 350, 138 S. W. 638; *Davis* v. *Jernigan,* 71 Ark. 494, 76 S. W. 554; *Barnett* v. *Hughey,* 54 Ark. 195, 15 S. W. 464.

The grantor in a deed may show what the consideration for the deed was, although it is not expressed in the deed, and he may show the value of this unexpressed consideration, but he cannot show that there was no consideration, or that the consideration failed, for the purpose

of defeating the conveyance. So here appellee may show what the consideration for the deed was, and the value thereof, and may recover judgment for the value of such portion of the consideration as he failed to receive, but the deed stands as a valid conveyance of the title to the land.

The decree of the court below will be reversed, and the cause will be remanded for further proceedings not inconsistent with this opinion.

HAWKINS *v.* BRADLEY.

Opinion delivered February 4, 1929.

Wallace Townsend, for appellant.

Owens & Ehrman, for appellee.

HUMPHREYS, J. Appellees brought suit against appellant in the chancery court of Pulaski County to en-

join him from filing a lien for material against the south 47 feet of the north 94 feet of lots 13 and 14, in Newton Addition to the city of Little Rock, Arkansas, valued at $813.60, which he had furnished and which was used in the construction of a residence thereon. It was alleged that appellant had executed a builder's bond in the sum of $2,000 to appellees for the construction of the residence, conditioned that their contractor, M. O. Gardner, should perform all the conditions of the contract and pay all bills for labor and material, and, in addition, had waived the right to file a lien against the property for the value of the materials to be furnished by him.

Appellant filed an answer, admitting the execution of the builder's bond and written waiver to file a lien for material to be furnished by him, but alleged appellees had breached the bond in that, without his knowledge and consent, they had made a material change in the contract for the construction of the house with M. O. Gardner, their contractor, by having the house extended four feet in length, which added materially to the cost of the house, and operated to relieve him as surety on the builder's bond; and further alleged that his waiver of a lien was conditioned upon agreement for him to furnish all material for the construction of the house, which appellees breached by failing to permit him to furnish everything, which operated to relieve him from the waiver. Appellant also filed a cross-complaint, alleging that the balance of $813.60 was due him for materials furnished to construct the residence, and prayed for a lien and foreclosure of same against the property.

Appellees filed a reply, denying that they breached the bond or the conditions in the waiver to a lien, and also denied that appellant was entitled to a lien for materials furnished to construct the residence.

The cause was submitted upon the pleadings and testimony introduced by the parties, from which the court found that appellant was not entitled to a lien because he executed the bond and written waiver of the lien, and dismissed the cross-complaint for want of equity, from which is this appeal.

The facts reflected by the record are in substance as follows: The Bradleys owned the lot, upon which they desired to build a residence suitable to the needs of Mrs. Beauchamp, in contemplation of selling same to her. M. O. Gardner, the contractor, was building a house at the time for Mrs. Dever, in the same neighborhood, which it was thought would suit Mrs. Beauchamp. Appellant was surety on Gardner's builder's bond to Mrs. Dever. He was in the lumber business, and selling material to Gardner for the construction of several houses, and in this way was interested in getting building contracts for Gardner. Gardner had drawn the specifications and rough plan for the Dever house. He was not an architect.

The specifications of the Dever house show that it was 28 feet wide by 42 feet long. The sizes of the rooms are designated on the sketch or plan, but not in the specifications. The dimensions of the rooms were designated on the sketch or plan before the contract to build the Bradley house and the bond were signed. The Dever house was in the course of construction, and was actually 46 feet and 1½ inches long. L. H. Bradley, M. O. Gardner and appellant called on Mrs Beauchamp at her apartment and showed her the Gardner sketch or plan of the Dever house She liked the plans, except the front. She had in mind the front of another house, and she preferred it if it could be applied to the Dever plan. She was assured that it could be. They then took her to see Mrs. Dever's house. It was determined that this change could be made, and the suggested changes in the front were marked on the sketch or plan. The sizes of the rooms were also agreed upon and noted in pencil on the sketch or plan, at Mrs. Beauchamp's apartment, or when they inspected the Dever house. The outside measurements of the Dever house were not mentioned when the parties met at either place. After the changes were made, the plans and specifications of the Dever house were handed to L. H. Bradley by Gardner to use in the preparation of the contract for constructing the

Bradley residence. Bradley added the following statement to the specifications:

"The house is to be in all essential details a duplicate of one being built for A. S. Dever on lot 13, in block 22, Newton Addition, except where differently noted on the plans and specifications."

The Dever plan and specifications, including this statement, were incorporated in the contract which the Bradleys made with Gardner to build their residence. The contract and bond were signed on October 5, 1927, and on the same day appellant executed and delivered the following release for a lien against the building to the Bradleys:

"We agree to furnish everything but labor for the construction of the brick veneer residence to be built by M. O. Gardner and L. H. and Brooks Bradley, on lot adjoining 2108 North Van Buren Street, immediately south, and waive any liens on same when contract made with Gardner is fulfilled.

"Hawkins Lumber Co.
"L. M. Hawkins."

On October 8, three days after the contract and bond for a lien were executed, at Gardner's suggestion, in the absence of appellant, Bradley and Gardner stipulated that the length of the residence should be changed from 42 feet to 44 feet. After the construction of the Bradley residence was begun it was discovered that, in order to construct the rooms of the dimensions designated on the plans, the house would have to be extended in length to about 46½ feet. Gardner thereupon instructed the foreman to extend the length of the house a sufficient distance to build in the rooms according to the dimensions noted on the plan. When extended, the house was 46 feet 5¾ inches long, or 4½ inches longer than the Dever house.

Appellant testified that he did not discover that the length of the Bradley house had been changed until nearly completed. He was at both houses frequently during their construction. The Bradleys paid the full

contract price to Gardner during the construction of the house. The plumbing and wiring were sublet to other parties, and the payment of the plumbing bill was authorized by appellant. Gardner lost money on the job, and did not have enough to pay appellant for all materials furnished by him. Appellant requested the Bradleys to help him get his money out of Gardner. After the completion of the building, appellant and Gardner met in Bradley's office for the purpose of going over the account and settling. At the conclusion of their interview, appellant took notes from Gardner for $1,000, after he failed to get an assignment of an out-of-town contract from him.

Appellant's first contention for a reversal of the decree is that the specifications were conclusive with reference to the length of the house that was to be constructed for the Bradleys. The specifications provided that the outside dimensions of the house should be 28 feet wide by 42 feet long, and, by subsequent stipulation, 44 feet long. It is argued from this premise that a material change was made in the length of the house without appellant's consent, which operated to release him from the undertaking in the bond. This argument would be sound if, as a matter of law, this provision expressed the intention of the parties, although in open conflict with another provision in the specifications and with the dimensions of the rooms designated on the plan. The other provision in the specifications with which this provision conflicted was to the effect that the house should be in all essential details a duplication of the Dever house. It also conflicts with the dimensions of the rooms marked on the sketch or plan, because the undisputed testimony shows that rooms of the dimensions specified could not be built within the length space of either 42 or 44 feet. The rule is that, where a contract contains conflicting provisions, resort must be had to extraneous testimony to ascertain the intention of the parties. According to the weight of the oral testimony, the parties contracted with reference to the dimensions

of the rooms noted on the plan for the Dever house and with reference to the Dever house in all essential details. In negotiating, the dimensions of the rooms were fixed, but nothing was said at all about the outside dimensions of the house. It is apparent that the outside measurements of 28 feet by 42 feet were inserted in the contract through error by copying the measurements from the Dever specification without giving the matter a thought. If this provision in the contract is stricken out (and it should be because erroneously included), the conflict between the provisions in the specifications and plan will be eliminated, and will reflect the intent of the parties according to the weight of the oral testimony. There is little or no difference in the length of the two houses as built. The Bradley house is only 4½ inches longer than the Dever house. As there was no material change after the contract and bond were executed, the immaterial change will not operate to release appellant from his obligations under the bond.

Under this interpretation of the contract it is unnecessary to discuss the next contention of appellant for a reversal of the decree, to the effect that he has a right to file a lien for his claim against the property because the condition of the waiver was broken in failing to allow him to furnish all the material for the building. The purpose of the bond was to protect the house from liens for material furnished, and appellant, being the surety in the bond, is bound according to its purpose. Under the terms of the bond it was and is his duty to pay for all the material used in the construction of the house.

Appellant's last contention for a reversal of the decree is that the court overruled his motion to reopen the case to enable him to show definitely that the construction of the Dever house had not progressed sufficiently, at the time the contract and bond for the Bradley house were signed, to determine the length space of the Dever house as a basis for the length space of the Bradley house. The motion was not filed until after the adjournment of the term at which the decree was entered. The motion

did not contain the necessary allegations to reopen the case after the adjournment of the term. Section 6290, Crawford & Moses' Digest. The motion fails to set up sufficient facts to reopen the case upon a bill of review under the chancery practice. *Felker* v. *Rice,* 110 Ark. 70, 161 S. W. 162.

No error appearing, the decree is affirmed.

BANK OF SHIRLEY *v.* BONDS.

Opinion delivered February 4, 1929.

[redacted]

Brundidge & Neelly, for appellant.

Opie Rogers and *Garner Fraser,* for appellee.

HUMPHREYS, J. Appellant brought this suit against appellees in the chancery court of Van Buren County, upon several notes; also to set aside and cancel two deeds to certain real estate which S. S. Bonds made to his son, R. J. Bonds, and a mortgage conveying said real estate so conveyed from R. J. Bonds to the Van Buren County Bank upon the allegation that they were without consideration and executed for the purpose of defrauding appellant in the collection of said notes. Ancillary remedies of *lis pendens,* attachment and garnishment were invoked to reach all other personal and real property alleged to belong to the Bonds. A writ of garnishment was served upon the Van Buren County Bank, seeking to impound any funds S. S. Bonds might have on deposit. A receiver was appointed, on application of appellant, to take charge of the real estate conveyed by S. S. Bonds to R. J. Bonds.

Answers were filed admitting the execution of the notes, except one for $2,000, and pleading full payment of the indebtedness evidenced by the notes. The Bonds denied that the two deeds were voluntary and executed for the purpose of defrauding appellant in the collection of its indebtedness, and the Van Buren County Bank and R. J. Bonds denied that the mortgage from R. J. Bonds to it was executed without consideration and for the fraudulent purpose of defrauding appellant in the collection of said indebtedness. The grounds alleged for the attachment were also controverted. The Van Buren County Bank answered, in the garnishment proceeding, that it only had in its possession eighty-eight cents belonging to S. S. Bonds.

The cause was submitted to the court upon the pleadings and testimony, which resulted in the finding that there were no grounds for the issuance of attachment or garnishment, and decreed a dismissal thereof;

also that the two deeds from S. S. Bonds to R. J. Bonds and the mortgage from R. J. Bonds to the Van Buren County Bank were not fraudulently executed, and dismissed the complaint for the want of equity, attacking them. The court also found that S. S. Bonds signed the $2,000 note, and that he was indebted to appellant on the several notes in the sum of $2,672.59, after allowing some of the credits and disallowing others claimed by him, and rendered judgment in favor of appellant against him for said amount. The court also found that there were no grounds nor necessity for the appointment of a receiver, and that said receiver should be discharged; and that one of the appellees, R. J. Bonds, was damaged by the wrongful appointment of such receiver in the sum of $250, the rental value of the lands over which the receiver was appointed; that said sum of $250 should be offset against two of the notes sued upon which were signed by the said R. J. Bonds, and that, after striking a balance, appellant owed R. J. Bonds on account of said damages the sum of $111.99, and rendered judgment in his favor against appellant for said amount. Exceptions to the adverse findings against appellant and appellees were made by the respective parties, and appellant prosecuted a direct and appellees a cross-appeal to this court.

Appellant contends for a reversal of the decree in so far as adverse to it and a modification thereof so as to conform to its contentions, upon the following grounds:

(1). Because the court erred in allowing damages in the sum of $250 to R. J. Bonds on account of the appointment of a receiver to take charge of lands conveyed to him by S. S. Bonds. (2). Because the court erred in allowing S. S Bonds credit for $202.50 and $582.50 on certain checks which he had deposited with appellant and which were known as the Gilmore and Gammill checks. (3). Because the court erred in allowing damages for cottonseed purchased from appellants by the Bonds. (4). Because the court erred in

refusing to grant judgment against the Van Buren County Bank in the garnishment proceedings.

(1). Appellant cites the case of *Riner* v. *Ramey-Milburn Company,* 166 Ark. 221, 265 S. W. 963, in support of its first contention, to the effect that the trial court erred in allowing R. J. Bonds $250 on account of the wrongful appointment of a receiver to take charge of his lands. It is not argued that, under the facts in the case, a necessity existed for the appointment of a receiver, but that it was within the discretion of the chancellor to appoint one without bond, because there is no statute in Arkansas requiring an indemnifying bond as a prerequisite to obtaining the appointment of a receiver, and that no damages can be assessed in favor of an injured party on account of the appointment of a receiver in a case by a chancellor or court where the chancellor or court had not ordered that a bond be given. The case cited recognizes the rule that, if a party litigant obtains the appointment of a receiver maliciously and without probable cause, he will be liable for resulting damages, although there is no statute in the State requiring the execution of indemnifying bonds as a prerequisite to obtaining the appointment of receivers. The court found in the instant case, upon testimony that justified the finding, that no ground or necessity existed for the appointment of the receiver, which was tantamount to finding that the appointment was obtained without probable cause, and inferably with malice. Under the facts in the case and the rule announced, the court did not err in allowing R. J. Bonds $250 on account of the wrongful appointment of the receiver.

(2). Appellant's next contention, to the effect that the court erroneously allowed S. S. Bonds credit on the notes for two checks, the Gilmore check for $202.50 and the Gammill check for $582.50, depends upon whether the allowance of them by the trial court is clearly against the preponderance of the testimony It cannot possibly serve any useful purpose to set out the conflicting testimony relating to these two items in this opinion. Suffice

it to say that, after a careful reading of the testimony, we are of opinion that the weight thereof supports the allowance of both credits.

(3). Appellant's next contention, to the effect that the court erroneously allowed appellees the value of worthless cottonseed which it sold them, is justified on the ground that it did not own the seed but merely acted as the agent of the merchants of Shirley in the sale thereof. Cottonseed was sold the appellees by appellant without disclosing its agency for the merchants of Shirley and without disclosing its principal. An agent who does not disclose his agency and the principal for whom he is contracting may be held liable as a principal. *Cooley* v. *Ksir,* 105 Ark. 307, 151 S. W. 254, 46 L. R. A. (N. S,) 527; *Beatrice Creamery Company* v. *Garner,* 119 Ark. 563, 179 S. W. 160; *Collier Commission Company* v. *Redwine Bros.,* 169 Ark. 814, 277 S. W. 2.

(4). Appellant's next contention, to the effect that the court should have rendered judgment against the garnishee, is without support in the testimony. The weight thereof is clearly to the effect that the Van Buren County Bank owed S. S. Bonds nothing of consequence at the time or after his writ of garnishment was served upon it.

Appellees contend on cross-appeal for a reversal of the decree in so far as adverse to it and a modification thereof, because the court did not allow an additional credit of $203.04 on the Gilmore check, and William Bonds and R. J. Bonds $100 each, and S. S. Bonds $150 damages for breach of the warranty as to the cottonseed.

As stated above, after a careful reading of the testimony we are convinced that the weight thereof supports the amount of the allowance made by the court.

Appellees cite the case of *Earle* v. *Boyer,* 172 Ark. 536, 289 S. W. 490, in support of their contention that the trial court adopted the wrong rule for the measure of damages relative to the sale of seed for planting purposes. Appellees did not bring themselves within the rule announced in that case by proving the proper prepa-

ration of the soil for the reception of the seed and that same were planted at the proper depth.

No error appearing, the decree is affirmed.

HUMPHREYS, J., (on rehearing). Appellant insists, on motion for rehearing, that the evidence does not warrant the conclusion reached by the chancellor and confirmed by this court, that S. S. Bonds was solvent, and that no necessity existed for the appointment of a receiver. We have read the testimony again, and think the finding of the chancellor is supported by the weight thereof. The testimony brings the case within the rule recognized in *Riner* v. *Ramey-Milburn,* referred to in the original opinion, to the effect that, where a litigant obtains the appointment of a receiver without probable cause, and inferably with malice, he will be liable for resulting damages, although there is no statute in the State requiring the execution of an indemnifying bond as a prerequisite to obtaining the appointment of a receiver.

Appellant also insists that it is not bound by the answer of the Van Buren County Bank to the writ of garnishment filed on January 19, 1927, to the effect that it had only eighty-eight cents belonging to S. S. Bonds, because the answer was prematurely filed. The answer was filed on the return day named in the writ, and the truth of the statements contained therein was not traversed in writing. This court ruled in the case of *Beasley* v. *Haney*, 96 Ark. 568, that the untraversed answer by a garnishee must be presumed to be true, even if an issue had properly been joined in the garnishment proceeding. We think the finding of the chancellor to the effect that there was no ground for the issuance of the writ of garnishment is sustained by the weight of the testimony. Van Buren County Bank had a *bona fide* indebtedness against the Bonds, and took a mortgage on unincumbered real estate to secure same. There is nothing in the record to indicate that the mortgage to the bank was fraudulent. It is true that, after the Van Buren bank filed its answer, it loaned $300 to Herman Bonds, 14-year-

old son of S. S. Bonds, and that S. S. Bonds bought cattle with it, under an agreement to divide the profits with his son. The record does not reflect that S. S. Bonds deposited any of his individual money in the bank. A little later on it seems that he purchased cattle with money which he borrowed from Brad Fraser, the cashier of the Van Buren County Bank, and checked on Fraser's account for such amounts as he used. As stated above, there is nothing in the record to indicate that S. S. Bonds ever deposited any of his own money in the bank after he filed his answer, which was not controverted.

The motion for rehearing is therefore overruled.

HYATT *v.* WIGGINS.

Opinion delivered February 4, 1929.

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

Sam T. Poe, Tom Poe and *McDonald Poe,* for appellant.

Fred A. Isgrig and *Phillip McNemer,* for appellee.

KIRBY, J., (after stating the facts). It is insisted that the court erred in the giving of the instruction objected to, relative to the changed specifications for the use of galvanized wire instead of steel in reinforcing the concrete, the jury being told, in effect, that the changed specification had been agreed to by appellants; but the majority is of opinion, in which the writer does not concur, that a fair construction of the instruction does not warrant this conclusion, and that, since the law was properly declared in other instructions in harmony with and not contradictory thereof, there was no error committed in the giving of the instruction in the form requested, and that no prejudice could have resulted therefrom.

The evidence is sharply in conflict as to whether there was any parol agreement made between the parties about the use of galvanized wire for reinforcing in lieu of steel provided to be used in the written contract, but the jury has found against appellants on this point, and, there being substantial testimony supporting the verdict, it will not be disturbed here.

Neither does the court find that error was committed in the giving or refusing to give instructions relative to the measure of damages for injury resulting from failure to construct the culvert in accordance with the contract therefor. Under the instruction given, the jury were authorized to find the damages consisted in the difference between the value of the property sold had the conduit been constructed in accordance with the contract and its value without such properly constructed and after the collapse thereof. The conduit was without value except

as a necessary drainageway for carrying off the surface water from the premises, and, under the circumstances, the damages would have been the difference in value of the property with the conduit or drain properly constructed in accordance with the contract and its value with the conduit constructed as it was in fact made.

The undisputed testimony showed what the value of the property was before and after the collapse of the conduit, and that the difference in such value was decidedly more than the cost of reconstruction of the conduit, and also the complaint alleged appellants were entitled to such damages of reduced value in addition to the cost of reconstruction of the conduit.

After a careful examination the court has concluded that there is no prejudicial error in the record, and the judgment is accordingly affirmed.

[redacted]

GIBSON *v.* CONTINENTAL CASUALTY COMPANY.

Opinion delivered February 4, 1929.

[redacted]

Wills & Wills, for appellant.

Roscoe R. Lynn, for appellee.

MEHAFFY, J. This suit was begun in the North Little Rock Municipal Court, where there was a judgment, and appeal taken to the Pulaski Circuit Court. The plaintiff, who is appellant here, alleged that on July 17, 1927, the defendant, appellee here, by its agent, applied to and solicited the plaintiff to take insurance in defendant company with sick and accident indemnity, and plaintiff subscribed for and took the same; that, in consideration therefor, plaintiff executed and delivered to said agent of defendant a deduction order on the Missouri Pacific Railway Company in payment of the premium, and defendant, through its said agent, issued to plaintiff a receipt and contract to the effect that the accident policy would begin July 18, 1927, and the illness insurance would begin August 3, 1927. A copy of the statement referred to is attached to plaintiff's complaint.

It was further alleged that the insurance indemnified plaintiff against loss of time from July 18, 1927, to the extent of $140 a month while confined in the hospital and $70 while unable to work on account of the accident.

Plaintiff alleged that, after said accident insurance became effective on July 30, 1927, and before the policy had been issued and delivered to plaintiff, he was injured while pursuing his usual occupation, by having his hand severely mashed. One of his fingers was mashed off and two others badly bruised. That, on account of said injury, he was confined to the hospital and unable to work for a period of 24 days, and is entitled to pay at the rate of $140 per month. And that, on account of said injury, he had been unable to work up to the time of filing the complaint, and is entitled to pay for this time at the rate of $70 per month, and that there is due him the sum of $224.67. He alleges that he complied with the terms of the insurance contract.

The following is the stipulation entered into by the attorneys:

"It is agreed by the parties that a jury be waived and the case submitted to the court sitting as a jury, upon the record in the municipal court and the following statement of facts:

"R. B. Henderson, a representative of the defendant, solicited the plaintiff for health and accident insurance. On July 17, 1927, the plaintiff signed an application for insurance, marked Exhibit A. Henderson handed the plaintiff a statement on form 2896, marked Exhibit B. The plaintiff at the same time executed and delivered to the agent what is called a deduction order, marked Exhibit C. Henderson testified that he understood that he was authorized to issue the statement just as he did. And plaintiff testified that he understood he was insured against accident from July 18, 1927, the time stated on form 2896, and made Exhibit B as above. The plaintiff was injured July 30, 1927, and made necessary proof of his injury, showing that the same was received in the ordinary performance of his duties. The defendant declined to accept proof, for the reason that the policy had not been issued at the time of the injury. If the policy had been issued it would have been on defendant's form 1174, marked Exhibit D.

"The correspondence shows that the defendant declined to issue the policy because the records of the company apparently indicated that the plaintiff was susceptible of kidney stones. The plaintiff advised R. B. Henderson, the representative of the defendant, that there was a mistake; that he had never had kidney stone, and had never had any insurance with defendant, and had never filed any claim of any kind with defendant other than for the injury here sued for. But, at the request of defendant, he signed a waiver, marked Exhibit E, of any loss resulting directly or indirectly from kidney stone, under date of August 3, 1927.

"It is agreed that the claim herein sued on is for loss of time from accident, and not on account of sickness, and that, if there is any liability against the defendant, it amounts to two hundred ninety-four and

67/100 dollars, plus interest from November 8, 1927, the date of the judgment in the lower court, at 6 per cent. per annum.

"It is further agreed that, if plaintiff is entitled to recover, he is entitled to have $35 attorney's fee taxed up as costs.

(Signed) "J. F. Wills,
"Attorney for plaintiff.
"Roscoe R. Lynn,
"Attorney for defendant."

The application signed by the plaintiff was also introduced in evidence. It is quite lengthy, and it will not be necessary to set it out in full.

When the application was signed, R. B. Henderson, the representative of the insurance company, thereupon gave plaintiff the following statement on defendant's form No. 2896:

"Continental Casualty Company. General Offices, 910 S. Michigan Avenue, Chicago.

"7-17-27.

"Name: Will Gibson.

"Occupation: Coach builder.

"Date application secured: 7-17-27.

"Date accident policy becomes effective: 7-18-27.

"Date illness insurance becomes effective: 8-3-27.

"Principal sum: $2,000.

"Accident indemnity: $70.

"Illness indemnity: $70.

"Premium: $59.40.

"First payment due from wages earned in month of August.

"No. of installments: 11.

"R. B. Henderson, representative."

Plaintiff thereupon gave Henderson, representative of defendant, the following deduction order:

"Paymaster's Order No.....

"Agent, notice: To avoid errors and for the benefit of paymaster, write applicant's name here, very plainly, giving correct spelling and first name in full:

"Will Gibson.

"Annual plan: I also agree that, if my wages are paid to me more often than once a month, then each installment, instead of being deducted and paid from a month's wages as herein provided, is to be deducted and paid from that part of the month's wages first payable to me.

"1. The annual premium of my said policy is $....., and I have agreed to pay it in ..... installments. The amount to be deducted from my wages for the month of ....., 19....., is $....., and the same amount is to be deducted monthly thereafter until the above number of installments have been paid.

"Monthly plan. 2. The annual premium of my said policy is $59.40, and I have agreed to pay it in monthly installments. The amount to be deducted from my wages for the month of August, 1927, is $9.90, and the amount to be deducted monthly thereafter is $4.95 until further notice. Should I desire to discontinue my policy after it has been maintained in force for at least one year, by reason of said payments, I agree to give the company thirty days' written notice.

"I hereby make this order a part of my application for insurance, and waive for myself and beneficiary under said policy notice of nonpayment of any premium for any reason.

"I understand that no agent of the company has any authority or power to waive or change any of the printed provisions hereof.

"My employer is: Missouri Pacific R. R.

"Division or department head: H. C. Ralls.

"My occupation is: Coach builder.

"My time is kept at: Little Rock.

"I am employed at Little Rock.

"Division: Arkansas, shop or section No. 4477.

"Dated at Little Rock, the 17th day of July, 19.....

"Signature: Will Gibson."

A copy of the policy which would have been issued was also introduced in evidence.

On August 3, 1927, three days after plaintiff had been injured, the defendant had him sign the following waiver:

"To induce the Continental Casualty Company to issue (or, if it be already issued, to continue) its policy of the above number, notwithstanding the fact that I have heretofore suffered from kidney stones, I hereby agree that no indemnity of any kind or amount shall be payable to me or to my beneficiary under said policy for loss which results wholly or partly, directly or indirectly, from kidney stones and/or any disease of the urinary tract in any form; this notwithstanding any provision there may be to the contrary in said policy contained. This agreement is executed by me in duplicate, one copy to be attached to the said policy as a part thereof, and the other to be retained by the company.

"Dated at Little Rock, this 3rd day of August, 1927.

(Signed) "Will Gibson."

"Approved as part of said policy. Continental Casualty Company.

"By H. G. N. Alexander, President."

The court, after considering the evidence mentioned above, held that, as no policy had been issued, there was no contract for the accident insurance.

Motion for a new trial was filed, overruled, exceptions saved, and the case is here on appeal.

The only question involved in this appeal is whether the insurance was in force at the time of the accident, or whether it did not become effective until application was received at the home office, approved, and policy issued. This court has held that an oral contract for temporary insurance until policy is issued is valid, and that an agent with authority to issue policies may make a valid, binding oral contract for temporary insurance.

It is a general rule that an agent with power to make and issue policies may agree orally for temporary insurance. Of course, if he could agree orally for temporary insurance, or insurance to begin at a particular date, he could do the same in writing. 14 R. C. L. 880-881.

The appellee contends that the insurance was not in force and that it was not intended to be in force until the application was received and the policy issued. The agent of appellee, however, filled out and signed appellee's form No. 2896. That stated: "Date application secured: 7-17-27; date accident policy became effective, 7-18-27; date illness insurance became effective: 8-2-27." This was appellee's form.

There is no dispute about Henderson being the agent of appellee and having possession of these forms for the purpose of soliciting insurance, and no question about his having authority to sign these orders; and appellee does not contend that he did not have the right to write in the dates and fill the blanks; they were evidently there for that purpose. And the appellee furnished the agent with these documents, and it was certainly within the apparent scope of his authority to make the contract that he did make. There is nothing in the application or in any of the forms introduced in evidence that in any way contradicts the statement in this form 2896.

Appellee argues that, while it is not necessary for the policy to be delivered before it takes effect, when it contains a provision that it shall take effect immediately upon its issuance, the court cannot say, under the agreed facts in this case, that it can take effect prior to its issuance. And, since in this case it was not issued, it is contended that no contract of insurance was made. This however is contradictory of the statement in form 2896.

It is argued that the intention of form 2896 was merely a receipt or memorandum, and that the transcript does not show what the agent's instructions were in reference to filling out the slips. There is no dispute about the fact that he had the slips and for the purpose

for which they were used. The blanks were there, and it was at least within the apparent scope of the agent's authority to fill these blanks. It would have been an easy matter to have form No. 2896 so printed as to show that it became effective when the policy was issued, and that would have been the most reasonable thing to do if that were a fact. But the very fact that the blank was left there following the words, "date accident policy becomes effective," shows that it would be unreasonable to hold that it was not the intention that these dates be filled by somebody sometime. And we think the most reasonable construction of the instrument is that the agent himself was to fill them. And especially is this true when we keep in mind the rule that the contract is to be construed most strongly against the insurer. In contracts of insurance, like other contracts, the intention of the parties must govern. And it certainly appears that the intention here was for the agent to fill in the blank showing the date when the accident policy became effective.

The policy was not issued, as the testimony shows, because the appellee got the idea somehow that appellant had some ailment. They afterwards learned, however, that they were mistaken about this. It is contended, however, that there is nothing in the stipulation of facts indicating that the agent had any authority other than as a mere soliciting agent, authorized to take applications and forward them to the company for approval, and, as such agent, had no authority to issue a policy. It may be that his agent had no authority to do what he did, but, under the circumstances, the acts of the agent appear to be clearly within the apparent scope of his authority.

Appellee calls attention to the case of *New Hampshire Fire Ins. Co.* v. *Walker, ante,* p. 317, and says that the opinion in that case seems to be decisive of the case at bar. We said in that case: "The undisputed proof shows that the agent had no authority to issue a policy for the appellant on property at Hensley."

There is no testimony in the instant case that disputes the authority of the agent Henderson to fill the blank, thereby stating the date when the accident policy became effective. We have already said that this action on the part of the agent was within the apparent scope of his authority. Of course, if he had no right to make this, and had not had the blanks for the purpose of filling them up, or if the undisputed proof showed that he had no authority to fill the blanks or to make the contract, then, of course, it would be controlled by the case of *New Hampshire Fire Ins. Co.* v. *Walker, supra.*

We also said in the above case that, while the authorities are in conflict, the appellant is bound only by such acts of the agent as are done in the ordinary course of the business in which he is engaged, and that, since he had no authority to write insurance for appellant in this territory, the appellant is not bound, even if a contract was made by Wells. In the instant case, so far as the record shows, the acts of the agent were done in the ordinary course of business in which he was engaged, and he had apparent authority to do the things he did.

It follows that the judgment of the circuit court must be reversed, and remanded for trial, and it is so ordered.

KIRBY and MCHANEY, JJ., dissent.

FIRST NATIONAL BANK OF BELLEVILLE, ILLINOIS, *v.* TATE.

Opinion delivered February 4, 1929.

[redacted]

A. G. Little and *C. M. Buck,* for appellant.

J. T. Coston, for appellee.

MEHAFFY, J. Adolph Knobeloch owned the north half of section 34, township 11 north, range 8 east, and northwest quarter and west one-half of the northeast quarter and southeast quarter of the northeast quarter of section 35, township 11 north, range 8 east, containing 600 acres, in Mississippi County, Arkansas, and entered into a contract to sell said land to Harold White. This contract was entered into some time prior to October, 1919. The contract expressly stated 600 acres, and it did not contain the words "more or less."

On October 3, 1919, White entered into a contract with Tate and Fitzhugh to sell them the land for $75,000, which would be $125 per acre if the tract contained 600 acres. This contract between White and Tate and Fitzhugh contained the same description of the land, followed by the words "containing 600 acres in Mississippi County, Arkansas," and this contract did not contain the words "more or less," or any similar words.

In the contract of sale by White to Tate and Fitzhugh there was to be a cash payment and five promissory notes for the sum of $11,000, each payable in 1, 2, 3, 4 and 5 years from date, bearing interest at the rate of 6 per cent. per annum from date, and a lien was retained for the balance of the purchase money. Said contract also provided for the delivery by White to the purchasers of an abstract of title to the land, and the parties were to have 30 days in which to examine the abstract, for the purpose of making such corrections as might be neces-

sary and meet the requirements of the attorney for the purchasers. The contract also provided that White should have possession of the land until January 1, 1920, at which time he was to deliver a warranty deed and the possession of the land. Said contract further provided for furnishing the purchasers a good and merchantable title to said land, the same to be approved by the attorney for the purchasers.

No deed was ever delivered, as provided for in the contract, and on the 12th day of January, 1920, White assigned the contract with Tate and Fitzhugh to Knobeloch. The assignment reads as follows:

"January 12, 1920. For and in consideration of the sum of $8,350 I assign all my interest in the above contract to Adolph Knobeloch.

"H. B. White."

Thereafter a deed was prepared and signed and acknowledged by Knobeloch and his wife in accordance with the White contract. But Fitzhugh and Tate declined to accept this deed, made some objections to the contract, and Fitzhugh, Tate and Knobeloch mutually agreed to a different contract. That is, it was different as to the amount of the deferred payments and the interest, and this deed to Fitzhugh and Tate from Knobeloch and his wife described the same land which is above described, said description followed by the words "containing 600 acres," but did not contain the words "more or less."

The testimony on the part of the appellees shows that, at the time they entered into this contract and before it was executed, Fitzhugh insisted on knowing the number of acres, and Knobeloch told him that there were 600 acres. Fitzhugh and Tate both swear that they purchased the land, not for $75,000 for the tract, but for $125 per acre. After some of the payments had been made, Knobeloch borrowed money from the First National Bank of Belleville, Illinois, in the town where he lived, and pledged these notes as security for the payment of his note. These notes were not paid at maturity, because Tate and Fitzhugh claimed to have discovered

that there was a deficiency; that there were several acres less than 600 in the tract, and thereupon the First National Bank filed suit in the Mississippi Chancery Court.

The defendants filed answer and cross-complaint, in which they alleged that a new contract was made; that they paid all of their notes promptly, and would have continued to do so if it had not been for the deficiency in the number of acres.

The chancery court found that the sale of the land was by the acres, and not *en masse*. The court also found that Knobeloch represented to Fitzhugh, before the sale was consummated, that the lands contained 600 acres, and that this representation was material and induced the execution of the contract, and that it was false. The court further found that appellees were entitled to a reduction on the purchase price for 11.8 acres at $125 per acre, amounting to $1,475. This appeal is prosecuted to reverse this decree.

The appellant first contends that there is no shortage; that the tract sold contained 600 acres.

Fitzhugh testified that it was distinctly understood that the price was to be $125 per acre, and that Knobeloch represented that the tract contained 600 acres. He also testified that Knobeloch agreed to make a reduction in the price, according to the deficiency in acres.

There was some correspondence, most of the letters having been written by Mr. Fitzhugh, but he also details a conversation with Mr. Knobeloch, which Mr. Knobeloch does not deny.

Fitzhugh then employed a surveyor, and, after agreeing to make good the shortage, if there should be any, Mr. Knobeloch employed a surveyor himself, who made a survey of the land and made a map or plat, which was introduced in evidence, and this plat shows a shortage of 11.8 acres. And Mr. Knobeloch's employee or surveyor, Mr. Gauss, made the plat and testified to its correctness. He testified that he had been in the business of surveyor and engineer practically all of his life; was with the government for about 13 years in this line of work, and since

that time has engaged in private practice; that he was requested to make a survey by the appellees, but stated to them that he had already made one for Mr. Knobeloch and did not feel like it was necessary to make any more measurements, because they had already been made. He testified that, basing his answer on property lines, the shortage in the total tract was approximately 11 acres—11.8 acres. He was unable to find the corners established by the government because the monuments and evidence had been destroyed, and he stated:

"The original survey by the government was made about a hundred years ago, and then they have been re-established from time to time by local surveys, and to say that an attempt was made to find that original corner would not be true, because it was not, but I have a little better authority than the mere property lines for the location of the quarter corner on the west side of section 34, because there is a local corner 5,280 feet due south of the center of the canal along that line of road, and that quarter corner, which is at the corner of the fence which marks the south line of section 34, is midway between the two corners, which, in the absence of any further evidence, would have to be accepted as the quarter corner. On the east side of 35 there is nothing there but the property corner, that fence corner."

And this witness also testified that he found the accepted corners, and this testimony, together with the testimony of the other surveyor, and the plat made and introduced in evidence, was sufficient evidence to justify the court in finding that there was a shortage of 11.8 acres.

It would be impossible, in many instances, to find anything but accepted corners. After a long period of time the corners and evidences of the corners established by the government are destroyed, and, in many instances, corners established by subsequent surveyors, and the proof of those things cannot be had. This was a question of fact as to whether there was a deficiency in the acreage, and, unless we could say that the chancellor's find-

ing was against the preponderance of the evidence, we would not be justified in reversing his finding.

It is also contended by the appellant that, if there is an actual shortage, this is not an action on the covenants in the deed. And it is contended that the White contract was assigned by White to Knobeloch, and that this is the contract entered into by Fitzhugh and Tate.

We do not agree with the appellants in this contention, for the testimony, we think, conclusively shows that the White contract was not carried out, but, according to the preponderance of the evidence, there were not only changes in the interest and the amount of the payments and number of notes, but the contract entered into was for $125 per acre, and it was represented by Mr. Knobeloch that there were 600 acres, and, according to the preponderance of the evidence, this was the contract finally entered into.

Any persons competent to make a contract can as validly agree to rescind it as they could agree to make it in the beginning. It is entirely competent for parties who have entered into a contract to modify it, to waive their rights under it, to vary or modify its terms, or to substitute a wholly different contract from the original one. And this may be done by mutual consent, and, according to the preponderance of the testimony in this case, it was so done.

This not only applies to oral contracts, but to contracts in writing as well. It is argued, however, that there is no consideration for the new contract or for the statement that there were 600 acres. It has been many times decided, however, that, so long as a contract remains executory, a mutual agreement of the parties to rescind it requires no new or individual consideration; for the release of each of the parties from his duties and obligations under the existing contract is a sufficient consideration for his agreement to release the other.

It is also true, as we have already said, that the parties may not only agree to rescind, but they may make a new contract with reference to the same subject-matter,

the new contract taking the place of the old, and the substitution of one for the other is a sufficient consideration to support the new agreement. Black on Rescission and Cancellation, vol. 2, 1234; 6 R. C. L. 914.

We think that Mr. Fitzhugh's and Mr. Tate's testimony as to the 600 acres and as to the purchase being by the acre instead of *en masse* is corroborated by the conduct and testimony of Knobeloch himself. Fitzhugh swears positively that that was the understanding, and that Mr. Knobeloch stated that there were 600 acres. Mr. Knobeloch does not deny having said this, except to say that he was not positive about it; could not have been, because he had not had the survey. It is argued that Mr. Knobeloch's promises thereafter to pay for any shortage are without consideration, and this is true so far as that conversation is concerned, but it is competent as evidence because it corroborates, or strengthens rather, the claim of Fitzhugh that that was the agreement originally.

It is contended also that the mention of the number of acres in the deed is not a matter of covenant. But it was certainly, if made as the preponderance of the evidence shows that it was made, a representation which turned out to be untrue, and, according to the undisputed testimony of Fitzhugh, was not only an inducement, but he would not have entered into this contract but for that representation.

Appellant calls attention to *Harrell* v. *Hill*, 19 Ark. 108, 68 Am. Dec. 202, and there are a number of other Arkansas cases to which attention might be called. In all of them, however, the words "more or less" were used after the mention of the number of acres, and it is generally held that "more or less" simply means approximately. And, if there is a very small discrepancy or insufficiency, that a statement of "more or less," or "estimated," will prevent the purchaser from recovering where the difference is trifling or small. But, even where the terms "more or less," or "estimated," or "approximately" are used, or either of them, if there is a very great discrepancy, the purchaser is entitled to recover.

But these cases to which appellants have referred are cases where the sale was *en masse,* and not by the acre. And it is generally held that, where the sale is by the acre, unless the number of acres called for in the deed are actually in the tract, the purchaser may recover the price per acre for the number of acres short.

The first case referred to by appellant is that of *Harrell* v. *Hill, supra,* and the court said:

"The general rule is that, when a misrepresentation is made as to quantity, though innocently, the right of the purchaser is to have what the vendor can give, with an abatement out of the purchase money for so much as the quantity falls short of the representation. * * * The same principle is thus expressed by Mr. Justice STORY: 'The general rule is that the purchaser, if he chooses, is entitled to have the contract specifically performed, as far as the vendor can perform it, and to have an abatement out of the purchase money or compensation for any deficiency in the title, quantity, quality, description or other matters touching the estate.'' *Harrell* v. *Hill,* 19 Ark. 104, 68 Am. Dec. 202.

It is immaterial whether the representations as to acreage were made innocently or otherwise. It might be a mistake or a fraud, but the rule is that, if one buys a certain number of acres, a misrepresentation as to the number, whether made innocently or fraudulently, entitles the purchaser to recover for the deficiency. And this is not an action for false and fraudulent representations.

The contention of the appellee is, and the preponderance of the evidence shows, that there were 600 acres represented by Mr. Knobeloch to be in the tract, and he may have thought that it contained that. But, if he made the representation, and it was bought by the acre, and there were not that many acres, the purchasers would be entitled to recover without regard to whether there was any fraud or not.

"It is not charged that Solmson knew this representation was false, but it is not essential that that fact be shown. This was a material matter, and he was bound

by his representations, however innocently made." *Solmson* v. *Deese,* 142 Ark. 189, 218 S. W. 657; *Neeley* v. *Rambert,* 71 Ark. 91, 71 S. W. 259.

If the contract was for $125 per acre and it was represented that there were 600 acres, it would be wholly immaterial whether there was any fraud or intentional misrepresentation, because the contract was to pay so much per acre. And the purchaser would in no event be liable for the price of any more acres than the tract contained, no matter how innocent the vendor may have been in making the representations.

There is no evidence of any fraud or any intentional wrong, but we think the great preponderance of the evidence shows that it was a purchase by the acre at $125 per acre; that it was represented to Fitzhugh that there were 600 acres; that he declined to purchase until this statement was made; and the evidence shows a shortage of 11.8 acres. And on the questions of fact involved in the case and determined by the chancellor, his finding is supported by a preponderance of the evidence.

The decree of the chancellor is correct, and is therefore affirmed.

HART, C. J., and KIRBY, J., dissent.

YARNELL *v.* MECHANICS' INSURANCE COMPANY OF PHILADELPHIA.

Opinion delivered February 4, 1929.

John E. Miller, for appellant.
Golden Blount, for appellee.

MEHAFFY, J. The appellee brought this suit to collect $81. The suit was based on the following note:

"The company is authorized to insert the number of policy in this note.

"$81.00. For value received, in policy No. CF 110, dated.....19....., issued by Mechanics' Insurance Company of Philadelphia, I promise to pay said company, or order, at its office in Chicago, Illinois, with expenses of collection and attorney's fees, and without relief from valuation or appraisement law, the sum of eighty-one and no/100 dollars, payable without interest in installments as follows: Twenty dollars and twenty-five cents on the first day of December, 1926, and twenty dollars and twenty-five cents on the first day of December, 1927, and twenty dollars and twenty-five cents on the first day of December, 1928, and twenty dollars and twenty-five cents on the first day of December, 1929.

"This note is for insurance, and, in case of loss under the policy for which it is given, the company is hereby authorized to deduct from the amount of said loss the entire amount of unmatured installments of this note. And it is hereby agreed that, in case any one of the installments herein named shall not be paid at maturity, or if any single payment promissory note (acknowledged as cash or otherwise) given for the whole or any portion of the premium for said policy, shall not be paid when due, this company shall not be liable for loss during such default, and the said policy shall lapse until payment is made to this company, and the whole amount of installments or notes remaining unpaid on said policy may be declared earned, due and payable, and may be collected by law. In case of the sale of the property insured under said policy before maturity of this note, this note shall become due and payable immediately.

"Dated at Searcy, Arkansas, this 5th day of December, 1925.

"J. Pitts Yarnell.

"Witness: C. A. Foster."

The circuit court directed a verdict in favor of the appellee, and appellant prosecutes this appeal to reverse the judgment of the circuit court.

In addition to the note above given in evidence, the appellant testified as follows: The policy of fire insurance was delivered, and appellant paid the yearly premium of $20.25; paid this sum at the time the policy was issued. That kept the policy in force one year. At the same time the company requested that a note be executed as evidence of four additional years at $20.25 per year, and the note which has been introduced in evidence was executed by him at the time. Witness was to pay $20.25 each year to keep the policy in force. The policy was dated December 5, 1925, and the premium which witness paid in this case made the policy in force until December 5, 1926.

On March 25, 1926, a fire destroyed the property and destroyed the copy of the policy which was in appellant's possession, and he did not have a copy. The adjuster came to see appellant, and had a copy of the policy, and made settlement with him for the face of the policy. Appellant afterwards received a letter from the company, asking him to pay the other installments of the note. He wrote the company, giving it as his understanding of the contract, and stated to the company that he did not consider he owed anything; and, in response to that letter, he received the following reply:

"Mr. J. Pitts Yarnell,
Searcy, Aransas.

"*In re*: Policy No. CF-110.

"Dear sir: Please disregard our letter to you of December 22, concerning an apparent delinquent note payment under this policy. This notice was sent to you through a misunderstanding, the above canceled policy having been in our possession at that time.

"Regretting any inconvenience we may have occasioned you, we remain,

"Very truly yours,

"W. J. Schmidt,
"Assistant Secretary."

When the adjuster came to see appellant he had a copy of the policy, and stated that the settlement was made in accordance with the copy of the policy which he had.

The appellant contends that the court erred in instructing the jury to find for the plaintiff, and cites and relies on the case of *American Ins. Co. of Chicago* v. *Storey,* 41 Mich. 385, 1 N. W. 877.

The majority of the court, however, are of opinion that the court did not err in directing a verdict for the plaintiff; that he was justified in so directing the jury under the authority of *American Ins. Co.* v. *Austin, ante,* p. 566. The installment note in the above case contained provisions very similar to the installment note in the instant case. In that case the court said:

"The cash payments made on the premium at the time the application was taken, although one-fifth of the premium on the policy for five years, did not constitute a payment of the premium for one year's insurance, but only a partial payment of a premium on a five-year policy of insurance."

And, in the instant case, the cash payment, according to the opinion of the majority, did not constitute a payment of the premium for a one-year policy of insurance. And in this case the undertaking of the insurer was not to insure the appellant's property from year to year, but for a period of five years, on condition that he pay cash one-fifth of the premium, and execute note for the balance, payable at intervals mentioned in the note.

The appellant also contends that the court erred in its refusal to give instructions requested by the appellant. And also it is contended that the court erred in its refusal to permit the introduction of the policy in evi-

dence, but appellant does not offer to show how he was prejudiced by the policy not being introduced.

Having reached the conclusion above with reference to the note and the policy, it necessarily follows that the court did not err either in its failure to give instructions or in its refusal to permit the policy to be introduced in evidence.

The writer of this opinion does not concur in the views above expressed, for the reason that he believes that the policy of insurance and note constituted one contract, and that, when the adjuster came to settle the matter, he had the policy with him, and, according to his statement, it was adjusted and settled according to the terms of the policy. The majority of the court, however, are of opinion that the case is controlled by the case of *American Ins. Co.* v. *Austin, supra,* and the judgment of the circuit court is therefore affirmed.

TEXAS COMPANY *v.* WILLIAMS.

Opinion delivered February 4, 1929.

Powell, Smead & Knox, for appellant.

Haynie, Parks & Westfall, for appellee.

McHaney, J. Appellee brought this action against appellant to recover $6,500 on an alleged oral contract to pay him such sum for personal injuries sustained by him on or about June 30, 1925. He alleged that on January 15, 1927, he entered into an oral contract of settlement with appellant, by which he was paid $1,500 in cash and was to be paid $5,000 in semi-monthly installments of $75 each; that appellant neglected and refused to pay said installments, and that, at the time of filing suit, twenty-six of said payments were past due, in the sum of $1,950, for which amount he prayed judgment. Appellant denied making any such settlement, or that its claim agent had any authority to make such settlement. It set up as a defense a release agreement executed by appellee in full settlement of all claims, in consideration of $1,500 paid to him by appellant, a copy of which is as follows:

"Know all men by these presents: That I, H. B. Williams, for the sole consideration of fifteen hundred and no/100 dollars, to me in hand paid by The Texas Company, have released and discharged, and by these presents do for myself, my heirs, executors, administrators and assigns, release and forever discharge the said The Texas Company of and from all claims, demands, damages, actions, or causes of action, on account of injuries resulting, or to result, from an accident to me which occurred on or about the 30th day of June, 1925, by reason of being injured by pulley shaft and centrifugal pump at Bradley vacuum station, near Griffin, Arkansas, rupturing my right side, back, hip, and other serious injuries to my body, totally disabling me, and of and from all claims or demands whatsoever in law or in equity which I, my heirs, executors, administrators, or assigns can, shall or may have by reason of any matter, cause or anything whatsoever prior to the date hereof.

"In witness whereof I have hereunto set my hand and seal this 15th day of January, 1927.

"H. B. Williams.

"In the presence of R. R. Brown, R. E. Wood."

Appellee replied, stating that he did not read the release agreement signed by him, and that appellant's claim agent falsely and fraudulently misrepresented the instrument to him as only a receipt for $1,500 cash payment, and that he signed same relying on statements of said agent that it was only a receipt for said sum; and that he was weak and nervous from his injury at the time, which was January 15, 1927.

Only three witnesses testified who pretended to know anything about the settlement—the appellee for himself, and appellant's claim agent, R. E. Wood, and R. R. Brown, who signed the release agreement as a witness, at the request of Wood, for appellant. Appellee admitted signing the release, but said he did not read it; that Wood read it to him, and that, as he understood it, he was to be paid $1,500 in cash and $75 semi-monthly until an additional $5,000 was paid; that, when the first installment came due, he wrote appellant demanding payment, and that he had written several letters since that time inquiring about it, but received only one letter in reply. He then brought suit on the 26 installments past due.

Witness Brown testified that his office was next to Wood's, and that he signed the release as a witness at Wood's request; that he saw appellee sign it, asked him if he signed it, and he said he did; that he understood that Wood was paying appellee $1,500 for personal injury case, and that appellee wanted to sign the release.

Wood contradicted appellee in all essential particulars. He denied that there were to be any further payments in addition to the $1,500 cash, but said that the $1,500 was a full and complete settlement with appellee for all claims on account of the injury sustained by him while in appellant's employ; that it was a case where he did not consider there was any liability, but that he

finally succeeded in getting his company to authorize him to pay $1,500 in full settlement, and that this sum was paid more out of sympathy for appellee than on account of any liability. He stated that he showed appellee a letter from appellant, by which he was authorized to make the settlement and take the release agreement which was taken, and that he had no authority to make the agreement alleged.

Appellee did not deny having been shown the letter authorizing Wood to settle with him for $1,500 and to draw a draft on appellant for such sum.

All the testimony regarding the alleged oral agreement which tended to contradict and vary the terms of the written agreement of settlement was admitted, over appellant's objections and exceptions. At the conclusion of the testimony appellant requested a peremptory instruction in its favor, which the court refused, over its exceptions. There was a verdict and judgment for $5,000 in appellee's favor.

We think the request for a peremptory instruction should have been sustained. The evidence shows that appellee is a man 39 years of age, is able to read and write, and possesses reasonable intelligence. There was no confidential relationship existing between appellee and Mr. Wood, appellant's claim agent, and no reason why he should rely upon his statements as to what the instrument contained. He admitted signing the release agreement, but said he did not read it, but he relied upon Wood to write the release in accordance with their previous agreement, and that he signed it without knowing its contents. He testified that Wood read it to him, but that what he read was not like the instrument exhibited at the trial. The evidence wholly fails to establish any fraud on the part of appellant whereby appellee was induced to sign the release agreement. As said by this court in the recent case of *Magnolia Petroleum Co.* v. *McFall, ante*, p. 596:

"The plaintiff was thirty-nine years old, and had been employed by the railway company for eighteen

years. He was not an illiterate person, and gave no reason why he did not read over the contract for the release of damages, except that the agent told him that it was only payment for his expenses and loss of time."

Appellee and Wood were dealing at arms' length. They were representing conflicting interests, and, as above stated, no relation of trust or confidence existed between them. Under such circumstances, he will not be permitted to say that he did not know what the written instrument contained, that he did not intend to execute such a contract, but intended to execute another; and he will not be permitted to avoid the written instrument by merely stating that the claim agent told him it was something else, and that he did not read it, when he admits himself that he signed the instrument, and was able to read, write and understand the nature of the contract. In *Upton* v. *Tribilcock,* 91 U. S. 50, the Supreme Court of the United States used this language:

"It will not do for a man to enter into a contract and, when called upon to respond to its obligations, to say that he did not read it when he signed it, or did not know what it contained. If this was permitted, contracts would not be worth the paper on which they are written. But such is not the law. A contractor must stand by the words of his contract; and, if he will not read what he signs, he alone is responsible for his omission."

The evidence in this case shows that appellee had ample opportunity to read the instrument. It was prepared by Wood, and left with appellee to read and sign while Wood went to a near-by office to get Mr. Brown to witness appellee's signature to the instrument. When Wood and Brown returned, he had either read the instrument or was still reading it, and was about to attach his signature to the same, which he did in Brown's and Wood's presence. Appellee relies most strongly upon the case of *St. L. I. M. & S. R. Co.* v. *Smith,* 82 Ark. 105, 100 S. W. 884, but we do not regard that case nor the others cited by appellee of controlling importance here. This case is controlled by the principles announced in

Kansas City So. Ry. Co. v. *Armstrong,* 115 Ark. 123, 171 S. W. 123, where this language was used:

"It will be observed that the release contract in express terms refers to the occasion on which the plaintiff's claim for physical injuries is based, and covers all claims which she had or could have had growing out of or connected with any injury received by her on that occasion. In other words, the contract, in the most complete terms, contains a covenant for a settlement of all claims in consideration of ten dollars, which was paid. The question is therefore presented whether there is anything in the evidence which affords the plaintiff any escape from the binding force of her contract, and whether the evidence warranted a submission of that issue to the jury. We think that, under the uncontradicted evidence in this case, the plaintiff is bound by the contract, and that the court should not have submitted the case to the jury. This is not a case where the plaintiff is shown to have been mentally incapacitated from entering into the contract, as in *St. L. I. M. & S. R. Co.* v. *Brown,* 73 Ark. 42, 83 S. W. 332; *Bearden* v. *St. L. I. M. & S. R. Co.,* 103 Ark. 341, 146 S. W. 84; or *St. L. I. M. & S. R. Co.* v. *Reilly,* 110 Ark. 182, 161 S. W. 1052; nor is it a case where there were fraudulent representations as to the contents of the written instrument, or any trick or subterfuge whereby the papers were substituted so as to induce the contracting party to execute it, as in *Hot Springs Railroad Co.* v. *McMillan,* 76 Ark. 88, 88 S. W. 846; *St. L. I. M. & S. R. Co.* v. *Smith,* 82 Ark. 105, 100 S. W. 884; neither is this a case where the injured person executed the release in reliance upon the superior knowledge of the physician or surgeon of the company as to the extent of the injuries, as in *St. L. I. M. & S. R. Co.* v. *Hambright,* 87 Ark. 614, 113 S. W. 803. The parties having deliberately contracted with each other for a settlement of the unliquidated claim, they are both bound by the contract, and in the absence of fraud in the particulars indicated above in the decided cases, neither of the parties can be

permitted to introduce testimony to show that the release was only partial."

As we have already stated, the parties were dealing at arms' length, and, even though the agent misrepresented to appellee the contents of the written instrument, he had no right to rely upon such misrepresentations, since he admitted himself that he was thirty-nine years of age, and able to read and understand the contents of the written instrument. The following from *Cherokee Construction Co.* v. *Prairie Creek Coal Mining Co.*, 102 Ark. 428, 144 S. W. 927, was quoted with approval in *K. C. So. Ry. Co.* v. *Armstrong, supra,* with reference to the conclusive effect of a release agreement:

"The lease or instrument in question was something more than a mere receipt. It was the final embodiment in writing of the agreement between the parties. It is a comprehensive discharge, not only of the difference between the parties, but of all matters between them. The natural meaning of the language used is broad enough to cover everything connected with the first lease. To permit the plaintiff to show by parol proof that it was not so intended would be to contradict or explain away the instrument, which is contrary to the established rule of law as established by the previous decisions of this court."

So here the written contract of release, executed and delivered, was the final contract between the parties, no matter what had previously gone before. To permit appellee now to testify that, although he signed the instrument and received the $1,500 mentioned therein, it was not the contract he intended to sign, but that they were to pay him $5,000 more in semi-monthly installments of $75 each until $5,000 additional was paid, would be to put at naught the fundamental rule of evidence with reference to written contracts.

The only attempt on the part of appellee to show fraud is that the claim agent represented to him that he was signing a receipt for $1,500, and not an absolute

release. This was not sufficient to justify a submission of the case to the jury.

For a further discussion of the binding effect of release agreements, see the recent case of *Mo. Pacific Rd. Co.* v. *Elvins,* 176 Ark. 737, 4 S. W. (2d) 528.

Having reached the conclusion that there was no sufficient showing of fraud and that the release agreement executed by appellee was for a substantial consideration and without fraud in its procurement, there was no question to be submitted to the jury. The judgment of the circuit court is therefore reversed, and the cause of action dismissed.

MARTIN AND WOODARD *v.* STATE.

Opinion delivered February 11, 1929.

Cravens & Cravens, for appellant.

Hal L. Norwood, Attorney General, and *Robert F. Smith,* Assistant, for appellee.

HART, C. J., (after stating the facts). The main reliance of the defendants for a reversal of the judgment is that the testimony is not legally sufficient to warrant a verdict of guilty of the crime of robbery. Ray Sloan, the person charged to have been robbed, was a witness for the State at the trial. What he testified to at the examining trial was admissible in evidence in contradiction of his testimony given at the trial of the case in the circuit court, but it was inadmissible as substantive testimony tending to show the guilt of the defendants. *Midland Valley Rd. Co.* v. *Ennis,* 109 Ark. 206, 159 S. W. 214. Thus we see that the testimony of Ray Sloan is eliminated, so far as establishing the guilt of the defendants is concerned, because he testified positively at the trial

that he lost the money in a game of poker, and that the defendants did not obtain it from him by force or intimidation.

This leaves the testimony of Mrs. Ray Sloan alone to establish the guilt of the defendants. It was shown by the State that the attendance of the witness at the court could not be procured, and that she was absent in the State of Oklahoma, where she lived. This made a predicate for the introduction of her testimony at the examining court at the trial of the case. *Maloney* v. *State,* 91 Ark. 485, 121 S. W. 28. It is earnestly insisted, however, by counsel for appellants that her testimony is not legally sufficient to warrant a verdict of guilty, and in this contention we think counsel are correct. Robbery is the felonious and forcible taking of the property of another from his person or in his presence, against his will, by violence, or putting him in fear. And this violence must precede or accompany the taking of the property. *Clary* v. *State,* 33 Ark. 561; *Routt* v. *State,* 61 Ark. 594, 34 S. W. 262; and *Coon* v. *State,* 109 Ark. 346, 160 S. W. 226. In these decisions the court also held that the taking must be done through force or fear. If force is relied on in proof of the charge, it must be the force by which another is deprived of his property and the accused gains possession of it. If putting in fear is relied on, it must be the fear under duress of which the possession of the property is parted with.

Tested by these settled principles of law, the testimony of Mrs. Ray Sloan is not legally sufficient to sustain a verdict of guilty of robbery against the defendants. No force whatever was used. The defendant Martin merely took the money out of the coat pocket of Ray Sloan. He was not in any manner jostled or assaulted, according to her testimony. Neither did there occur anything tending to show that any intimidation was used. Ray Sloan was not put in fear by the defendants to induce him to part with his money. In the Routt case, above cited, the court said that it is well established that the snatching of money or goods from the hands of another

is not robbery, unless some injury is done to the person, or there be some previous struggle for the possession of the property, or some force used in order to obtain it. This rule was recognized and approved in the Coon case, above cited, and the court said that the State in that case made out a case of larceny, but failed to prove robbery, because no force or putting in fear was established.

It follows that the testimony was not legally sufficient to sustain the verdict, and, for that reason, the judgment must be reversed, and the cause remanded for a new trial.

CROWE *v.* STATE.

Opinion delivered February 11, 1929.

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McNalley & Sellers, for appellant.

Hal L. Norwood, Attorney General, and *Pat Mehaffy*, Assistant, for appellee.

HART, C. J., (after stating the facts). It is first earnestly insisted by counsel for the defendant that the evi-

dence is not legally sufficient to warrant the jury in finding him guilty of murder in the first degree. We do not agree with counsel in this contention. The jury were the judges of the credibility of the witnesses, and, when all the attendant circumstances are considered, it had the right to find that defendant killed the deceased with premeditation and after deliberation. The defendant confessed to killing the deceased, and there is nothing whatever in the record tending to show that the confession was not voluntary. There were three bullet wounds in the body of the deceased. One of them was in the back, which might indicate to the jury that the defendant shot the deceased while he was running away, and that the deceased did not at any time attempt to hurt the defendant. There was also a knife wound in the body of the deceased, on the left side, which was about two inches long and big enough for a man to insert his fingers in and feel around. The defendant admitted that he made this knife wound in the body of the deceased before he put it in the car. The State also proved that the defendant had made threats against deceased at various times. These facts and circumstances, testified to by the witnesses for the State, if believed by the jury, fully warranted it in returning a verdict of guilty of murder in the first degree. *Owens* v. *State,* 120 Ark. 563, 179 S. W. 1014; *Thomas* v. *State,* 161 Ark. 644, 257 S. W. 376; *Beason* v. *State,* 166 Ark. 142, 265 S. W. 956; *Harris* v. *State,* 169 Ark. 627, 276 S. W. 361; *Lesieurs* v. *State,* 170 Ark. 560, 280 S. W. 9; and *Adams* v. *State,* 176 Ark. 916, 5 S. W. (2d) 946.

It is next insisted that the court erred in admitting the testimony as to the threats made by the defendant against the deceased. According to the evidence for the State, the defendant was the aggressor, and, according to the testimony of the defendant, the deceased was the aggressor. Threats are circumstantial facts which tend to show motive. In any case, uncommunicated threats are admissible as tending to show who was the aggressor and to show ill will or motive for the killing, if made by the defendant. The threats proved by the State in the

present case were made during the months of May, June, July and August of 1928, and the killing occurred in the latter part of August of the same year. Hence they were not so remote in time as to render incompetent the testimony, nor can it be said that they were so ambiguous as to render them inadmissible. *Combs* v. *State,* 163 Ark. 550, 260 S. W. 736; and *Humpolak* v. *State,* 175 Ark. 786, 300 S. W. 426.

We have carefully examined the instructions given by the court, and find them to be in accordance with the settled principles of law, except in one respect. The defendant was indicted for murder in the first degree, and the jury returned a verdict in which they found him guilty of murder in the first degree as charged in the indictment. The defendant was sentenced to death by the court. The court did not instruct the jury as to its right to render a verdict of life imprisonment in the State Penitentiary, at hard labor, in accordance with the provisions of § 3206 of Crawford & Moses' Digest. Under this section of the statute the jury had the right to fix the punishment of the defendant at life imprisonment, at hard labor in the penitentiary. This was the lesser penalty provided by the statute, and the court erred in not so instructing the jury. There is no other error, however, in the record; and the error in this respect can be cured by modifying the judgment of the lower court by reducing the punishment from the death penalty to life imprisonment in the State Penitentiary, at hard labor. This is accordingly done.

There being no other error in the record, the court can remove all prejudice that might have resulted to the defendant from the failure of the court to instruct the jury that it might impose the lesser penalty provided by the statute by reducing the punishment to life imprisonment. It is well settled that the court does not reverse a judgment and remand a cause for a new trial for errors which the record affirmatively shows could not be prejudicial to the rights of the defendant. That this is the proper procedure was decided in *Davis* v. *State,* 155

Ark. 245, 244 S. W. 750. As bearing on the question, see *Bullen* v. *State,* 156 Ark. 148, 245 S. W. 493; and *Clark* v. *State,* 169 Ark. 717, 276 S. W. 849.

With the modification above stated, the judgment will be affirmed.

HIVELY *v.* JONES.

Opinion delivered February 11, 1929.

Oscar E. Ellis, for appellant.

HART, C. J. The complaint in this case was filed before the mayor of an incorporated town, and reads as follows:

"Wm. Jones, in acct. with Dan A. Hively.

1926.

Oct.—To failure to take deliver bond for 3 acres of cut corn, pea and soy bean hay of value of...$ 35.00

1927.

May 10—Three bu. cottonseed at $0.75, $2.75; 3-4 sacks chops at $2, $1.50; 3 wrenches at $2... 5.75

Damages to corn crop, 9½ acres, by stock of said Wm. Jones running on said crop in months of May, June and July, 1927; failure to cultivate said crop, and bad stand of same..... 35.60

Damage to Dan A. Hively by failure to plant peas with said crop by said Wm. Jones as per rental contract, to-wit: Seed peas, 10 bu. at $1.50, $15; 3 tons hay at $12.50, $37.50..... 52.50

Wastages of leaves, vines and roots of hay crops as fertilizer, 9½ acres, $2 per acre..... 19.00

Damage to house..... 5.00

Use of pasture for 3 months for 3 head of animals, $1.50 per head 14.00

$165.85

The complaint consists of several paragraphs, and on motion of the defendant it was dismissed for want of jurisdiction. Plaintiff filed an affidavit and bond for appeal to the circuit court. In that court a demurrer of the defendant to the jurisdiction of the court was sustained, and the plaintiff's cause of action was dismissed. Plaintiff has duly appealed to this court.

Counsel for the plaintiff relies for a reversal of the judgment upon the principles of law decided in *Little Rock & Fort Smith Ry. Co.* v. *Smith,* 66 Ark. 278, 50 S. W. 502, where it was held (quoting from syllabus):

"In an action before a justice of the peace, plaintiff may combine several causes of action for killing stock, where the damage claimed in each of the several causes of action does not exceed one hundred dollars, though their aggregate amount exceeds that sum."

We do not think that case applies. There were three paragraphs to the complaint, one for killing a horse, one for killing a cow, and one for killing two hogs. The complaint shows that the stock was killed on different days, and each paragraph constituted a distinct and separate cause of action. In *Berry* v. *Linton,* 1 Ark. 252, it was held that the amount of each separate demand or cause of action, and not the aggregate of various causes which may be joined in one action, determines the jurisdictional amount. This rule has been followed ever since. *Brooks* v. *Hornberger,* 78 Ark. 595, 94 S. W. 708; *American Soda Fountain Co.* v. *Battle,* 85 Ark. 213, 107 S. W. 672, 108 S. W. 508; and *Winer* v. *Bank of Blytheville,* 89 Ark. 435, 117 S. W. 232, 131 Am. St. Rep. 102.

In the case at bar it is fairly inferable from the complaint that the matters alleged and stated in the different paragraphs all relate to the same transaction and constitute but one cause of action. The various paragraphs are all different elements of damages of the same cause of

action, and their aggregate amount is the measure of damages, and therefore determines the jurisdictional amount. Inasmuch as the aggregate of the items is more than $100, and the cause of action is one in tort, the mayor's court had no jurisdiction, and the circuit court acquired none on appeal. *St. L. S. W. Ry. Co.* v. *O'Neal,* 163 Ark. 193, 259 S. W. 393; and Crawford & Moses' Digest, § 7676, as amended (General Acts of 1921, p. 407). Therefore the judgment will be affirmed.

[redacted]

STATE *v.* ANDREWS.

Opinion delivered February 11, 1929.

[redacted]

Hal L. Norwood, Attorney General, and *Boyd Cypert,* for appellant.

HUMPHREYS, J. The declared purpose of this appeal is to obtain a construction of §§ 10313-14 of Crawford & Moses' Digest, being a part of the "Trade Union Label Act," under which appellee was charged with counterfeiting and imitating the Little Rock Printing Trades Council Union label.

Appellant contends that the trial court misinterpreted the sections of the statute in question. For aught that appears in the record, the trial court may have interpreted the statutes just as appellant contends they should be interpreted. Upon a trial of the cause the trial court found appellant was not guilty as charged, and acquitted him. The testimony was conflicting as to whether the

label used by appellee was a counterfeit or imitation of the Little Rock Printing Trades Council label, therefore the court may have found, under his construction of the evidence, that appellee was innocent, even though the law meant just what appellant contends it means.

According to the record, no interpretation of the statutes was requested and no declaration as to their meaning was announced by the court. In other words, the court made no declaration of law at all which is incorporated in the record. He sat as a jury in the case, and rendered a general verdict of not guilty. This court cannot presume that he rendered a general verdict under a misinterpretation of the statutes. Since the court might have acquitted appellee on a finding in his favor on the disputed questions of fact, and could have done so under a correct construction of the statutes, it would be an act of supererogation for this court to construe statutes which the trial court did not erroneously construe. As we read the record, the question presented for determination is moot.

No error appearing, the judgment is affirmed.

REEVES *v.* BARTHOLOMEW.

Opinion delivered February 11, 1929.

[redacted]

W. G. Dinning, for appellant.

J. G. Burke, Bevens & Mundt and *E. M. Pipkin, Jr.,* for appellee.

HUMPHREYS, J. Appellant, the owner of lot 12 in West's Addition to the city of Helena, brought this suit against Bartholomew & Barry, a firm of contractors, to recover damages in the sum of $2,000 for alleged acts of trespass committed by them upon said lot by excavating and removing the terrace and destroying the sidewalk adjoining the property on the south side.

Bartholomew & Barry filed an answer, denying that the excavation was done on said lot, but, on the contrary, was done in St. Mary's Street, adjoining the lot, and at the request and direction of the mayor, city engineer and street commissioner of the city of Helena, and requested that said city be made a party defendant, in a cross-bill alleging that, if defendant's property was injured, it was under the direction of the city officers, and that said city is wholly responsible.

The city of Helena filed an answer, admitting the excavation was done under the direction of its officers, but alleged that the terrace and sidewalk were built unlawfully in St. Mary's Street, and that the excavation was done by Bartholomew & Barry for the mutual benefit of themselves and the city of Helena, "they to get dirt needed in another contract, and the city to have its street improved for the better accommodation of the public." And, as a further defense, said that all of the excavation was done in St. Mary's Street, and that none of the dirt removed was a part of the lot belonging to appellant, and that the excavation was done willfully, but was done after a careful survey was made by the city engineer.

The record reflects the following facts: Mary E. West and Mary G. West platted a certain tract of land adjoining the city of Helena into an addition thereto, and dedicated the streets in said division to the public. Among the streets dedicated was St. Mary's Street, 60 feet wide

north and south by 606.6 feet east and west. They sold lots in the addition according to the plat filed for record, and sold the particular lot in question to appellant's husband many years ago. After appellant's husband purchased the property, he expended a large sum in grading the lot and terracing it on the south side and constructing a sidewalk 256 feet in length on the terrace. Owing to the topography of the lots in that vicinity, the sidewalks were built along terraces in the streets near the adjoining lots. Appellant's husband constructed the terrace in question and the sidewalk under the supervision and direction of the city engineer of Helena and in accordance with the natural grades or lay of the land. Only a portion of St. Mary's Street was used by the public. It had never been opened up to the terraces, sidewalks, nor to its full width of 60 feet, until in December, 1926. Bartholomew & Barry had a contract near this property to fill in other property, and needed dirt for the purpose. The mayor and the city engineer, in order to widen St. Mary's Street without cost, requested Bartholomew & Barry to move their steam shovel to St. Mary's Street and excavate the dirt up to the property line of the lot owned by appellant, without her knowledge and consent. The city surveyor was requested to survey St. Mary's Street, and set line stakes between the adjoining property and said street. The survey showed that the terrace which constituted the lateral support to appellant's lot and the sidewalk thereon were in the street. No grade was furnished, and it was not shown that the grade had ever been changed from the surface or natural grade which governed at the time the terrace was constructed and the sidewalk built thereon. In addition to grading the lot, building the terrace and constructing the sidewalk, appellant's husband had built a house on the back end of the lot in question, which was being used and rented to servants at the time the excavation was made. The porch to this house extended over the property line into the street, the house and porch being constructed with reference to the terrace and sidewalk. The entrance

to the house was from St. Mary's Street. The excavation was made according to the survey of the city engineer, up to the property line, and, according to the evidence introduced by appellant, several feet over her property line.

The city engineer testified that, after the excavation had been made and before he testified, he made another survey, and found that several feet had caved in on the lot itself on account of the excavation all along the south line thereof. In making the excavation, the terrace and sidewalk were destroyed. The excavation was to a depth of about 12 feet, and was almost perpendicular. In other words, the excavation took away from the lot its lateral support, and caused it to cave in at the top. After the excavation had been made, a part of the porch to the house extended over the precipice, and the entrance thereto was entirely destroyed.

The cause was sent to the jury, over the objection of appellant, upon the theory that appellees were not responsible for any damage to the lot resulting from the excavation, if, in making the excavation, they did not encroach upon the lot itself. Every instruction given by the court to the jury told them, in effect, to find for appellees if the excavation was made in St. Mary's Street. All of the instructions given were erroneous declarations of law as applied to the undisputed facts in the case. In the case of *Fayetteville* v. *Stone,* 104 Ark. 136, 148 S. W. 524, this court announced the rule to be that "the use of the natural surface of a grade as a street by a municipality is the establishment of a grade conforming to that surface"; and, further, that "when the natural surface has been used as the grade line for the streets of a city, and abutting property owners have improved their property with reference to streets and grade lines, if the city afterwards changes the grade from the natural surface so as to damage abutting property owners, the city will be liable for such damages."

The rule as announced is applicable in the instant case under the undisputed facts. Appellant's lot was

adjacent to St. Mary's Street, and was improved with reference to the natural grade, under the supervision of the city engineer, and, in disregard of this fact, appellees excavated the street 10 or 12 feet deep, without establishing a different grade, and, in doing so, destroyed the terrace and sidewalk on the south side of her lot, as well as all lateral support, so that the lot would and did cave in. Even though the city council had changed the grade from the surface to the depth the street was excavated, appellees would have been responsible for all damages resulting from the excavation, and the court should have instructed the jury that appellees were liable for all damages resulting to appellant's lot on account of the excavation, and should have submitted the question of the amount of damages to them for determination. The amount of the damages to the lot is the only question that should have been submitted to the jury, and that should have been submitted under a correct rule or measure for ascertaining said amount. Appellant was entitled to recover the difference in the market value of her lot before and after the excavation.

On account of the error indicated the judgment is reversed, and the cause is remanded with directions to submit the issue of damages to the jury.

ROSS *v.* LINCOLN SAVINGS & LOAN ASSOCIATION.

Opinion delivered February 11, 1929.

Harrison, Smith & Taylor, for appellant.

Vincent L. Boisaubin, Evan W. Crawford and *C. A. Cunningham,* for appellee.

HUMPHREYS, J. This suit was brought upon a note for $3,500 and accumulated interest executed by appellant and payable to the Lincoln Housing Trust, a Missouri business trust, at its home office in St. Louis, Mo., and to foreclose a deed of trust of even date on Blytheville property, in Arkansas, which was given to secure said note. The note was non-negotiable, bore interest at the rate of 4 per cent. per annum, computed annually in advance. Appellant agreed to pay the note in the following way:

"The sum of $26.25 is to be paid on the 18th day of each month after date hereof until such payments shall repay the said sum of $3,500 (the amount of the loan), and all interest computed as aforesaid. The interest due each year shall, at the end of the year, be deducted from the aggregate of said monthly payments made during the

year, and the balance applied in reduction of the unpaid balance of said loan. The maker hereof may at any time anticipate the balance due under this obligation and pay same at once, under the following conditions: He shall be debited with the amount of the loan, together with interest thereon, computed as aforesaid, and credited with the aggregate of his monthly payments, and may pay the balance due in full satisfaction of this obligation."

Frank C. Millspaugh, Commissioner of Finance of the State of Missouri, was appointed receiver to take charge of the assets of the Lincoln Housing Trust, by the circuit court, city of St. Louis, Division No. 14, in a proceeding to liquidate its assets for the benefit of its stockholders. The receivership proceeding resulted in a reorganization of the Lincoln Housing Trust and a transfer of 79 per cent. of its assets to its successor, Lincoln Savings & Loan Association, the appellee herein. Along with its other assets, the note and mortgage sued upon were duly assigned by said receiver to appellee in words as follows:

"The within note or mortgage or deed of trust securing same and all rights thereunder are hereby assigned, transferred and delivered to Lincoln Savings & Loan Association, without recourse on me. Frank C. Millspaugh, receiver of Lincoln Housing Trust."

Appellant interposed the following defenses to the action:

(1) That the note and mortgage sued upon by appellee are not owned by it; (2) that the note and mortgage are unenforceable because the Lincoln Fiscal Agency was employed by the Lincoln Housing Trust to sell stock in Arkansas, and, pursuant to such employment, sold appellant two certificates of stock in the State, in violation of the Arkansas Blue Sky law, which enabled him to borrow the money on the note and mortgage in question; (3) that the note and mortgage are unenforceable because the sale of the certificates of stock for the purpose of accumulating funds to lend constitutes a lottery, or was a scheme of chance; (4) that the note and mortgage are

usurious and void, because 20 per cent. of the face of the loan was deducted by the Lincoln Housing Trust at the time the loan was made.

The cause was submitted to the court upon the pleadings and testimony adduced by the parties, which resulted in a judgment against appellant for $4,192.78, including interest to September 18, 1927, and with interest thereafter at the rate of 4 per cent. per annum, to be computed annually in advance, and a decree of foreclosure of the lien in the deed of trust against the real estate described therein to pay said amount, from which is this appeal.

Appellant's first contention for a reversal of the decree is that appellee failed to establish ownership of the instruments sued upon. The orders and judgments of the circuit court of St. Louis, introduced in evidence, disclose that, in a receivership proceeding for the benefit of the stockholders of the Lincoln Housing Trust, a reorganization was effected by which 79 per cent. of its assets were sold to appellee herein in consideration that said appellee would assume 79 per cent. of its obligations and liabilities. A part of its assets were the note and mortgage sued upon. The original note and mortgage were introduced in evidence, and it appears that they were duly assigned to appellee by the receiver of the Lincoln Housing Trust, pursuant to the order of the court in which the reorganization was adjudged. Appellee's ownership of the instruments sued upon was completely established.

Appellant's next contention for a reversal of the decree is that the note and mortgage are unenforceable because the payee and mortgagee, through its fiscal agents, sold appellant two certificates of stock, designated as A-100 and A-100-A, in violation of the Blue Sky law of Arkansas. It is conceded that these certificates of stock were sold to appellant contrary to the provisions of Crawford & Moses' Digest, 750 *et seq.*, known as the Blue Sky law, which prohibits the sale of stocks, bonds and securities except under license issued by the Railroad Commission. These particular certificates of stock, under the

constitution and by-laws of the Lincoln Housing Trust, had no borrowing privileges at the time appellant applied for a $5,000 loan nor at the time he obtained the $3,500 loan, and neither certificate was used as a basis for procuring the loan. Appellant had not paid enough at the time in monthly dues or payments to mature borrowing privileges. These certificates were exchanged in the reorganization for stock in the Lincoln Savings & Loan Association, the appellee herein. Under the constitution and by-laws of the Lincoln Housing Trust, a stockholder might purchase borrowing privileges from stockholders who had paid enough on their stock to mature such privileges. The stockholder purchasing such privileges might then borrow as much from said company as it would lend upon the real estate security offered. In order to apply for and procure a loan, appellee, through the fiscal agent of the Lincoln Housing Trust, purchased from their stockholders who had bought their stock in Missouri, borrowing privileges entitling him to a $3,500 loan, provided the real estate security offered by him was satisfactory to the fiscal agent. Appellant purchased borrowing privileges on stock certificates numbers E-51, E-54, and parts of E-42 and E-72, in series No. 1, upon which he borrowed $3,500. Since the loan was procured on borrowing privileges acquired by purchase on stock legally sold in Missouri, the loan and securities are disconnected from the illegal transaction of selling stock certificates numbers A-100 and A-100-A to appellant by the fiscal agent of the Lincoln Housing Trust Company. The general rule is that securities may be enforced, although growing out of illegal acts or contracts, if they can be separated from the illegal transaction or transactions, and if in enforcing them it is unnecessary for the plaintiff to rely upon the illegal transaction or transactions in order to establish his case. 13 C. J. 502; 6 R. C. L. 821; 17 R. C. L. 1233; Elliott on Contracts, vol. 2, §§ 277 and 1078. It was not necessary in the instant case, in order for appellee to recover, to prove the illegal sale of the two certificates of stock in violation of the Blue Sky law of Arkan-

sas by the fiscal agent of the Lincoln Housing Trust to appellant, as said certificates had no borrowing privileges and could not be and were not used in procuring his loan.

Appellant's third contention for a reversal of the decree is that the note and mortgage sued on are unenforceable because the entire scheme employed by the Lincoln Housing Trust to sell its stock and accumulate funds with which to make loans was, in effect, a lottery or scheme of chance. It is argued that the plan is identical with the Home Planters' Depository, which was condemned by the Supreme Court of Missouri as being a lottery and repulsive to the Missouri Constitution and State laws. In support of the argument, appellant cites the case of *State of Missouri ex rel. Home Planters' Depository* v. *Hughes,* 299 Mo. 529, 253 S. W. 229, 28 A. L. R. 1305. The Home Planters' Depository had no license to do business in the State of Missouri, and was denied a license by the Commissioner of Finance for Missouri. That suit was one in mandamus to compel the commissioner to issue the Home Planters' Depository a license. After reviewing the plan, the court ruled that the commissioner rightfully refused it a license because its plan involved the operation of a lottery. Upon a motion for rehearing in that case, the Lincoln Housing Trust filed a brief as *amicus curiae,* suggesting apprehensions that some of the language used by the court might impugn and stigmatize the plan of the Lincoln Housing Trust. The court took occasion to say, in its written opinion on rehearing, that the Lincoln Housing Trust was operating under a license from the State of Missouri issued under an express statute, § 10263, by the Commissioner of Finance for the State of Missouri. The court further stated that: "There is no impropriety in saying that this court does not desire to be understood as disposing of either rights or reputations of organizations or individuals not before it." We think a complete answer to the charge that the entire plan and scheme of the Lincoln Housing Trust to accumulate funds for the

purpose of lending same and the lending thereof constitutes a lottery, is that it was operating under permission of the State of Missouri by express license under authority of § 10263 of the statutory laws of that State. In view of the license under which the Lincoln Housing Trust was operating, it must be presumed that its scheme and plan were not contrary to the public policy of that State. The plan of the Lincoln Housing Trust, as we gather from the record in this case, was to sell its stock to raise or accumulate a fund for the purpose of lending it to stockholders who had matured borrowing privileges incident to the stock by paying a certain number of monthly payments thereon, provided the real estate security offered by the borrower was satisfactory to the fiscal agent of the Lincoln Housing Trust. Under the plan or scheme, any stockholder who owned borrowing privileges might apply for and obtain a loan if the fund was on hand, provided the security offered was satisfactory to its fiscal agent. If the stockholder had not sufficiently matured his stock upon which to borrow money, the privilege was accorded him, under the plan or scheme, of buying borrowing privileges from stockholders who had sufficiently matured their stock. There is nothing in the record indicating that the loans were made by casting lots or by any other method of chance, or that any discrimination was made in favor of one borrower against another through lot or other method of chance.

Appellant's fourth and last contention for a reversal of the decree is that the contract was usurious. The argument is made that, because $700 was deducted from the loan and paid to the fiscal agent of the Lincoln Housing Trust, said amount together with 4 per cent. per annum rendered the contract usurious. We do not understand that $700 was deducted from the face of the loan and retained by the Lincoln Housing Trust. Appellant received two checks covering the amount of $3,500 borrowed by him. One check was for $2,800 and the other was for $700. Both checks were made payable to him, and there was an assignment of the $700 check, writ-

ten across the back thereof when he received it, for him to sign and return to the fiscal agent of said Lincoln Housing Trust. Testimony was introduced to the effect that the fiscal agent retained only $70 of this amount for its services in purchasing borrowing privileges from other stockholders for appellant in order that he might use said privileges as a basis for borrowing $3,500, and that the balance was used in payment for borrowing privileges. In other words, all that the Lincoln Housing Trust or its fiscal agent received or retained out of the loan was $70. The balance went to stockholders who had borrowing privileges to sell. Seventy dollars added to the contract rate of 4 per cent. would not and did not render the contract usurious. *Simpson* v. *Smith Savings Society, ante,* p. 921.

No error appearing, the decree is affirmed.

WILLIAMS *v.* KETCHUM.

Opinion delivered February 11, 1929.

J. G. Burke, for appellant.

John C. Sheffield, for appellee.

SMITH, J. Suit was brought by Joe Williams to recover possession of an eighty-acre tract of land in Phillips County, upon the allegation that the land was owned by Henry Williams at the time of his death, and that the plaintiff, Joe Williams, was the only child and sole heir-at-law of Henry Williams. Krow & Neumann acquired such title as Joe Williams owned, and were substituted as plaintiffs.

The testimony on the part of plaintiff was to the effect that Henry Williams came to Arkansas in 1884, and brought with him a small boy, Joe Williams, the original plaintiff in this suit. Henry Williams always referred to the boy as his son, and he was generally regarded as such. Henry married a woman named Lena, in Mississippi, who was the mother of two daughters, but no children were born to this marriage. Henry and Lena came to Arkansas, and brought the three children with them, all of whom were called Williams, but it was generally known that the daughters were stepchildren, while it was commonly supposed that the boy was the son of Henry.

Henry lived on the land, which had become his homestead, and died in 1911, and his widow continued to reside on the land as her homestead until her death in 1921. The daughters of Lena Williams took possession of the land, under the claim that they had inherited it from their mother, who had inherited it from Henry by reason of the fact that he was not survived by any direct or collateral kin.

The defendants denied, in their answer, that Joe Williams had any interest in the land, for the reason that he was not the son of Henry Williams. The chancellor found the fact to be that Joe was not the son of Henry, and dismissed the complaint as being without equity, and this appeal is from that decree.

Appellants invoke the presumption, said to be one of the strongest known to the law, that a child born in wedlock is legitimate, and cite us to cases of our own in which it was held that marriage may be proved in civil

cases by reputation, by the declarations and conduct of the parties, and by other circumstances usually accompanying that relation, and that the declarations of the parties are evidence tending to establish that relation. We recognize the authority of these cases, but we concur in the finding of fact of the court below that the testimony does not establish the fact that Joe Williams was born in wedlock or that Henry Williams was his father.

Witness John Crawford testified that he first knew Henry Williams in 1878, and that Henry later married Lena, who was then the mother of two daughters, and in 1884 Henry brought his mother to live with him, and she brought with her a small boy about nine years old, named Joe Moore. Henry gave this boy to witness, in the spring of the year, and witness kept the boy until Christmas, when he returned the child to Henry. Witness was told by Henry that the child was not his, but that he intended to keep the child as long as his (Henry Williams') mother lived, and that Henry did this, and when Henry's mother died the child left Henry's home. Later the boy re-entered Henry's family as a member thereof.

Louis Allison testified that he knew Henry Williams in Tennessee; that Henry said he never saw the child until he went to bring his own mother to live with him, and that he had heard Henry say that he had been married only one time, and that was to the mother of his stepchildren, the appellees in this case.

Will Wilson testified that he knew Henry Williams in Tennessee, and that Henry was never married until he married Lena.

At § 5 of the chapter on "Bastards," in 3 R. C. L., page 725, it is said:

"It has been said that the law presumes that every child in a Christian country is *prima facie* the offspring of a lawful rather than of a meretricious union of parents, and this is true in one sense. Filiation being established, legitimacy is presumed. However, where the right to inheritance is claimed, the burden is on the claimant to establish the fact that he is a legitimate heir, though,

after proof of filiation, he will receive the benefits of the presumption of legitimacy."

See *Weatherford* v. *Weatherford,* 20 Ala. 548, 56 Am. Dec. 206, and note commencing on page 210; note to case of *Wallace* v. *Wallace,* 126 Am. St. Rep. 253.

Here no witness testified that Henry had ever lived with the mother of Joe. On the contrary, the testimony is to the effect that the child was eight or nine years old when Henry first saw him, and was then known as Joe Moore. It is true Joe was later called Williams, but so also were the stepdaughters, and if it be said that the testimony shows that Henry referred to the boy as his son, the testimony also shows that Henry was never married but once, and then to Lena, the mother of his stepchildren. There is no testimony that Henry Williams ever at any time lived with any other woman as his wife. In this connection it may be observed that Joe Williams was not called as a witness in the case.

Appellants claim only such title as Joe Williams had, and must recover, if at all, upon the strength of this title, and, as it does not appear that Joe Williams had any title, the decree is correct, and must be affirmed. It is so ordered.

[redacted]

EAST ARKANSAS LUMBER COMPANY *v.* BEARD.

Opinion delivered February 11, 1929.

[redacted]

Fred M. Pickens, for appellant.

Ira J. Mack, for appellee.

KIRBY, J. This appeal is prosecuted to reverse a decree adjudging W. T. Davenport, appellee, not liable

to the payment of a bill for lumber alleged to have been purchased and used in making improvements for an amusement park in which he was alleged to have been a partner.

It appears from the testimony that he and W. H. Beard were partners in the construction of a dancing pavilion, upon his land, of certain dimensions, out of some of the lumber purchased from appellant. He admitted that he helped in the construction of the first dancing platform, later enlarged, and that he shared or suffered one-half of the loss for certain entertainments held there, before the other buildings were made, and paid his part of the loss. He claimed afterwards, however, that, upon this loss being suffered and settled for, he quit the partnership and told W. H. Beard that he could proceed with the improvements alone, and that he was not going further. The materials were sold to Beard, and charged to him on the books. Witnesses, employees who sold the lumber, testified, however, that they understood at the time of the purchase that appellee, Davenport, was a partner in the venture, and that the company looked to both of them for payment for the lumber furnished.

Beard testified that appellee, Davenport, was a partner with him, and that it was their expectation, on completion of the improvements, to organize a fair association and to construct the buildings for supplying refreshments and amusements with the materials bought.

Two other witnesses testified that it was their understanding that appellee, Davenport, was a partner in the venture, and each of them stated that he had told them he was a partner in the beginning, but that, after he had suffered the loss on the first few entertainments and paid up, he had quit the partnership, and had nothing further to do with the venture and no interest in it, and was not in any way liable thereafter to the payment of any claims.

Appellee made no claim that he had given any notice to appellant company or any of its agents or any one else of the dissolution of the partnership, and there was no testimony indicating that appellant had any notice

whatever of any such dissolution before the materials were furnished. Even though appellee, Davenport, withdrew or attempted to withdraw from the partnership before most of the materials were furnished, as he now insists was the case, he does not claim that there was any notice given or attempted to be given to appellant or any one else of his withdrawal from or dissolution of the partnership. His attempted withdrawal from the partnership without any notice, actual or constructive, to appellant company of such withdrawal, did not release him from liability for the payment of the account for materials furnished on the faith of his being a partner at the time. *Hinton* v. *Brown,* 174 Ark. 1025, 298 S. W. 198; 20 R. C. L., §§ 190, 194.

The court erred in holding appellee, Davenport, not liable as a partner to the payment of the bill for materials furnished by appellant company, such holding being contrary to the preponderance of the testimony, and the decree is accordingly reversed, and the cause remanded with directions to enter a decree against said appellee therefor, and any other necessary proceedings in accordance with the principles of equity and not inconsistent with this opinion.

MISSOURI PACIFIC RAILROAD COMPANY *v.* HOBBS.

Opinion delivered February 11, 1929.

Thomas B. Pryor and *H. L. Ponder,* for appellant.

Brundidge & Neelly, for appellee.

KIRBY, J., (after stating the facts). Equity has jurisdiction to prevent repeated trespasses upon the property of another by injunction, where the remedy at law for damages is inadequate, and also to restrain such trespassing, to avoid a multiplicity of suits, especially where the wrongdoer is insolvent. 32 C. J. pp. 140-144; 14 R. C. L. pp. 422-455; *Sanders* v. *Boone,* 154 Ark. 239, 242 S. W. 66; *Dufresne* v. *Paul,* 144 Ark. 94, 221 S. W. 485; *Boswell* v. *Jordan,* 112 Ark. 162, 165 S. W. 295; *Ellsworth* v. *Hall,* 33 Ark. 63; *Fletcher* v. *Pfeifer,* 103 Ark. 225, 146 S. W. 864.

It is said in C. J., *supra,* 140:

"It is now well settled that an injunction will apply to restrain acts of trespass which are continuously or constantly recurring, where irreparable injury will result, unless they are restrained, and the court will award the relief that the nature of the action demands, and the fact that the injury done or threatened is of a nominal character, or is insubstantial, or that the wrongful acts, when viewed separately, may not have materially impaired the use and enjoyment of the property affected, does not take away the jurisdiction of a court of equity to prevent the continuance of such wrongful act."

The premises or property of the railroad company is private property as between it and trespassers, as appellee was alleged and by the demurrer conceded to be. In 14 R. C. L., page 455, it is said:

"While courts of equity will not ordinarily enjoin a mere trespass, yet they will interfere for the purpose of preventing a continuing trespass involving a multiplicity of suits at law, and which is both a grievance to the parties and a burden to the public. * * * Thus, the property of the railroad company is to be deemed in every legal sense private property, as between it and those of the general public who have no occasion to use it for purpose of transportation. A court of equity will

therefore enjoin such persons from a continuous trespass on the premises used for stations and depots, their only purpose being the meeting of passengers and solicitation of their patronage, the remedy at law, in a case of this character, being manifestly inadequate.'' Citing *Donovan* v. *Penn. Co.,* 199 U. S. p. 279, 26 S. Ct. 91; *N. Y. R. R. Co.* v. *Scovill,* 42 L. R. A., p. 157. See also note, 47 A. L. R. 564; *Joy* v. *St. Louis,* 138 U. S. 1, 11 S. Ct. 243; *Landregan* v. *State,* 31 Ark. 50; *Graham* v. *St. L. I. M. & S. Ry. Co.,* 69 Ark. 562, 66 S. W. 344.

It was the duty of the railroad company to take such action and make such arrangements as might promote the comfort and convenience of passengers arriving or departing on its trains, as well as for their protection from annoyance while thereon. The allegations of the complaint were sufficient to authorize the granting of the relief prayed, and the court erred in holding otherwise.

The decree is accordingly reversed, and the cause remanded with directions to overrule the demurrer, and for all further necessary proceedings in harmony with the principles of equity and not inconsistent with this opinion.

LYNN *v.* QUILLEN.

Opinion delivered February 11, 1929.

Pratt P. Bacon, for appellant.

Gustavus G. Pope, Will Steel and *James D. Head,* for appellee.

MEHAFFY, J. J. J. Lynn and Nancy D. Lynn were husband and wife, and lived together for more than 40 years, rearing a family of five girls. J. J. Lynn had one son by a former wife. J. J. Lynn had conveyed to his son, Archie Lynn, 160 acres of land, the appellant joining with him and signing the deed. After this conveyance to the son, the appellant wanted J. J. Lynn to make deeds to the five girls to the property that he then owned, so that the son, Archie Lynn, would not inherit any part of it, her contention being that he had already received a deed to 160 acres, and that the girls should have the rest of the land. J. J. Lynn agreed to do this, and, on March 1, 1918, made deeds to Ophelia Quillen, Mabel

Barkman, Mary Eliza Dickert, Fannie Stewart and Agnes Hendren to the land in controversy, a part of which was, prior to that time, the property of appellant.

No objection is made to the deeds conveying property which belonged to J. J. Lynn, but the appellant says she did not agree to convey the 160 acres that she owned, that she did not sign the deeds, and that she did not acknowledge the execution of the deeds.

J. J. Lynn delivered the deeds to J. S. Brooks, the circuit clerk, before whom the deeds were acknowledged. J. J. Lynn died January 9, 1920, leaving his widow, the appellant, and the five girls, to whom the land was conveyed, and also one son, Archie Lynn, surviving him. After his death J. S. Brooks called the parties together and gave them the deeds, the appellant being present at the time. The parties took possession of the lands and occupied them, but appellant testifies that it was a month or two after the deeds were delivered, which was January 20, 1920, before she learned that her land was included. She knew the deeds were being delivered, but she testified she did not know that it included her land. She was unable to read or write. She testified that she did not sign or acknowledge the deeds, and that when they were delivered she did not know that her name was signed to them. She denied acknowledging the deed before J. S. Brooks, and denied having any knowledge of the deeds until the time they were delivered. Appellant lives on the land deeded to Mabel Barkman. All of the grantees, except Mabel Barkman, were married at the time the deeds were delivered, and she is now married. Appellant made no objection to the delivery of the deeds, but said she did not know their contents at that time, and did not learn it for two months. She then learned that her name had been signed to them. She also knew that every one of them took the land that was deeded to them and claimed to own it, and that that condition continued until this suit was brought. She testified that she did not know about the mortgages. Appellant claims that when she found out about the deeds she told them she did

not sign them, but that if they would pay rent for the land she would let it stand, and that they agreed to do this, and some of them have paid rent.

The testimony is undisputed that they took possession of the land, and claimed to own it, with her knowledge, and continued to claim it and pay taxes on it until the time this suit was brought. She did not, according to her testimony, authorize any one to sign her name or acknowledge the deeds. There is no dispute about the deeds having been signed and acknowledged by Lynn and delivered to Brooks to be delivered after Lynn's death.

Brooks, the clerk, testified that he did not see the appellant sign the deed, but that he took her acknowledgment; that he had written the deeds in his office at the request of Mr. Lynn, and he identified the deeds which he wrote. Brooks knew how Mr. Lynn wanted the land divided, and, after writing the deeds and taking Lynn's acknowledgment, he carried the deeds home with him. And, shortly after that, Brooks went to Mrs. Lynn and asked if she acknowledged signing it, and she said she did. He then left the deeds in the office, after certifying to the acknowledgment. Mr. Lynn told him to deliver the deeds after his death, and he kept them until Mr. Lynn's death, in 1920, and then called the children together and delivered the deeds. Mrs. Lynn was present. Witness testified that the appellant said: "You children get all the land; will you agree for me to get the money in the bank?" There was about $600, and they all agreed.

The testimony is undisputed that all of the personal property was given to the appellant. It consisted of money, a Liberty bond, savings stamps, and live stock and farming implements.

The appellant testifies very positively that she not only did not sign the deed to her land, but that she did not know it was included, until about two months after the deeds were delivered. She is 69 years old, unable to read or write, and it is undisputed that she requested

her husband to deed the land to the girls, who were her children, as well as his, because the son by a former marriage had already received what she conceived to be his part of the property belonging to her husband.

It is contended by the appellant that the finding of the chancellor is against the preponderance of the evidence, and she insists that she is only required to prove by a preponderance of the testimony that she did not sign or execute the deeds. In this last contention we agree with the appellant. If the preponderance of the evidence is in her favor, this would be sufficient to show that the deed was not executed.

This court has frequently held that the burden of proof rests upon the person denying that he signed the deed or acknowledged it, to show the falsity of the certificate of acknowledgment, but that the weight of the evidence should not be affected by any particular rule peculiar to the subject. But it has also many times held that the recitals of the certificates of an officer authorized by law to take such acknowledgment, regular on its face, are, in the absence of fraud or duress, conclusive of the facts therein stated.

A certificate of acknowledgment to a deed duly placed on record makes a *prima facie* case of the proper execution of the deed. *Polk* v. *Brown,* 117 Ark. 321, 174 S. W. 562; *Nevada County Bank* v. *Gee,* 130 Ark. 322, 197 S. W. 680; *Straughan* v. *Bennett,* 153 Ark. 254, 240 S. W. 30; *Miles* v. *Jerry,* 158 Ark. 314, 250 S. W. 34; *Hale* v. *Mitchell,* 175 Ark. 641, 1 S. W. (2d) 59. Many other cases might be cited to the effect that the certificate of the officer is *prima facie* correct, and that one attacking a deed so executed and acknowledged has the burden of proof and is required to show by a preponderance of the evidence that the deed was not, in fact, signed.

In this case we have the positive testimony of the appellant that she did not sign the deed, but we also have the testimony of the officer that she acknowledged it. We have her admission that she learned about it two months after the deeds were delivered; that the grantees in the

deed occupied and claimed to own the land for several years, and practically all of the circumstances corroborate the statement of Brooks, or at least the fact that, when she discovered, according to her testimony, that the deeds had been made, she acquiesced in the making and delivery of the deeds. She was 69 years old, unable to read and write, and the husband who had the deeds written was dead, and the transaction was what she wished and had urged her husband to do, except, as she claims, this did not apply to her 160 acres of land. At any rate, whether she did or did not sign the deed or acknowledge it and ratify the execution and delivery, is a question of fact, and the chancellor's finding will not be disturbed by this court, unless the finding is against the preponderance of the evidence.

In appeals from the chancery court trials are *de novo,* but the findings of fact by the chancellor are allowed to stand unless they are clearly against the preponderance of the evidence. *Henry* v. *Erby,* 175 Ark. 614, 1 S. W. (2d) 49; *Doane* v. *Rising Sun Mining Co.,* 139 Ark. 605, 213 S. W. 399; *Hyner* v. *Bordeaux,* 129 Ark. 120, 195 S. W. 3; *Midyett* v. *Kerby,* 129 Ark. 309, 195 S. W. 674; *Houser* v. *Burchart & Levy,* 130 Ark. 178, 197 S. W. 28; *Ferguson* v. *Guydon,* 148 Ark. 295, 230 S. W. 260.

Appellant calls attention to numerous authorities which hold that, the statute not being complied with, the signatures are not *prima facie* the signatures of appellant, and that therefore the burden is on appellee to establish by a preponderance of the evidence that appellant did sign these deeds. But, even if the statute was not complied with, appellant ratified the signature and the acts of the clerk when she acknowledged the deed before the clerk. She not only, according to the testimony of Brooks, acknowledged the execution of the deeds before him, but she ratified it when she had a meeting with the grantees and they gave her all of the personal property.

There is some conflict in the testimony with reference to what took place, but the conduct of the parties

corroborates the testimony of the grantees and shows very clearly, we think, that appellant ratified the signature and acknowledgment.

Signature, as contended by the appellant, while it includes mark when a person cannot write his name, must be written and witnessed by a person who writes his own name as a witness. But, when the acknowledgment is before a proper officer, although there is no witness to the mark, and the name may have been written by another, it will be considered an adoption of the written name, and especially is this true when the conduct of the party clearly indicates that she acquiesces in the transaction. And this court has said, in substance, that, while the mark of one who is unable to write is not to be considered a signature unless the person writing his name writes his own name as a witness, still it has also said that this only means that such signature is not taken as *prima facie* true without other proof of the signing, and the statute was not intended to exclude other proof. *Ex parte Miller,* 49 Ark. 18, 3 S. W. 883; *Davis* v. *Semmes,* 51 Ark. 48, 9 S. W. 434; *Fakes* v. *Wilder,* 70 Ark. 449, 69 S. W. 260; *Ward* v. *Stark,* 91 Ark. 268, 121 S. W. 382.

Although the statute may not be complied with, and the name may be written without authority, still, if the person whose name is signed to the instrument goes before an officer authorized to take acknowledgments and acknowledges the instrument, he thereby ratifies the signature, and it is as valid and binding as if he had written his name himself, or, if he could not write, had signed by mark and the mark was witnessed.

"The signatures of James Hill and Phoebe Hill by marks did not appear to be attested, as provided by our statute. J. H. Hill and Phoebe Hill could not read and write. The method provided by statute for attesting the signature of a person who cannot read or write is not exclusive, but only establishes *prima facie* the genuineness of the signature without other proof of signing. The grantors in this deed appeared before a justice of the peace and acknowledged the execution of the deed. Their

signatures were signed to the deed, and, even if unauthorized, they were ratified by the grantors appearing before the justice of the peace and acknowledging the execution of the deed." *Naill* v. *Kirby,* 162 Ark. 140, 257 S. W. 735.

Appellant claims that the parties paid her rent, but, even if her contention in this respect is true, she had already ratified the signature when she went before J. S. Brooks, and did at this time agree, in the presence of all the parties, that the deeds might stand if they would pay her rent. At any rate, she admits that she agreed they might stand, and says they were to pay rent, but the appellees testify that they did not agree to pay rent, and that they never paid any rent. One of the sons-in-law testified that he gave her some corn, but did not give it to her as rent, but merely gave it to her. Appellant not only knew that the appellees were occupying the land, claiming it as their own and paying taxes thereon, but she stood by for more than seven years without making any claim to the land at all, and permitted them to exercise ownership, claim it as their own, and she is thereby estopped to claim that the deeds were not properly executed. She also saw the improvements made on some of the property. But when she permitted them to claim it, to exercise ownership, and pay the taxes, knowing all the time that they were claiming it as their own, she could not have the deeds set aside.

Section 6942 of Crawford & Moses' Digest provides, among other things: "No person or persons, or their heirs, shall have, sue or maintain any action or suit, either in law or equity, for any lands, tenements, or hereditaments, but within seven years next after his, her or their rights to commence, have or maintain such suit, shall have come, fallen or accrued."

As to all the issues involved in this case, that is, whether she signed the instruments or acknowledged them, or stood by and permitted the grantees to claim it as their own, occupy it, mortgage it, pay taxes on it, are all questions of fact, and the finding of the chancellor is supported by the evidence.

The decree is therefore affirmed.

WOODS *v.* QUARLES.

Opinion delivered February 11, 1929.

[redacted]

Brewer & Cracraft and *Williamson & Williamson,* for appellant.

Wilson & Norrell and *W. G. Dinning,* for appellee.

MEHAFFY, J. Appellee brought suit in the Drew Chancery Court against G. A. Woods and A. S. Woods,

alleging that he, Quarles, was a resident of Phillips County, Arkansas; that on the 4th day of April, 1925, in a cause pending in the Drew Chancery Court, wherein G. A. Woods and others were plaintiffs and T. D. Hunt and others were defendants, a writ of garnishment was issued out of Drew Chancery Court, directed to the sheriff of Phillips County, Arkansas, wherein John M. Quarles was named as garnishee; that, pursuant to said writ of garnishment, on June 10, 1925, judgment for $8,750.35 was rendered against him by reason of his failure to answer in response to said writ of garnishment. A certified copy of the judgment was attached to plaintiff's complaint as a part of same.

Quarles further alleged that the decree was void because the Drew Chancery Court had no right or authority to issue a writ of garnishment directed to the sheriff of Phillips County, directing him to serve the same upon Quarles, a resident of Phillips County, Arkansas, and that the issuance and delivery of such writ was wholly void, and the judgment of the Drew Chancery Court based thereon exceeded its jurisdiction. He also alleged that said writ of garnishment was not served upon him in any manner, although the same has a return indorsed thereon showing that the same was served by E. Toney, deputy sheriff. He stated that the return was false and fraudulent, and that no service was had upon him, and that he had no knowledge, either actual or constructive, of the garnishment proceeding against him until March, 1927. On the 23d of March, 1927, the appellants filed suit in the Phillips Chancery Court, alleging that they had recovered a judgment against Quarles by reason of the garnishment proceeding, and sought to subject certain funds recovered by Quarles from the Ætna Casualty Company to the payment of said judgment; that service of summons in the suit in the Phillips Chancery Court was served shortly after March 25, 1927, and that this was the first information, either actual or constructive, which Quarles had of the pendency of any garnishment proceeding in the Drew Chancery Court; that if the writ

of garnishment had been served on him, he could and would have filed an answer to the same, denying that he was indebted to Hunt in any sum whatever. He alleged that Hunt is insolvent, and is, in fact, indebted to the plaintiff.

Plaintiff prayed that the decree of the Drew Chancery Court be canceled and set aside, and for all proper relief.

It was shown that G. A. Woods and A. S. Woods were nonresidents of the State of Arkansas, and a warning order was published. The burden was, of course, on appellee to show not only that the return of the officer was false, that no service was ever had on him, but also to show that he had a meritorious defense. He alleged that he was not indebted to Hunt in any way, but that Hunt was indebted to him, and, if that were true, it would have been a meritorious defense.

Appellants, however, state in the beginning of the argument that the only issue of fact presented by the appeal is the allegation of appellee in his complaint, which was sustained by the lower court, that he, Quarles, was not served with the writ of garnishment involved—that the sheriff's return is false.

All of the material allegations in the complaint were denied by appellants, and they also denied the jurisdiction of the court, and alleged that his action was stale; that he was guilty of laches; and also pleaded estoppel.

The chancery court held that the writ of garnishment issued on the 4th day of April, 1925, was never served in any manner whatever upon John M. Quarles, and set aside the default judgment rendered on June 10, 1925, in the sum of $8,750.35, together with interest, canceling, vacating, setting aside and holding for naught said judgment.

Quarles himself testified that he lived in Helena, Arkansas, and filed as an exhibit to his deposition the certified copy of the judgment or decree rendered by the Drew Chancery Court on the 10th day of June, 1925. That the writ of garnishment issued by the Drew Chan-

cery Court April 4, 1925, was never served on him by Edgar Toney or any one else, and that he never learned anything about the judgment by default until summons was served on him in the Phillips Chancery Court, March 26, 1927; that he had neither actual nor constructive notice; that, if said garnishment had been served, he would have taken steps to prevent any judgment; that he did not owe Hunt anything, and that Hunt was still indebted to him. He further testified that at the time the deputy sheriff claimed to have served the garnishment he was living in Little Rock, with his family; that his wife's health was not good, and that he did not go back to Phillips County until the 28th day of May, 1925, about 18 days after the date on which the deputy sheriff claimed to have served him in Helena; that he was not in Helena in May until the 28th; that he had no recollection of Toney serving him with papers in front of the Cleburne Hotel, when he got off the train. That he was never served by Toney, the deputy sheriff, with any papers of the kind in this case, during 1925.

Mrs. Elizabeth Walker, the mother of Mrs. John M. Quarles, who is 69 years old, testified that she lived in the home with Mr. Quarles, and had for the last seven years; was living with them in Little Rock in May, 1925, where they had been all the year, and that they moved away from Little Rock on May 29, 1925; that for ten days or two weeks previous to that, Quarles was in Little Rock all the time, on account of the sickness of his wife; that John M. Quarles was in Little Rock on May 20. He was at home all hours of the day to see his wife, because she was ill, and he did not leave town.

Edgar Toney, the deputy sheriff, testified that he served the original writ of garnishment on John M. Quarles, in Phillips County, Arkansas; that the return was in his handwriting, and that it correctly recited the facts, and that he recollected serving it, and he thought it was in front of the Cleburne Hotel; that he remembered his former testimony, and remembered serving this paper on Quarles. He said he was not testifying

that he served it for the reason that the return was written by him, but that his memory about the paper is now clearer than it was when he first testified; that he did not think he testified, on November 16, that he had no personal recollection of having served the paper.

In his former testimony he said: "Well, it seems to me now that about two years ago I served a paper similar to this, that is, in size, on Mr. Quarles. But, it being so long, I cannot remember, and lots of papers I serve I never read the contents. But I remember serving a paper like this on Mr. Quarles."

He also testified in the present case that he read the contents of the writ of garnishment before he served it. Toney was a deputy sheriff, and had been for six years. He said, as deputy sheriff, he had served several papers on Mr. Quarles, but never served but one paper the size of the writ of garnishment. He did not remember ever serving a paper on Quarles at his residence or giving one to any member of the family, but had always caught him down town.

In order to set aside a decree rendered without notice, it is necessary to make a *prima facie* showing of a meritorious defense. The appellee in this case in the court below, in order to have the decree set aside, was required to show a meritorious defense, and that the writ of garnishment was never served upon him. The testimony as to a meritorious defense is undisputed, and is sufficient. The evidence shows that Quarles did not owe Hunt anything, and, if that is true, this would be a complete defense. The evidence on the question of whether the writ of garnishment was served is conflicting. But Quarles testifies positively that the writ was never served, and he also testifies that he was in Little Rock during the entire month of May, or rather, until the 28th day of May, and was not in Helena, and, if this is true, the writ could not have been served on him in Helena.

Mrs. Elizabeth Walker, the mother-in-law of J. M. Quarles, testifies that she lived in the home of Quarles in Little Rock, and testifies to the same, in substance,

that Quarles did about his being in Little Rock in May and not being in Helena at the time the deputy sheriff says he served the writ of garnishment.

The return of the officer is *prima facie* true, but this court has many times held that evidence might be introduced to show that no service was had.

"This court is committed to the doctrine that an officer's false return of service of process shall not preclude the defendant from showing the truth, in a proper proceeding to be relieved from the burden of a judgment or decree based thereon. One who is aggrieved by a judgment rendered in his absence must show, not only that he was not summoned, but also that he did not know of the proceeding in time to make a defense." *Karnes* v. *Ramey,* 172 Ark. 125, 287 S. W. 743. See also *State* v. *Hill,* 50 Ark. 458, 8 S. W. 401; *First National Bank* v. *Dalsheimer,* 157 Ark. 464, 248 S. W. 575; *First National Bank of Manchester* v. *Turner,* 169 Ark. 393, 275 S. W. 703.

In passing upon a question very similar to the question in this case, this court said:

"Considering that it does not appear that the judgment was obtained by fraud practiced by the successful party, the court is of opinion that in this case the defendant was prevented, without any fault upon his part, from appearing or making his defense to the action, and that his case comes fairly within the spirit of the seventh subdivision of § 4197, Sandels & Hill's Digest." *Hunton* v. *Euper,* 63 Ark. 323, 38 S. W. 517.

In the above case the plaintiff brought suit, just as was brought in the instant case, to set aside the judgment, upon the ground that it was rendered without any summons or notice having been served on him. The complaint also prayed for a temporary restraining order to prevent the execution of the judgment until the hearing, which was granted. The return showed that defendant had been served, just as it does in the instant case. It appeared that it was served by a negro boy 16 or 17 years of age, who testified that he had given the paper to a

man he supposed to be Mr. Euper, and thought it was an account. The evidence also showed that the summons was handed to the negro boy by the attorney for the plaintiff in the action, with directions to give it to defendant Euper, and he handed it to a man who was pointed out to him as Euper. Euper swore positively that he had never been handed a summons in the case by the boy, and had never been served, and knew nothing of the judgment until long after the term of court had elapsed.

Under our decisions, if the negro boy or anybody else had given him a summons, or if he had knowledge that the suit was pending, he would have been required to answer, and, if he failed to do so, he could not, after the term of court had expired, maintain a suit to set aside the judgment or decree. In the instant case, however, Quarles testifies positively that he not only was not served, but that he knew nothing of the suit, and had never heard of it until March, 1927. When he did find out about it, he immediately brought suit to set aside the decree.

As to whether the writ of garnishment was served on Quarles and whether he had any notice that the suit was pending, were questions of fact, and the finding of the chancellor is supported by a preponderance of the evidence. However, the appellant contends that, even if the summons was not served, Quarles' attorney had notice, and that notice to the attorney was notice to the client, and cites and relies on § 1334 of Crawford & Moses' Digest, *State* v. *West,* 160 Ark. 419, 254 S. W. 828, and *Bank of Hoxie* v. *Merriwether,* 166 Ark. 39, 265 S. W. 642, and numerous other authorities from which he quotes. The section of the Digest relied on reads as follows:

"Where it is not otherwise specially provided, a notice to a party in an action of any motion or proceeding to be made or taken therein, in court or before a judge, may be served upon such party or his attorney; but the service upon the attorney in any such case must be by delivering to him a copy of the notice." Section 1334, Crawford & Moses' Digest.

In the case pending in the Drew Chancery Court, Quarles was not a party until the writ of garnishment was issued. He therefore had no attorney representing him in that litigation upon whom a notice could have been served. And certainly notice, if it had been served in the manner provided by statute on some lawyer simply because he had represented him in some other case, would not bind him in that case. It would be no notice whatever. Besides, a writ of garnishment is a summons. Its purpose is not only to prevent the garnishee from paying money to the person to whom he owes it, but it is a summons for him to appear in court and answer the interrogatories filed, and it must be served as any other summons. Notice to an attorney that a summons has been issued in a case where a party is defendant would be no notice whatever to the party simply because he had employed the attorney in some other litigation.

In the first case referred to by appellant, the court said:

"It is not denied that Ivie, who was and is her attorney, was served with notice. It is true this attorney accepted the service only for himself and not for his client, but the service upon him was not in his individual capacity but as the attorney for the widow; and it was not denied and is not denied that he was then and is now her attorney in this matter." *State* v. *West,* 160 Ark. 413, 254 S. W. 828.

There is no suggestion in the instant case that the attorney notified was the attorney for Quarles in this matter. He never represented him in this matter, and was not authorized to receive notice, and no notice was served on him. There was some correspondence between the attorney who had formerly represented Quarles and the attorney for the appellant, but the attorney with whom the correspondence was had did not represent Quarles in this matter, and Quarles never had notice, either actual or constructive, according to his testimony, of the writ of garnishment.

In the next case to which attention is called by appellant and on which he relies, the court said:

"Notice to Albright, who was the cashier of the bank, was notice to the bank. The general rule is that the principal is affected with notice of all that his agent knows in the line of his duty or within the scope of his powers. A corporation must necessarily act through agents, and the general rule is that knowledge of an agent acquired in the ordinary discharge of his duties for the corporation is ordinarily to be imputed to the principal." *Bank of Hoxie* v. *Meriwether,* 166 Ark. 39, 265 S. W. 642.

There is nothing in the decision in the above case that supports the contention of the appellant in this case. The attorney with whom the correspondence was had was a lawyer in Little Rock, and not an attorney of Quarles in this matter, and nothing he did was within the line of his duty as attorney for Quarles. When a client employs an attorney in a certain litigation, notice to the attorney of motions and actions taken in that particular case ordinarily bind the client. But it has never been held that notice to an attorney in a case in which he had not yet been employed was notice to the party, although he may have represented the party in other litigation.

The evidence in this case fails to show that Quarles had any notice whatever of the writ of garnishment, other than the testimony of the deputy sheriff that he served it upon Quarles. The notice that it is claimed was given to attorneys might as well have been served on or given to any attorney in Arkansas. Service on an attorney means service on the attorney employed in the particular litigation or employed generally. It does not mean service on an attorney who at some time had represented the party. This is no notice at all, and we therefore think that Quarles had no notice of the pendency of the suit, and that there is no evidence tending to show that he had notice, other than the testimony of the deputy sheriff, showing that he served the writ of garnishment.

The appellant next contends that this is not a direct attack, but a collateral attack on the decree, and calls attention to a great many authorities to the effect that, on collateral attack, the question is tried upon the record only. We do not agree, however, with the appellant in this contention. This is a direct attack, and, as we have already shown, evidence may be introduced that no service was ever had. A direct attack on a judgment is an attempt to amend it, correct it, reform it, vacate it, or enjoin the execution in a proceeding instituted for that purpose. And a motion or petition to vacate a judgment is a direct attack thereon. 15 R. C. L., 839; *Continental Gin Co.* v. *DeBrod,* 34 Okla. 66, 123 Pac. 129; *Newman* v. *Mackey,* 37 Tex. Civ. App. 85, 83 S. W. 31; *Housser* v. *Bonsal & Co.,* 139 N. C. 51, 62 S. E. 776. Then the cases decided by this court already referred to show conclusively that this is a direct attack.

Appellant further contends that the motion to dismiss for want of service should have been granted, and that no personal judgment can be rendered on constructive service. It is not necessary to decide these questions, because the appellants entered their appearance and filed answer, and thereafter the court entered an order setting aside the decree.

Our conclusion is that the evidence shows there was no service, and that Quarles had no notice, either actual or constructive. The decree of the chancery court is correct, and it is therefore affirmed.

KIRBY, J., dissents.

KYZER AND LACKEY *v.* STATE.

Opinion delivered February 11, 1929.

N. A. McDaniel, X. O. Pindall, Troy W. Lewis and *Clayton Freeman,* for appellant.

Hal L. Norwood, Attorney General, and *Pat Mehaffy,* Assistant, for appellee.

McHaney, J. Appellants were jointly indicted in two indictments, one for making mash and one for possessing a still. The two cases were consolidated by agreement, and the consolidated trial resulted in a verdict and judgment against them, by which they were sentenced to the penitentiary for one year on each indictment. Several errors are assigned for the reversal of these judgments.

1. That the indictments seek to enforce statutes combining a dual sovereignty, each foreign to the other, making it criminal in one to do an act without complying with the requirements of the other. One indictment charges that they "did unlawfully and feloniously make and ferment a large quantity of mash, wort or wash fit to be used in the distillation, making and the manufacturing of alcoholic, vinous, malt, spirituous and fer-

mented liquors, * * * not being persons then and there authorized under the laws of the United States to manufacture sweet cider, vinegar, non-alcoholic beverages or spirits for other than beverage purposes." The other indictment charges that they "did unlawfully and feloniously have and keep in their possession a certain still for the purpose of using same, and which, when set up, might be used for the production of distilled alcoholic spirits, without having registered said still with the proper United States officers."

It is argued that there is no authority in the State to enact act 324 of the Acts of 1921, page 372, the authority under which these indictments were returned, because neither the Volstead act nor the Eighteenth Amendment to the Constitution of the United States authorizes such legislation. A sufficient answer to this contention is that the State's right to enact such legislation as contained in the act of 1921 is not dependent upon either the Eighteenth Amendment or the Volstead act. But, even if it were so dependent, the second section of the Eighteenth Amendment specifically provides that "the Congress and the several States shall have concurrent power to enforce this article by appropriate legislation."

In *U. S.* v. *Lanza,* 260 U. S. 377, 43 S. Ct. 141, the Supreme Court of the United States held directly to the contrary of appellant's contention. It was there held that both the Congress and the several States might pass such prohibitive legislation, carrying into effect the amendment, as might seem proper. Mr. Chief Justice TAFT, speaking for the court, said:

"To regard the amendment as the source of the power of the States to adopt and enforce prohibition measures is to take a partial and erroneous view of the matter. Save for some restrictions arising out of the Federal Constitution, chiefly the commerce clause, each State possessed that power in full measure prior to the amendment, and the probable purpose of declaring a concurrent power to be in the States was to negative

any possible inference that, in vesting the national government with the power of countrywide prohibition, State power would be excluded. In effect, the second section of the Eighteenth Amendment put an end to restrictions upon the State's power arising out of the Federal Constitution, and left her free to enact prohibition laws applying to all transactions within her limits. To be sure, the first section of the amendment took from the States all power to authorize acts falling within its prohibition, but it did not cut down or displace prior State laws not inconsistent with it. Such laws derive their force, as do all new ones consistent with it, not from this amendment, but from power originally belonging to the States, preserved to them by the Tenth Amendment, and now relieved from the restriction heretofore arising out of the Federal Constitution. This is the *ratio decidendi* of our decision in *Vigliotti* v. *Pennsylvania,* 258 U. S. 403, 66 L. ed. 686, 42 Sup. Ct. Rep. 330. We have here two sovereignties deriving power from different sources, capable of dealing with the same subject-matter within the same territory. Each may, without interference by the other, enact laws to secure prohibition, with the limitation that no legislation can give validity to acts prohibited by the amendment. Each government, in determining what shall be an offense against its peace and dignity, is exercising its own sovereignty, not that of the other. It follows that an act denounced as a crime by both national and State sovereignties is an offense against the peace and dignity of both, and may be punished by each."

Many convictions have been sustained by this court on indictments drawn under authority of the act of 1921, from *Logan* v. *State,* 150 Ark. 486, 234 S. W. 493, down to the present case.

2. It is further argued that the indictments do not charge the statutory offense in the language of the statute, or in language of equal import. One of counsel for appellants, in oral argument, conceded that, as to the indictment for making mash, his contention was

erroneous, for the indictment does charge that the mash so made was "fit for and to be used in the distillation" of liquor. But it is contended as to the other indictment, charging the unlawful possession of a still, that it is defective in charging, as it did, that they had and kept "in their possession a certain still for the purpose of using same, and which, when set up, might be used for the production of distilled alcoholic spirits," etc., does not charge the offense in the language of § 2 of the above mentioned act, nor in language of equal import. Section 2 of the act reads as follows:

"No person shall keep in his possession any stillworm or still, without registering the same with the proper United States officer, and no person shall set up to be used as a distillery, any stillworm or substitute therefor, and a still or substitute therefor, such as a kettle, washpot, metal tank, or any other vessel of any kind, for the purpose of using same, or which, after being so set up, may be used for the production of distilled spirits."

The indictment really charged more than was necessary to be charged in order to state an offense under the above section. The above section makes it unlawful for any person to keep in his possession any stillworm or still without registering the same with the proper United States officer. The mere possession of a still, whether set up or otherwise, and regardless of the intent with which it is possessed, is made an offense by said act. But we think the language used in the indictment charges the offense substantially in the language of the statute, or at least in words of equal import, and that appellants' contention in this regard should be overruled. *Rosslot* v. *State,* 162 Ark. 340, 258 S. W. 348; *Earl* v. *State,* 155 Ark. 286, 244 S. W. 333.

3. It is next argued that the appellants were substantially prejudiced by being compelled to testify against themselves as to other offenses. Appellants were witnesses in their own behalf, and on cross-examination they were asked if they had not recently pleaded guilty

before a United States Commissioner to the offense of possessing or transporting whiskey. They both admitted that they had, over their objections. There was no error in this regard, as the court specifically stated that it went to their credibility, and their admission could not be used against them as affirmative testimony to prove their guilt of the offense charged. *Shinn* v. *State,* 150 Ark. 215, 234 S. W. 636.

Several other contentions are made by appellants for a reversal of the case, all of which we have examined carefully, and do not find them to be meritorious. We think it would serve no useful purpose as a guide in future cases to discuss these questions separately.

We find no error, and the judgment is affirmed.

ROBB *v.* HOFFMAN.

Opinion delivered February 11, 1929.

[redacted]

Jeff Bratton, for appellant.

Block & Kirsch, for appellee.

McHaney, J. This case was tried on an agreed statement of facts substantially as follows: On August 9, 1911, R. S. L. Crockett and his wife, Martha, executed to J. C. Honey a mortgage on the 124 acres of land in controversy, to secure an indebtedness to Honey. The land was Crockett's homestead, and he thereafter died, leaving a widow and eight minor children. At the November term of the chancery court of 1915, Honey foreclosed his mortgage, and Crockett's widow, who at that time was Martha Crockett Finley, became the purchaser at the foreclosure sale, paying therefor $646.42. She borrowed the money to pay the purchase price at the commissioner's sale, for which she gave a note and mortgage, which was paid off in April, 1922. Apparently she borrowed the money with which to pay the last mentioned mortgage, for on February 8, 1922, she and her husband mortgaged the land to appellee, E. D. Hoffman, executing at the same time two mortgages, both bearing said date, a first mortgage for $550 and a second mortgage for $55. The second mortgage was payable in annual installments of $11 each, with interest from maturity, only one of which installments was paid, in 1923. Appellee, Hoffman, assigned a one-half interest in the second mortgage to Louis Linke, and at the April term, 1924, of the chancery court, Hoffman and Linke foreclosed the second mortgage as reformed, the land being incorrectly described therein, and at the commissioner's sale under said foreclosure, appellant, Al Robb, became the purchaser of said land, his bid being $1,670, the full value of said land.

Robb did not have actual knowledge of the existence of the first mortgage for $550 on said land, but, before paying the purchase price and before the confirmation of the sale, to-wit, on November 12, 1924, he filed a motion to set aside the sale, because he had discovered

the existence of the first mortgage. The court overruled the motion to set aside the sale, but approved and confirmed it, and on February 5, 1925, appellant paid the commissioner the amount of his bid and received a deed therefor. In November, 1924, four of the adult Crockett heirs intervened in the action, asking for a certain part of the proceeds of the sale to Robb. Martha Crockett Finley died on April 6, 1925, and the Paragould Trust Company was appointed administrator of her estate. Appellee Hoffman probated his first mortgage indebtedness of $550 with the administrator of her estate, which was allowed and approved. The administrator intervened in the action, claiming the fund in court, and all the Crockett heirs were brought into the litigation, who filed answer to the administrator's intervention, and in December appellant, Robb, filed an intervention, to which an amendment was filed in March, 1926, setting up the facts aforesaid relative to his purchase, in which he claimed the right to have the fund in court used to pay off the first mortgage indebtedness. Thereafter appellee, Hoffman, filed his claim to foreclose the first mortgage for $550 with interest, making appellant, the administrator, and all the Crockett heirs defendants, to which appellant separately answered that he had purchased the land at the former foreclosure sale, and had paid to the commissioner $1,670, which was the full value of the land; that he had no knowledge at the time of his purchase of the first mortgage; that the first mortgage should be paid out of the fund in court, and that his title to the land be confirmed and quieted in him. The court entered a decree dismissing appellant's intervention and answer, in both suits, for want of equity, and rendered judgment in appellee, Hoffman's, favor for the amount of his first mortgage and interest. It was further ordered "that the clerk shall pay to the plaintiff (Hoffman) his judgment and costs, after which the lands herein shall be treated as a substitute fund pending the litigation between M. A. Robb (appellant), upon the warranty of Mrs. Martha Finley and the administrator

of the said Martha Finley and her heirs and assigns. The residue of the said fund arising from the sale aforesaid (meaning the sale to appellant), after the payment of plaintiff's judgment, be distributed" to the Crockett heirs.

It will be seen, from the quotation from the decree first above set out, that the chancery court did not finally determine who was entitled to the land as between appellant Robb and the administrator of the Martha Finley estate. The decree recites that said lands shall be treated as a substitute fund pending the litigation between appellant upon the warranty of Mrs. Martha Finley and the administrator of her estate, her heirs and assigns. It does not appear from this record that there is any litigation between appellant and the administrator and the heirs of Martha Finley upon any warranty of Mrs. Martha Finley. Appellant bought at a judicial sale, and the rule of *caveat emptor* applies. There was no warranty in the mortgage executed by Martha Finley to appellee, Hoffman, as against the first mortgage. The second mortgage, under which appellant bought at the foreclosure, specifically provides that it is a second mortgage, and the warranty clause provides that the lands are free and clear of incumbrances "except a first mortgage in favor of E. D. Hoffman of Cape Girardeau, Missouri, for $550 and interest thereon."

The court did, however, dismiss appellant's intervention and answer in both cases for want of equity, which was a final adjudication of the rights set up by him in his intervention and answer. *Flanagan* v. *Drainage Dist. No. 17,* 176 Ark. 31, 2 S. W. (2d) 70; *Fox* v. *Pinson,* 177 Ark. 381, 6 S. W. (2d) 518.

We are of the opinion that the court correctly decreed that the first mortgage for $550 and the interest thereon should be paid out of the fund in the hands of the commissioner, being the balance left from the sale to appellant under the second mortgage. But we are furthermore of the opinion that the court erroneously refused to determine the question as to appellant's in-

terest in the land. To reverse the case and remand it with directions to determine that question might cause another appeal, and would be a useless and expensive procedure to all parties concerned. We therefore proceed to determine that question.

In the case of *Watts* v. *Blair,* 137 Ark. 143, 208 S. W. 434, this court held that the purchaser of land at a mortgage foreclosure sale under a decree of the chancery court is entitled to the protection which the holder of the mortgage foreclosed enjoyed. In other words, the purchaser at a mortgage foreclosure sale steps into the shoes of the mortgagee in the mortgage foreclosed, and is entitled to all the rights such mortgagee had under the mortgage. *Turman* v. *Bell,* 54 Ark. 273, 15 S. W. 886; *Bogenschultz* v. *O'Toole,* 70 Ark. 253, 67 S. W. 400.

In 42 C. J. 258 it is said: "The purchaser at a sale under foreclosure of a junior mortgage takes title to the land subject to the prior mortgage on the premises, even though the prior mortgagee is not made party to the foreclosure proceedings, and even though the prior mortgagee had previously foreclosed without making the second mortgagee a party, and had bought in the property. But his liability is restricted to the extent of the interest covered by the prior mortgage and of the claims secured thereby, and is entirely released as soon as the lien of the prior mortgage is discharged."

Had appellee, Hoffman, been the purchaser at the foreclosure sale instead of Robb, and had bid the same amount appellant bid, undoubtedly he would have been entitled to deduct from the amount paid to the commissioner the amount of his first mortgage, and satisfy same of record, and we therefore fail to see any good reason why appellant should not be entitled to have the first mortgage satisfied out of the amount of his bid, same being largely in excess of both mortgages and the interest thereon. Moreover, the agreed statement of facts shows these two mortgages to Hoffman to be simultaneous mortgages, although one is denomi-

nated a first mortgage and the other a second, and although the first mortgage was recorded ahead of the second, and the general rule seems to be that, upon the foreclosure of either one of them, the surplus remaining after sale shall be applied to the satisfaction of the other.

Mr. Jones, in his work on mortgages, vol. 3 (8 ed.) § 2171, states the rule as follows:

"So, if there be simultaneous mortgages upon the same land, they are in effect one instrument, and, upon the foreclosure of one of them, the surplus remaining after satisfying that is applicable to the payment of the other, although only part of it is due. When such mortgages are held by different persons, the money arising from the sale of the property should be equitably divided between the mortgages; the fact that one was recorded before the other does not matter, if both mortgages were made under an agreement entered into by the mortgagor at the same time with both mortgagees."

Appellee, Hoffman, the holder of the first mortgage, cannot complain, as his indebtedness is fully paid. The administrator of Martha Finley's estate is in no position to complain, since the obligation under the first mortgage was presented to it and allowed, and, even though this fund in its entirety had been turned over to the administrator as an asset of her estate, less the amount of the second mortgage, it would have been under the obligation of paying said claim out of said fund. The Crockett heirs are in no position to complain, because the facts show that the amount of both mortgages involved in this litigation was but a continuance of the mortgage indebtedness due by their ancestor to J. C. Honey.

We therefore conclude that appellant was entitled to have the title to the land in controversy quieted in him as against all of the other parties to this litigation. The decree will therefore be reversed in this regard, and remanded with directions to enter a decree in accordance with this opinion. It is so ordered.

REDDIN *v.* COTTRELL.

Opinion delivered February 18, 1929.

[redacted]

[redacted]

Gaughan & Sifford, C. L. Poole and *John Baxter,* for appellant.

Compere & Compere and *J. R. Wilson,* for appellee.

HART, C. J., (after stating the facts). It is first sought to uphold the decree on the ground that the plaintiff was entitled to the 280 acres of land in controversy, or the proceeds thereof, after the death of Mrs. Eliza F. Hall, which occurred in October, 1924. This contention is made under the provisions of § 3 of the will of John B. Hall, which is copied in our statement of facts, and need not be repeated here. Reference to that section of his will shows

that he gave Eliza F. Hall all of his property, after the payment of certain legacies, to have and to hold during her natural life, with the right to sell and convey the same without restriction or limitation. The 280 acres of land in question was the property so devised to Mrs. Hall. The section of the will contained a proviso that, if Mrs. Hall died seized and possessed of any part of this property, then it should go to the plaintiff. This court has repeatedly held that, where a testator gives an estate for life only, with power in the life tenant to convey the estate absolutely, the life tenant may defeat the estate of a remainderman by the exercise of such power. *Archer* v. *Palmer,* 112 Ark. 527, 167 S. W. 99; *Thurman* v. *Symonds,* 126 Ark. 216, 190 S. W. 106; *Union Mercantile & Trust Co.* v. *Hudson,* 143 Ark. 519, 220 S. W. 820; *Galloway* v. *Sewell,* 162 Ark. 627, 258 S. W. 655; and *Combs* v. *Combs,* 172 Ark. 1073, 291 S. W. 818.

In the application of the settled rules of construction decided in these cases, Mrs. Hall had the absolute right to convey the property to the defendant, W. R. Reddin, and it was not necessary for him to have procured a quitclaim deed from the plaintiff. W. R. Reddin was a brother of Ira Reddin, the first husband of the plaintiff, and, according to his testimony, he obtained the quitclaim deed merely because he wished to have the sanction of the plaintiff to the trade. He testified that he went on the place and took charge of it, and cared for Mrs. Hall, with the consent and approval of the plaintiff. According to the testimony of the plaintiff, she executed the quitclaim deed because the attorney for the defendant told her that her interest in the property was recognized, and that she would have the same interest in the proceeds derived from the sale of the land as she would have had in the land itself. We need not decide this question of fact, however, for, if Mrs. Hall had the power under the will of her husband to convey the land to the defendant Reddin, it was not necessary to obtain a quitclaim deed from the plaintiff. The title to the land, under the authorities above cited, immediately became vested in the defendant

Reddin after the execution of the deed by Mrs. Hall and his acceptance thereof. It did not make any difference whether she collected any of the purchase price of the land from the defendant Reddin or not. After her death, whatever was due from Reddin became a part of her estate, to be distributed under the terms of her will. *Galloway* v. *Sewell,* 162 Ark. 627, 258 S. W. 655.

If the conveyance by Mrs. Hall to W. R. Reddin had been a simulated conveyance, then the plaintiff would be entitled to the land upon the death of Mrs. Hall. The reason is that, if the transaction was a simulated one, the title would not pass from Mrs. Hall to W. R. Reddin. There is nothing whatever in the record, however, to show that the transaction was a simulated one. The record does show that Mrs. Hall was opposed to the second marriage of the plaintiff, and for that reason conveyed the land to W. R. Reddin. This fact, however, does not make any difference. Under the will of her husband she had the absolute power and right to convey the land, and it did not make any difference what her motive was. All that the court could concern itself with was whether or not the transaction was real or simulated. We are of the opinion that, under the terms of the will, Mrs. Hall had a right to convey the land to W. R. Reddin, and that he acquired the title thereto by the conveyance to him from Mrs. Hall on the 25th day of June, 1918, and that the plaintiff had no interest whatever in the proceeds which Mrs. Hall might acquire from the sale of the land.

Again, it is insisted by the plaintiff that John B. Hall and his wife agreed to make a will in favor of the plaintiff in consideration of her support during their natural lives, and that this agreement on her part was substantially performed by her to such an extent that equity should grant her relief equivalent to specific performance, and should impose a trust upon the property for her benefit. If it be conceded that the facts bear out her contention in this respect, she is barred of relief by the statute of limitations, which was pleaded by the defendant Reddin. John B. Hall died on the 21st day of

April, 1915, leaving a will in which he devised the land in question to his wife with absolute power of disposal, and the remainder to the plaintiff. This will was duly offered for probate, and Mrs. E. F. Hall became the executrix. The plaintiff and her husband assisted in the probate of the will, and it is fairly inferable that plaintiff knew of the claim of Mrs. Hall to the property under the terms of the will. In any event, plaintiff was put on notice of the claim of Mrs. Hall when she conveyed the land to W. R. Reddin on the 25th day of June, 1918. The present suit was not instituted by the plaintiff until December 16, 1925, so it will be seen that, under any statute of limitations, the plaintiff would be barred of her relief under this contention. *Goff* v. *Beaty,* 157 Ark. 212, 247 S. W. 787.

The main reliance of the plaintiff to uphold the decree is that the facts establish a parol agreement on the part of John B. Hall and Eliza F. Hall to convey the land in question to her for the services she and her husband should render towards the support of Hall and his wife during the remainder of their lives, and that possession was delivered to her, and that she made valuable improvements in reliance on said parol contract. If it be conceded that the facts establish her contention and bring the case within the principles of law applicable thereto, as decided by this court in *Ashcraft* v. *Tucker,* 136 Ark. 447, 206 S. W. 896, and *Rugen* v. *Vaughan,* 142 Ark. 176, 218 S. W. 205, still plaintiff is barred by the statute of limitations. As we have already seen, Mrs. Eliza F. Hall executed a deed to said land to W. R. Reddin on the 25th day of June, 1918, and W. R. Reddin at once went on the land, and has been in possession of it ever since. Mrs. Hall subsequently recognized the deed to Reddin as binding on her, and gave the plaintiff notice to move away from the place. The plaintiff was put upon notice of the claim of Reddin to the land. The plaintiff moved away from the land on the first of November, 1918. The present suit was not instituted until December 16, 1925. During all this time W. R. Reddin was in possession of the

land, claiming it under the deed of Mrs. Eliza F. Hall to him. This constituted a period of time more than seven years, and, as far as the plaintiff was concerned, W. R. Reddin acquired title to the land by adverse possession. W. R. Reddin went into actual possession of part of the land described in the deed from Mrs. Hall to him, and this gave him constructive possession of all the land within the calls of his deed. *Moorehead* v. *Dial,* 134 Ark. 548, 204 S. W. 844; *Hargis* v. *Lawrence,* 135 Ark. 321, 204 S. W. 755; and *Carter* v. *Stewart,* 149 Ark. 189, 232 S. W. 936.

The result of our views is that the chancery court erred in not finding that the plaintiff was barred of relief in this action; and for that error the decree must be reversed, and the cause will be remanded with directions to the chancery court to dismiss the complaint of the plaintiff for want of equity. It is so ordered.

WRIGHT *v.* LAKE.

Opinion delivered February 18, 1929.

[redacted]

M. A. Matlock and *J. R. Wilson,* for appellant.

Mahony, Yocum & Saye, for appellee.

HART, C. J., (after stating the facts). The court sustained a demurrer to the complaint in each case, and

rendered judgment accordingly. The allegations of the complaint are the same, except as to the amounts due, and the demurrer confesses them to be true. Contrary to the common-law rule, under our Code every possible intendment and presumption is to be made in favor of a pleading, and a complaint will not be set aside on demurrer unless it be so fatally defective that, taking all the facts to be admitted, the court can say that they furnish no cause of action whatever. *Sharp* v. *Drainage District No. 7,* 164 Ark. 306, 261 S. W. 923, and *Penix* v. *Shaddox,* 169 Ark. 132, 273 S. W. 364.

Counsel for the defendant first seek to uphold the judgment of the circuit court on the ground that the cause of action is barred by the statute of limitations. We do not agree with counsel in this contention. According to the allegations of the complaint in each case, the defendant concealed from the plaintiff the withholding of certain part of the earnings of the partnership for the three years set out in the complaint. It is alleged that the plaintiff had no voice in the management of the business, and did not actively assist in carrying it on. On the contrary, it is alleged that the defendant Lake was the actual manager of the business, and fraudulently concealed from the plaintiff that he had failed to pay him a part of his earnings for the three years specified in the complaint and that he had converted same to his own use. It is further alleged that notice of the fraud was not acquired by the plaintiff until October 1, 1926. The original complaint was filed on the 8th day of April, 1927, and summons was served on the defendant on the 9th day of April, 1927. The amendment to the complaint was filed on May 26, 1928. Therefore the cause of action is not barred by the statute of limitations. It is well settled in this State that, where there has been a fraudulent concealment of the cause of action, the statute of limitations does not begin to run until the fraud is discovered. *Conditt* v. *Holden,* 92 Ark. 618, 123 S. W. 765; *Dilley* v. *Simmons National Bank,* 108 Ark. 342, 158 S. W. 141; *Meier* v. *Hart,* 143 Ark. 539, 220 S. W. 819; *Greer* v. *Craig,* 165

Ark. 209, 263 S. W. 400; and *Valley Planting Co.* v. *Currie,* 173 Ark. 862, 293 S. W. 746.

Counsel for the defendant also seek to uphold the judgment of the circuit court in sustaining the demurrer to the complaint under the well-settled rule that, in a suit for accounting and settlement of partnership affairs, the jurisdiction of equity is practically exclusive. *Short* v. *Thompson,* 170 Ark. 931, 282 S. W. 14; *Tankersley* v. *Patterson,* 176 Ark. 1013, 5 S. W. (2d) 309. The reason is that equity has almost exclusive jurisdiction in suits between partners where an accounting is necessary of some equitable relief required, such as opening up a settlement for the purpose of adjusting the accounts between the partners.

There are certain exceptions, however, to the general rule. In the instant case the partnership had been dissolved, and the plaintiff in each case had sold out his interest to the defendant Lake. The wrong complained of does not involve a readjustment of the partnership business or accounts. The contract of dissolution stands, and the partnership relation no longer exists. The ground of action is in no way connected with the state of the partnership business, except that the defendant is alleged to have withheld from the plaintiff a part of the profits for three different years and to have converted the same to his own use. A certain specified and definite amount is alleged to have been withheld by the defendant for three different years, and to have been fraudulently converted to his own use. The alleged fraud and deceit is not asked to be a ground for setting aside the settlement between the partners or for reforming the accounts. The right of the action in this case is the alleged tort of Lake in fraudulently withholding from the plaintiff in each case a certain part of the profits of the partnership for three different years, and converting the same to his own use. The former partnership between the parties is in no way concerned, and there is nothing in the former partnership relation which prevents the maintenance of this action for the alleged deceit. *Crockett* v. *Burleson*

60 W. Va. 252, 54 S. E. 341, 6 L. R. A. (N. S.) 263; *Russell* v. *Grimes,* 46 Mo. 410; *French* v. *Mulholland,* 218 Mich. 248, 187 N. W. 254, 21 A. L. R. 1, and case-note at 97; and *Farnsworth* v. *Whitney,* 74 Me. 370, where fraud was alleged in the settlement of partnership affairs, which case held that the defrauded partner could bring an action on the case for deceit.

This principle was recognized and approved by this court in *Hamilton* v. *McGill,* 152 Ark. 587, 239 S. W. 721, and *Phillips* v. *Mantle,* 136 Ark. 338, 206 S. W. 660. The reason is that no reopening or readjustment of the partnership accounts is necessary in such a case, and the plaintiff, having affirmed the dissolution of the partnership except as to the fraud alleged to have been practiced upon him, has a remedy at law for the alleged fraud and deceit.

It follows that the court erred in sustaining the demurrer to the complaint in each case, and for that error the judgment must be reversed, and the cause remanded for further proceedings. In this connection it may be stated that a defendant sued at law must make all the defenses he has, both legal and equitable; if any of them are exclusively cognizable in equity, he is entitled to a transfer to equity. *Dunbar* v. *Bourland,* 88 Ark. 153, 114 S. W. 467; and *Automatic Weighing Co.* v. *Carter,* 95 Ark. 118, 128 S. W. 557.

It follows that the judgments will be reversed, and the causes will be remanded for further proceedings according to law and not inconsistent with this opinion.

FOX *v.* HARRISON.

Opinion delivered February 18, 1929.

[redacted]

Hughes & Davis, for appellant.

Z. B. Harrison and *Frank Berry,* for appellee.

SMITH, J. Appellant brought this suit against the prosecuting attorney of the Second Judicial Circuit, of which Crittenden County is a part, and the sheriff and other peace officers of that county, to restrain them from interfering with him in the operation of a dog-racing track in that county. A demurrer to his complaint was sustained, and it was dismissed as being without equity, and he has duly prosecuted this appeal.

Plaintiff alleged that he had invested $150,000 in a plant for the conduct of the races, which were to begin Monday, October 10, 1927, at 8 P. M., and to continue until Saturday, November 26, 1927, at 11 P. M., Sundays alone excepted. It was alleged that thousands of people, men, women and children, would attend these races, eight in number each night, which would be conducted in an orderly manner, if the defendant officers were enjoined from interfering with them. The complaint alleged in detail the manner in which the races are conducted and the sources from which funds are derived to pay the prizes to be awarded to the dogs which run, first, second and third, in each of the races.

It is not contended that wagers are not laid on the chances of the different dogs to win the races in which they are entered as contenders for the respective prizes, but it is insisted that making wagers upon races other than horse races is not illegal under the laws of this State, and that the defendants are about to destroy property valuable only as a dog-racing plant, and which is not

an unlawful business. In support of this insistence it is pointed out that in the early case of *State* v. *Rorie,* 23 Ark. 726, it was held that betting upon a horse-race was not unlawful under the gaming statutes of the State, and that in the case of *State* v. *Vaughan,* 81 Ark. 117, 98 S. W. 685, 7 L. R. A. (N. S.) 899, 118 A. S. R. 29, 11 Ann. Cas. 277, it was said that: "It will not do to overrule *State* v. *Rorie* merely because against the weight of authority; there is good reason to sustain the distinction therein made, and it has been acquiesced in by the State for 45 years, when at any time it could have been changed by legislation. Therefore it must be taken in this case that betting on horse-racing is not a crime of itself."

It is further argued that, at a session of the General Assembly which convened soon after the opinion in the Vaughan case was handed down, § 2669, C. & M. Digest, was enacted (act February 27, 1907, page 134), making it unlawful to bet on a horse-race run in or out of this State, and, inasmuch as betting on horse-races was therein prohibited, while other kinds of races were not included, the purpose of the Legislature was manifested to make betting on races unlawful only when the races were horse-races, and that betting on dog and other races remains innocuous and lawful, and therefore the peace officers should be enjoined from interfering with the plaintiff in affording persons who desire to indulge in this pleasurable and innocent pastime the opportunity to do so.

We think there are two sufficient answers to these arguments, either of which amply supports the action of the court below in sustaining the demurrer and dismissing the complaint as being without equity. The first is that learned counsel for appellant do not give to the act of 1907 (§ 2669, C. & M. Digest) its full effect. Immediately prior to the passage of this statute the court had called attention to the fact that for forty-five years the Legislature had refused to enact a statute overturning the decision in the case of *State* v. *Rorie, supra,* "that betting on horse-racing is not a crime of itself," although, as was

there pointed out, the decision in the Rorie case, that horse-racing was a sport, and not a game, was against the weight of authority, which was to the contrary. The Legislature accepted this challenge at its first opportunity, and enacted that betting on horse-races, whether run in or out of this State, should be unlawful.

The effect of this legislation was to completely destroy the authority of the Rorie case on this subject, and that of the Vaughan case, which followed it. We have therefore the liberty—of which the court in the Vaughan case felt itself restrained—to follow the weight of authority, uninfluenced by the doctrine of the Rorie case. Being thus emancipated, we feel constrained by considerations of public morals, as well as by the better reasoning of the adjudged cases, to follow the weight of authority, and we now hold that racing, whether by men, horses, dogs or other animals, or by animals of one kind against those of another, is a game, and one who bets on such a race offends against the statute prohibiting betting on games.

In the case of *Mace* v. *State,* 58 Ark. 79, 22 S. W. 1108, it was held that baseball was a game within the meaning of the statutes which makes betting on "any game of hazard or skill" an offense. However, Justices Battle and Mansfield dissented in that case upon the ground that the Rorie case, *supra,* controlled.

The second reason for affirming the decree appealed from is that it is in exact harmony with the Vaughan case, *supra.* Notwithstanding the fact that the court held in the Vaughan case that betting on horse-races was not unlawful, it was held in the Vaughan case that the maintenance of a place wherein money is received, won and lost on horse-races is a nuisance at common law. It was there said:

"What is the status of such a house, notwithstanding it is conducted in a quiet and orderly manner, without unusual noise or disorderly conduct? At common law there were no statutes against gaming, yet the maintenance of a gaming house was a criminal nuisance, indict-

able and punishable as such. Mr. Justice SCOTT for this court said: 'Independent of any statute, the keeping of a common gaming house is indictable at common law on account of its tendency to bring together disorderly persons, promote immorality, and lead to breaches of the peace. Such an establishment is thus a common nuisance.' *Vandeworker* v. *State,* 13 Ark. 700. Chief Justice WATKINS for this court said: 'At common law, gaming houses were indictable as a public nuisance (*Vandeworker* v. *State,* 13 Ark. 700), but, unless restrained by express statute, ordinary wagers or betting were tolerated as being for amusement or recreation.' *Norton* v. *State,* 15 Ark. 71."

After making it clear, upon a review of the authorities, "that the fact that betting on horse-racing is not within the gaming statutes does not prevent a house maintained for such business being a criminal nuisance," it was pointed out that "the punishment for common-law offenses not covered by statute is fixed as a fine not exceeding $100 and imprisonment not to exceed three months. Kirby's Digest, § 623 and 624," and that "these statutes have been held applicable to a gaming house as a common misdemeanor" (Citing authorities).

The opinion in the Vaughan case concluded by saying:

"It is not only the right, but the sworn duty of every prosecuting attorney, to proceed by information in justice's or circuit court to close these illegal places when they have information of them; it is not only the right but the duty of every grand jury to find the existence of such places, if they exist, and to indict the keepers thereof. It is also the privilege of any citizen to proceed against them at any time, by affidavit, before a justice of the peace. There is no possible excuse under the law for a pool-room—a place maintained for carrying on or facilitating betting on horse-races or any other sport or game, or contest, or other event upon which wagers are laid—to exist in Arkansas for one minute. This maintenance is a crime, nothing more, nothing less."

In view of the forceful statement of the duty of the public officers and of the rights of the citizens to proceed in the suppression of such places as appellant proposes to operate, we must hold that the chancellor was clearly correct in refusing to restrain the officers from discharging this duty.

The decree of the court is therefore affirmed.

OLD AMERICAN INSURANCE COMPANY *v.* DELONEY.

Opinion delivered February 18, 1929.

John L. Crank and *Brickhouse & Brickhouse,* for appellant.

Feazel & Steel, for appellee.

SMITH, J. Appellee brought this suit against the appellant insurance company to recover the amount of a policy of insurance issued by the appellant company on the life of appellee's wife, in which he was the beneficiary. The company denied liability, upon the ground that the insured falsely represented in her application for insurance that she did not have, at the time of the application, nor had she had, during the two years preceding the application, certain diseases mentioned in the application for the policy.

There was a failure to prove that the insured had, or had had, the mentioned diseases, but there was some testimony to the effect that, between the date of the application for the policy and its delivery, the insured had a spell of influenza. At the conclusion of the testimony, defendant requested an instruction numbered 2, reading as follows: "You are instructed that, if you find from

the evidence that plaintiff became ill after applying for insurance with defendant company and before the delivery of the policy, and if you further find that the contract of insurance provided that, if applicant became sick during the pendency of the application, the application should then be considered as withdrawn, then your verdict will be for the plaintiff in the sum of such amounts as you find were paid as premiums on said policy, together with 6 per cent. interest thereon."

The court refused to give the instruction, whereupon defendant asked leave to amend its answer to conform to the testimony, showing a breach of the warranty contained in the application reading as follows: "In the event I should become ill or die between the date of the application and before such delivery of the policy to me, then it is agreed that any premium paid with the application shall be returned to me or my legal representative, the application being treated as withdrawn."

The court overruled the motion, for the reason stated, that the evidence was closed and the witnesses discharged, and this amendment to the answer injected a new issue in the case.

There was a verdict and judgment for appellee, for the reversal of which it is insisted that the court should have given the instruction set out above, and should have permitted the answer to be amended to raise the issue covered by this instruction.

The defense that the insured became ill between the date of the application for the policy and that of its delivery was one not raised by the answer nor by the motion to amend it, until after the witnesses had been discharged, and it was therefore a matter of discretion on the part of the trial court whether then to permit this new defense to be interposed, and we are unable to say that the court abused its discretion. *Butler* v. *Butler,* 176 Ark. 126, 2 S. W. (2d) 63.

It becomes unnecessary therefore to determine whether the instruction correctly interpreted the language of the application quoted above, as this issue was not raised in apt time. The judgment must therefore be affirmed, and it is so ordered.

HOWELL *v.* DUTY.

Opinion delivered November 19, 1928.

Schoonover & Schoonover, for appellant.

Pope & Booth, for appellee.

MCHANEY, J. Appellant instituted this action to recover damages against the appellees for the alleged breach of on oral contract to rent land from appellee, Roy Duty, for the year 1927, who, prior to the beginning of the term, sold and conveyed same to E. Duty, who had knowledge of the outstanding rental contract. Appellant was to pay the usual and customary part of the crop as rent for the land, one-fourth of the cotton and one-third of the other crops. Appellant offered to prove as damages his loss of profits that he probably would have made had he been permitted to cultivate the land, but the court refused to permit him to make such proof, and ruled that the measure of damages appellant suffered, if any, was the difference between the actual rental value of the land and the rent reserved or agreed to be paid in the contract, and that, since there was no evidence as to what the actual value of the land was, ap-

pellant had failed to make a case for the jury, and instructed peremptorily for nominal damages only.

It is conceded by appellant that the former decisions of this court sustain the ruling and judgment of the trial court, but it is insisted that this court has gone too far in its prior decisions, and we are now asked to overrule these cases. We do not agree with appellant in this regard. This rule is so firmly established by the former decisions of this court that we do not think it would be either wise or expedient to either modify or overrule its former holdings. It has been the established rule of this court since 1883, *Rose* v. *Wynn,* 42 Ark. 257, that the general rule for the measure of damages in an action by a lessee against his lessor for damages for his refusal or failure to deliver possession of the demised premises is the difference between the rent reserved and the value of the premises for the term, and that, if there be no difference between these values, the lessee can only recover nominal damages, even though the lessor wrongfully refused to give possession. It was there said:

"The books agree that, in an action by a lessee against a lessor for damages for refusal or failure to deliver possession of the demised premises, the general rule for the measure of damages is the difference between the rent reserved and the value of the premises for the term. If the value of the premises for the term is no greater than the rent which the tenant has agreed to pay, then the latter is not substantially injured, and can in general recover only nominal damages, though the landlord, without just cause, refused to give possession. But, if the value of the premises is greater than the rent to be paid, the lessee is entitled to the benefit of his contract, and this will ordinarily consist of the difference between the two amounts."

In *McElvany* v. *Smith,* 76 Ark. 468, 88 S. W. 981, 6 Ann. Cas. 458, the court adhered to this same rule, and there said:

"If the rental value of the place from which he is evicted is greater than the price he agreed to pay, he may

recover this excess, and, in addition thereto, any other loss directly caused by the eviction, such as the expense of removal to another place."

In *Thomas* v. *Croom,* 102 Ark. 108, 143 S. W. 88, the case of *Rose* v. *Wynn, supra,* was cited with approval, and the court again said:

"The measure of damages for the breach of this implied contract for possession is the difference between the rental value of the demised premises and the rental price named in the lease, together with such special damages as have necessarily resulted from such breach." See also *Andrews* v. *Minter,* 75 Ark. 589, 88 S. W. 822; *Young* v. *Berman,* 96 Ark. 78, 131 S. W. 62; *Reeves* v. *Romines,* 132 Ark. 599, 201 S. W. 822; *Malone* v. *Wade,* 148 Ark. 548, 230 S. W. 579.

It will therefore be seen that this court has many times passed on the question now presented for decision, and has never varied from the rule herein announced. We do not see proper to do so in this case, nor is any good reason advanced why this case should be an exception to the rule.

Affirmed.