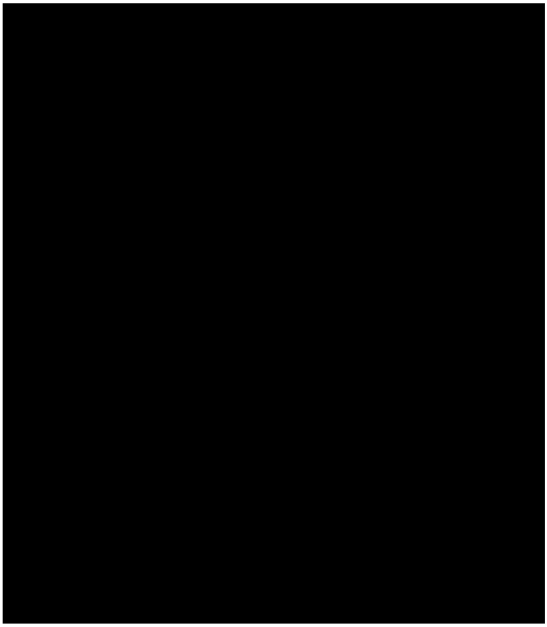

[redacted]

ÆTNA CASUALTY & SURETY COMPANY *v.* BIG ROCK STONE & MATERIAL COMPANY.

Opinion delivered September 30, 1929.

[redacted]

Frauenthal, Sherrill & Johnson, for appellant.

Rose, Hemingway, Cantrell & Loughborough, for appellee.

KIRBY, J. Appellee brought this suit against Herman & McCain Construction Company, the contractor for the erection of a building for the Little Rock Tent & Awning Company, the owner, and the appellant company, surety on the contractor's bond, for materials furnished the contractor and used in the construction of the building and not paid for. Judgment was prayed against the contractor, the surety on his bond, and for a materialman's lien on the owner's lot upon which the building was constructed, for the materials furnished, and the surety has appealed from the judgment rendered against it.

The contractor's bond, upon which the appellant company became surety, was made to the owner in the penal sum of $16,000, was not recorded with the clerk nor for double the amount of the contract price of the building, and provides:

"The contractor shall faithfully execute the contract, * * * and shall pay off and discharge claims for labor and material of whatever kind used in the construction of said work, * * * and shall turn over said work on completion to said owner in an undamaged condition, and free and clear of all liens and incumbrances whatever of mechanics or materialmen that may arise out of said contract." The final clause of the contract reads:

"Now, if the said contractor shall fully and completely comply with all the provisions and conditions of said contract, and turn over said work to the said owner in an undamaged condition and free and clear of all liens and incumbrances whatever arising out of said contract, then this obligation shall be null and void."

The court found that no notice had been given by the material furnisher to the owner of intention to file a claim for a lien, and that none had been filed or suit

brought within 90 days from the time the last materials were furnished, but rendered judgment against appellant, surety on the bond, for the materials furnished. The bond by its terms does not indicate that it was intended to be given in compliance with the statute, § 6912, C. & M. Digest, for discharge of liens against buildings and improvements, and the court did not err in holding it not to be a statutory bond. *Mansfield Lbr. Co.* v. *National Surety Co.,* 176 Ark. 1035, 5 S. W. (2d) 294.

Appellant insists that, notwithstanding the surety bond be held not to have been given in compliance with the statute, under a correct and proper construction of its terms, it being executed solely for the benefit of the owner, it cannot be held to the payment of any claim for materials furnished or labor done upon the buildings which were not duly made a lien therefor. The bond provides: "The contractor shall faithfully execute the contract, * * * and shall pay off and discharge claims for labor and material of whatever kind used in the construction of said work, * * * and shall turn over said work on completion to said owner in an undamaged condition, and free and clear of all liens and incumbrances whatever of mechanics or materialmen that may arise out of said contract." However, the majority is of opinion, in which the writer does not concur, that the language used is sufficiently broad and inclusive to make the surety liable to pay off and discharge all claims for materials and labor used in the construction of the building, and the provision, if the contractor shall turn over said work to the owner "in an undamaged condition and free and clear of all liens and incumbrances whatever arising out of said contract, then this obligation shall be null and void," does not limit the liability to the payment of such claims for labor and materials furnished as constituted liens against the improvement, under the authority of the opinions in *Leslie Lbr. & Supply Co.* v. *Lawrence,* 178 Ark. 574, 11 S. W. (2d) 458; and *Mansfield Lbr. Co.* v. *National Surety Co., supra.*

The court is also of opinion that a reasonable construction of the terms of the bond shows it to have been made not only for the benefit of the owner, but for the benefit of materialmen and laborers as well, authorizing them to sue thereon for a breach of its terms. *Mansfield Lbr. Co.* v. *National Surety Co., supra.*

Appellant company being a paid surety and its contract one in the nature of a contract of insurance, it will be construed accordingly, most strongly against the surety. *Union Indemnity Co.* v. *Forgey & Hanson,* 174 Ark. 1110, 298 S. W. 1032; *Leslie Lbr. & Supply Co.* v. *Lawrence, supra.*

Finding no prejudicial error in the record, the judgment is affirmed.

GALLEGLY *v.* AMERICAN INSURANCE UNION.

Opinion delivered September 30, 1929.

Oliver & Oliver, for appellant.

Caraway, Baker & Gautney, for appellee.

BUTLER, J. This is a suit on an insurance policy issued to D. N. Thomas by appellee. Sophie Thomas, wife of assured and mother of appellants, was the beneficiary named in the policy. She died at an undisclosed date, and the assured died on September 20, 1927. Appellants are adults, and their mother and father died intestate, leaving no debts.

The trial was before the court sitting as a jury, and a judgment was rendered finding "the issues of law and fact for the defendants," and dismissing the suit of appellants, who, in apt time, filed their motion for a new trial, in which the following assignments of error were made: "(1) That the findings of the court are contrary to the evidence. (2) That the findings of the court are contrary to the law. (3) That the findings of the

court are contrary to the law and the evidence. (4) That the court erred in its holding that the defendant was not bound, under the terms of its contract, to advance or pay for him, Thomas, the one month's premium for October, 1926, being the month for which defendant attempted to forfeit the contract of insurance sued on. (5) That the court erred in its holding that the defendant was not compelled to use the reserve that had accumulated upon the contract sued on in order to prevent a forfeiture, rather than to declare a forfeiture, and thus obtain the reserve for its own use."

The motion was overruled, hence this appeal.

Appellee first insists that appellants were not entitled to bring or maintain this action because there is no provision either in the certificate or by-laws that will permit a relative to sue for an alleged claim. The answer to this is that they are not suing as relatives of the assured, but as the heirs at law of the beneficiary, and as such are entitled to whatever benefits might have accrued to their ancestor, and the fact that there is no declaration in the by-laws relating to the heirs or relatives of a deceased beneficiary cannot diminish or change their legal status or their rights thereunder, and it therefore follows that they are proper parties plaintiff in this case.

The principal defense of the appellee (defendant below) was and is that the policy, the basis of this action, was forfeited for nonpayment of the monthly premium falling due October 1, 1926.

It is admitted by the appellant that, under the constitution and by-laws of appellee, this, if true, is a perfect defense, but they say such was not in fact the case. The facts relevant to the material question in issue are undisputed, and such as are necessary for the decision of the case will be stated in this opinion.

The assured was a member of, and held a certificate of insurance on his life in favor of the beneficiary hereinbefore named in, some kind of insurance company or association known as "The Home Protective Associa-

tion." In the aforesaid certificate he was insured for the sum of $1,000, for which he paid a monthly premium of $1.44. He held this certificate for an undisclosed period of years, and paid his premiums promptly on the first day of each month until the year 1919, when the association surrendered its assets to appellee, which took over its membership and agreed to pay the claims then existing, and such death claims of the membership of the Home Protective Association as might thereafter accrue. It was also agreed, in what appellee calls the "merger agreement" of the two insurance companies, that appellee might and should increase the premiums due each month to "a sum sufficient to meet the costs of his insurance on the basis of the American experience table of mortality, with interest at 4 per cent., or upon such other standard table of mortality and plan as may be deemed necessary by the national board of the American Insurance Union, to meet the *costs of his insurance.*"

The constitution and by-laws of the appellee provided for its creation and operation as a fraternal benefit society, with a central organization and local "chapters," and for initiation, ritualistic work, etc., such as are common in organizations of its kind; these chapters to have chaplains and various other officers, one of whom was called the "cashier," the idea being that, in addition to the insurance benefit, other indirect but highly important benefits would accrue to the membership from the fraternal spirit inaugurated and fostered by the local chapters, the frequent meetings, the ritualistic work, the visits of the brethren in sickness, their charity in distress, and the promoting and cementing of friendship by frequent association.

In part, to provide funds for this important and laudable portion of the activities and benefactions of appellee, § 907 of the by-laws provided that: "Beginning with the date of his admission, each life benefit member shall pay to the cashier of his chapter, in addition to his monthly premium, such sum as chapter dues

as *his chapter* may prescribe, which shall be not less than 15 cents a month, nor more than 25 cents'' * * *.

Such was the agreement under which assured became a member of appellee Union, such were appellee's professed aims, and such the manner in which it proposed to function. Beginning with January 1, 1922, insured's dues were increased from $1.44 per month to $6.95 per month, and with the beginning of each year thereafter the monthly dues were increased 75 cents, so that on January 1, 1926, his dues reached the sum of $9.95 a month, and continued so down to and including the date of the alleged forfeiture, October 1, 1926. The assured paid each month his premiums down to and including September 1, 1926. About a year prior to the last mentioned date he suffered a paralytic stroke, and never left his bed until his death, his daughter, Mrs. Gallegly, one of the appellants, attending to his wants and paying his monthly insurance premiums. When it became time to remit for the November premium, Mrs. Gallegly discovered that she had failed to send in the October premium, and on November 4 remitted for both the October and November premiums, with an explanation. The remittance was returned by the appellee, with certain blanks for reinstatement, including a certificate of ''good health'' to be made as a prerequisite to a consideration of the application. As the assured was and had been a helpless and incurable invalid for more than a year, the certificate could not be made, and, after some time, Mrs. Gallegly and assured were advised by appellee that the policy had been forfeited for the failure to pay the October premium within the 20 days of grace. Tender was made for four months premiums in advance, which was refused, and no other premiums were paid. Assured died September 20, 1927.

Beginning with January 1, 1922, and continuing each month until and including September 1, 1926, appellee Union exacted of assured, and he paid, in addition to the premiums on his policy, a monthly fee of 25 cents

as "chapter dues," the total of which amounted on October 1, 1926, to a sum in excess of the premium due on that date. As, under the merger agreement, which has been quoted, the "costs of the insurance" were met by the payment of the monthly premiums, the only legitimate purpose for which the chapter dues could have been collected was to provide for the needs of the chapter in its ritualistic work, and to aid in its fraternal activities. But it appears that this was not the real motive for the collection of this sum, nor the uses to which it was devoted. There were 12,000 members taken over by appellee from the Home Protective Association, and 38,000 from other associations which appellee absorbed. The reasonable inference is that each of these were required to and did pay 25 cents each month as chapter fees, all of which totaled each month the sum of $12,500. Now, neither assured, Thomas, nor any other of the brethren acquired from the various associations taken over by appellee, ever made application to and none were ever initiated into any chapter. Assured lived in or near the town of Corning, Arkansas. There was never any chapter of appellee at that place. When the assured and the 38,000 others became members of the appellee Union, they were assessed chapter dues as members of chapter 2,200, the domicile of which was said to have been at Columbus, Ohio, but into which neither assured nor the others were ever initiated or attended, because it *never met*. It never had a meeting during its entire alleged existence, and we are warranted in concluding that it never did have any existence, but was as "insubstantial" as Prospero's airy pageant, "such stuff as dreams are made on," with this marked difference, that nothing ever comes of dreams, while $12,500 monthly came of this out of the policyholders, in excess of the "cost of insurance."

In the case of *Mutual Aid Union* v. *Perdue,* 162 Ark. 551, 258 S. W. 375, it was held that where, under the by-laws, assessments are required to be levied by the board of directors, the levy of such assessments by the secre-

tary is without authority, and a failure to pay an assessment so levied did not work a forfeiture of the policy. Applying the rule announced in that case to the facts of the case at bar, it is clear that the exaction of the chapter dues was without authority. Their payment by assured and his agents cannot be said to have been voluntary, because it was made without a full knowledge of the fact, and under coercion implicit in the very demand. Because of this, the money so demanded and paid remained the property of the assured, and on October 1, 1926, amounted to a sum greater than the premium due. Under such circumstances the insurer should have applied the funds in its hands, wrongfully collected from the insured, to the payment of the premium, and thus avoided a forfeiture, and, having failed in this duty, the law makes the application, and, doing so in this case, it follows that the premium due October 1, 1926, had been paid before its due date, and there was no forfeiture. We think the conclusion reached consonant with reason, and has the support of authority. "It is inequitable and against the policy of the law to permit a society to forfeit a contract of insurance for nonpayment of an assessment, when it has in its possession the money of the member to an amount covering the assessment, and has the power to apply the money as an assessment." Niblack, Accident Ins. and Benefit Societies, 2 ed., § 271.

In the case of *Knight* v. *Supreme Council, etc.*, 6 N. Y. Sup. 427, the court said:

"The defendant had already in its hands moneys illegally exacted from the deceased which it ought to have applied to the extinguishment of the assessment. * * * Knight became a member of the order on July 28, 1884. He was not liable for any assessment for any loss prior thereto. Yet it is shown that he was included in and paid an assessment of July 22, 1884, under circumstances which would show that it was not a voluntary payment. * * * So long as there remained in the treasury of the defendant sufficient funds of the deceased

with which to pay the assessment in question, no defense of forfeiture for nonpayment was available to it."

The issue relative to the illegal demand and of the payment of such for chapter dues, while not raised by the pleadings originally filed, was raised by the evidence introduced, to which no exception was made, and therefore the complaint will be treated as amended to conform to the proof.

It will be noted that the learned trial judge made no specific findings of fact or declarations of law, and for that and the further reason that, from an inspection of the record, a question of law only was involved, we think the second assignment of error was as definite as the judgment would permit, and sufficient to bring the entire case before this court on review.

The payment of the premiums on the several monthly due dates after October 1, 1926, were not made, but of this appellee cannot complain, for, having refused to accept same when tendered, and declaring the policy forfeited, any tender thereafter would have been futile. However, the dues for the month of November and December, 1926, at $9.95 each, and those for January to and including September, 1927, at $10.70 each, are now due appellee.

From an inspection of the constitution and by-laws of the company we have concluded that it is a "fraternal benefit society," and not subject to the penalties prescribed by § 6155, C. & M. Digest, for failure to pay claims due by it, nor liable for an attorney's fee in this case.

In view of the conclusions reached, the judgment of the trial court must be vacated, and the facts on the question we deem important and decisive of this case having been fully developed and undisputed, the clerk of this court will ascertain the amount due appellants from the amount named in the policy, plus $4.30 balance of chapter dues remaining in hands of appellee, deducting November and December dues, 1926, at $9.95 each, and

monthly dues from and including January to and including September, 1927, each for the sum of $10.70, and will enter judgment for the balance, with 6 per cent. interest from September 20, 1927, until paid.

BRIERTON *v.* ANDERSON.

Opinion delivered October 7, 1929.

Joseph Morrison, for appellant.

M. F. Elms, for appellee.

HART, C. J., (after stating the facts). The first assignment of error is that the court erred in giving at the request of the plaintiff instruction No. 1, which reads as follows:

"The court instructs you that, if you find from all the evidence in this case, the plaintiff met and complied with each and every obligation and condition laid on him by the contract here sued on, by delivering to defendant one Gade dredgeboat or excavator of caterpillar traction, in good, merchantable condition, with the shovel thereon repaired so as to be in good working condition, at the place specified in said contract, or at such other place as the defendant may have, after the execution of said contract, have directed or requested the delivery thereof, if you also find that he later requested its delivery to a different place than specified in the contract, within a reasonable time, and you further find it was free of liens, and was for a period of two days by plaintiff demonstrated as required by said contract, at a place specified by defendant, and you further find that on said demonstration it met with all the conditions of said contract with reference to its working condition, then you should find for the plaintiff for such amount as you find due him upon said contract."

Counsel for defendant now contends that this instruction misled the jury into thinking that it was only necessary to find that the shovel on the machine must have been in good working condition under the terms of the contract in order to warrant a recovery in favor of the plaintiff. We do not think so. The plain meaning of the instruction is that the whole machine, including the shovel, should be in good merchantable condition. If counsel for the defendant thought that the instruction

was calculated to confuse or mislead the jury in the respect now complained of, specific objection should have been made to the instruction, and doubtless the court would have changed it to meet the objection of the defendant.

It is next insisted that the evidence is not legally sufficient to support the verdict. In the first place, it may be said that the contract of sale was in writing, and a warranty of the condition of the property sold cannot be incorporated in the written contract by parol evidence. This court has also held, that the sale of a second-hand article carries no implied warranty as to the quality, condition or fitness for the purpose intended of such article, and this is especially true where the property is subject to inspection at the time of the sale. *Kull* v. *Noble*, 178 Ark. 496, 10 S. W. (2d) 992, and *Old City Iron Works* v. *Belmont*, 177 Ark. 223, 7 S. W. (2d) 772, and cases cited.

The undisputed testimony shows that Brierton saw the dredgeboat, and inspected it before he executed the written contract for the purchase of it. The testimony for the plaintiff shows that the machine was repaired, and was in good working order at the time it was delivered to the defendant. The plaintiff specifically testified that the shovel or bucket was in good working condition at the time of its delivery. According to the evidence for the defendant, he refused to pay for the dredgeboat, because of its defective condition at the time of the delivery. This disputed issue was submitted to the jury under proper instructions, and the question was settled in favor of the plaintiff by the verdict of the jury.

There being evidence of a substantial character to support the verdict, we cannot disturb it on appeal. Therefore the judgment will be affirmed.

DREW GRAVEL COMPANY, INC., *v.* STELL.

Opinion delivered October 7, 1929.

[redacted]

O. A. Featherston, for appellant.

Tom Kidd, for appellee.

SMITH, J. On August 31, 1923, G. L. Gideon executed a lease to A. S. Drew, which permitted Drew to mine and remove sand, gravel and clay from certain lands owned by Gideon, in Pike County. This contract was amended by the parties on October 1, 1923, and the amended contract was assigned by Drew to a corporation organized and managed by Drew, and known as the Drew Gravel Company, Inc.

A disagreement arose about the operation of the gravel pits, and the payment of the rents and royalties provided for in the lease, and on April 24, 1925, the lease contract was further amended whereby it was provided that a monthly rental of $50 should be paid, whether the gravel pits were worked or not, but, if worked in any month, this rental should be credited on the royalties due for that month, if they exceeded $50.

A suit was brought by Gideon, in which a decree appears to have been rendered in August, 1928, but neither the pleadings in that case nor the decree pronounced therein were offered in evidence in this suit, which was commenced by filing a complaint on October 3, 1928. There appears in the record in this case a stipulation between opposing counsel to permit testimony taken in the former case to be read in evidence in the instant case.

The original lease provided that the rights conveyed therein should cease, and the lease be forfeited, if operations were not conducted thereunder for as much as ninety consecutive days, and this provision was not changed by the amendments. The complaint in the instant case alleged a failure to operate as required by the lease, and prayed its cancellation on that account. It also alleged the failure to pay rents for the months of April, May, June, July and August, 1928, and prayed judgment for $250.

Upon final submission the relief prayed was granted, and this appeal is from that decree.

For the reversal of this decree, it is insisted that the former decree is conclusive of the issues here raised. But we cannot agree with counsel in this contention, for the reason, as stated, that the identity of the issues is not made to appear, nor does it appear that the decree rendered was a final one which disposed of the issues, whatever they may have been. The first suit may have been for the rents in arrears at the time that suit was begun, and that date is not disclosed, and there is no intimation that a cancellation of the lease was prayed in the first suit. Whatever the nature of the first suit may have been, the testimony now before us on the part of the plaintiff shows a continuous failure to operate the lease for more than ninety consecutive days, and the lease provides for a forfeiture in that event.

It is insisted that, although cause for the forfeiture of the lease and its cancellation was given, through the nonpayment of the rent, and the failure to mine the

gravel, it would be inequitable to grant this relief, for the reason that no demand for the rent was made, and the managing officer of the appellant company testified that he had agreed with Gideon for the latter to draw drafts each month through a local bank, and which would have been paid had they been presented, but which were not drawn or presented. Gideon had died before the trial, and this testimony was not directly controverted, but neither the original lease nor the amendments thereto provided for payment in this manner, and the insistent and peremptory letters which Gideon wrote during his lifetime, which appear in the record, make it very clear that Gideon had no intention either to remit or to postpone these payments. Several of these letters announce the intention of declaring a forfeiture, and of canceling the lease if the payments were not promptly made, and there is nothing in the record to justify the belief on the part of the officers of the corporation that any indulgence would be given if the rents were not paid.

It is admitted that for five consecutive months the plant had not been operated, nor had the rent been paid, the payment of which would have avoided the forfeiture, and the right to cancel the lease existed unless it had been waived; and we think the court was warranted in finding that there had been no waiver. It is true that the lessee, in its answer, offered to pay the past due rents; but, if the right to cancel had then accrued, this right was not destroyed by the belated tender.

We find nothing in the record to support the plea of *res judicata* in bar of this action, nor any conduct on the part of the lessor which would warrant the finding that he had waived the right given by the lease to cancel it for the nonpayment of the rents.

The decree must therefore be affirmed, and it is so ordered.

MISSOURI PACIFIC RAILROAD COMPANY *v.* BUSHEY.

Opinion delivered October 7, 1929.

N. F. Lamb, Gordon Frierson and *Thos. B. Pryor,* for appellant.

Pace & Davis, for appellee.

HUMPHREYS, J. Appellee, administratrix of the estate of George M. Bushey, deceased, brought this suit under the Federal Employers' Liability Act (45 U. S. C. A. §§ 51-59) against appellant in the circuit court of Poinsett County, to recover damages in the sum of $75,000 for the benefit of herself and minor son, Marion F. Bushey, on account of the injury and death of her husband, a railroad engineer in the employment of appellant at the time, through its alleged negligence in allowing the railroad track, about three and one-half miles north of McGehee, to become so unsafe that it failed to support the locomotive which her intestate was operating in pulling train No. 102, in use in transportation of express and passengers from Louisiana to Arkansas and other States.

Appellant filed an answer, denying the alleged negligence, and attributing the injury and death to the act of a miscreant in disconnecting a rail, and moving the south end thereof toward the center of the track, which caused the derailment of the locomotive, and two of the cars and a coach; and pleading assumed risk on the part of her intestate as an affirmative defense.

The cause was submitted to the jury upon the issues of alleged negligence and assumed risk, with directions as to elements and measure of damages, contingent on liability, which resulted in a verdict and consequent judgment in favor of appellee for $48,500, from which is this appeal.

Appellant contends for a reversal of the judgment upon the alleged ground, that the undisputed testimony reflects that the proximate cause of the injury to appel-

lee's intestate, resulting in his death, was the disconnection of a certain rail, and the removal of the south end thereof about eighteen inches west toward the center of the track, by an unknown miscreant, and that the derailment of the locomotive and said cars and coach did not result from the unsafe condition of the track.

The wreck occurred about midnight of September 13, 1926, some three and one-half miles north of McGehee. Thirty-five minutes before the wreck occurred another train had passed over the track at this point safely, running thirty-five or forty miles an hour. At the time of the wreck the train was traveling north, and after bending a part of the rails and tearing most of the ties literally to pieces for a distance of three hundred feet, the locomotive, detached from the mail and baggage cars and chair coach, and leaving them almost demolished in various positions on the track, was found on the east side of the track, partly east of the right-of-way fence, lying on its left side, emitting hot water and steam, beneath which appellee's intestate was caught and tightly held by his legs for about three hours before they could release him, during which time the hot water and steam blew into his face, and put out his eyes. Immediately after being released he died from the effects of the injuries received. During the entire time he was pinned under the locomotive his suffering was intense. He was conscious, and continually called on those present for help and assistance to get out. The two sleepers or Pullmans at the rear of the train were uninjured, the front wheels of the first one being on the ground and the back wheels on the rails, and the second one standing on the track in a normal position.

The superintendent, roadmaster and other officials and employees came out from McGehee to the scene of the wreck, and, a short time thereafter, set about to ascertain the cause of the wreck. They discovered a detached or disconnected rail under the front Pullman, with the south end thereof moved eighteen inches or more

toward the center of the track, and they, as well as other parties present, testified that the rail was straight, sitting upright, pulled several feet forward, and attached or connected to the bent rail in front of it; that the angle-bars, bolts, washers and taps were lying near and around the place where they had been detached from the rail south or back of it; that the threads on the taps and bolts were bright, and all of them uninjured, indicating, to their minds, that the taps had been unscrewed, and that the bolts, angle-bars and washers had been removed by some person. The spikes had all been removed on the inside of said rail, but not on the outside, with a claw-bar which had left its print on the ties. Tools which would have been used to disconnect the rail and pull the spikes were found hidden between some logs a short distance from the right-of-way. The plates on the seven ties upon which the rail had rested disclosed evidences of wheels having passed over them, but the seven ties themselves were left uninjured. The rails in front or north of these seven ties were bent, and the ties for a distance of three hundred feet were demolished. The east rail immediately in front of the disconnected rail was turned on its side, and had marks upon it, indicating, to the minds of appellee's witnesses, that the locomotive and other cars were derailed at that point. Sand had been sprinkled on three or four rails on the south of the displaced rail, all of which were still in alignment, and in place.

Appellant concedes that the testimony introduced by appellee showed that the track where the rails were bent and ties demolished by the locomotive, two cars and chair coach, was in bad condition. This concession was based upon the testimony of witnesses introduced by appellee, who testified that this portion of the track, as well as the portions thereof for a long distance to the north and south, were out of repair and unsafe on account of rotten ties and loose spikes holding down the rails; that a large number of new ties had been scattered by the side of the track at the point of the wreck and a considerable dis-

tance each way, for the purpose of repairing the track. Appellant argues that, notwithstanding the concession it makes, the testimony does not contradict its testimony to the effect that, before reaching the bent rails and demolished ties, the locomotive, cars and coach between it ran off the rails onto the ties at the place where the rail was disconnected, and moved toward the center of the track, and that this was the cause of the commencement of the wreck, and necessarily the cause of the death of appellee's intestate.

This would be a conclusive argument against liability of appellant if the physical facts testified to by its witnesses were entirely undisputed. The condition found and testified to by them is disputed by physical facts testified to by appellee's witnesses. According to the testimony of the witnesses introduced by appellee, the rail which was turned and bent was immediately in front of the first Pullman. The testimony disputes that of appellant to the effect that it began with the displaced rail. The physical fact that the seven ties under the displaced rail were not demolished by the locomotive, cars and coach, just as the ties were north of the seven ties, also disputes the physical fact that the bolts had been unscrewed and rail moved before the train arrived at that point. It is almost inconceivable that a locomotive of perhaps one hundred tons weight and two cars and a coach could have dropped, while rapidly moving, off of a rail onto the ties, and not have displaced them, when the same locomotive, cars and coach, necessarily with a little less speed, had demolished and displaced the ties and bent the rails immediately north and in front of the seven ties which escaped injury or displacement from such rough treatment. The jury may have reasonably concluded that the physical condition relative to the displaced rail, bolts, washers, angle-bars and taps found and testified to by appellant's witnesses did not exist at the time the locomotive, cars and coach passed over the space occupied by the seven ties. Appellant argues,

however, that it must have existed, because corroborated by its witnesses, who testified that, before reaching that particular point, the emergency brakes were applied and sand dropped on three or four rails just south of the displaced rail. The track was straight at the point where the wreck occurred for a long distance each way. If the condition existed, the jury may have found that the engineer and fireman could have discovered the displaced rail in ample time to have stopped the train before reaching it. The reasonable conclusion is that they would have done so, as it was their duty to keep a lookout, as well as for their own protection to do so. The emergency brakes may have been applied and sand dropped on the rails for other reasons. It may be that they saw something further ahead on the straight track that caused the engineer to do this, or something may have happened to the engine which impelled him to do it.

Again, it is highly improbable that an unknown miscreant would have disconnected the rails for the purpose of wrecking a train, and endangering the lives of a great many people. The record is silent as to the motive on the part of any one for committing such an act. There was therefore a dispute in the testimony as to what caused the wreck, and ample testimony in the record of a substantial nature to support the verdict of the jury, to the effect that the proximate cause of the injury and death of appellee's intestate was the unsafe condition of the track. It cannot be said, in arriving at the verdict, that the jury arbitrarily discarded or rejected the testimony of appellant's witnesses relative to the displacement of the rail by a miscreant. The testimony was weighed, found wanting in reason, and rejected because contradicted by the evidence of a substantial nature tending to establish a reasonable and certain conclusion as to the cause of the wreck. The court did not err in refusing to peremptorily instruct a verdict for appellant in the case.

Appellant also contends for a reversal of the judgment because five of the jurors who tried the case had

not assessed for the payment of a poll tax, although each had paid same, and because all answered upon their *voir dire,* at the commencement of the term, that they were qualified electors of Poinsett County. Under statute as well as the practice in this State, it is too late, after the rendition of a verdict, to raise the ineligibility of a juror to serve, unless it can be shown by the complaining party that diligence was used to ascertain his disqualification, and prevent his selection as a juror. Crawford & Moses' Digest, § 6343; *Casat* v. *State,* 40 Ark. 515; *James* v. *State,* 68 Ark. 464, 60 S. W. 29; *Teel* v. *State,* 129 Ark. 181, 195 S. W. 32; *Doyle* v. *State,* 166 Ark. 505, 266 S. W. 459. In the instant case diligence was not shown. The contention of appellant for a reversal of the judgment upon this ground is without merit.

Appellant also contends for a reversal of the judgment, because the trial court instructed the jury that nine of them could return a verdict. Appellant argues that the amendment to the Constitution authorizing nine jurors to render a verdict in a civil case did not become effective as a part of the Constitution until the favorable vote thereon by the people at the general election held October 6, 1928, was reported to the Speaker of the House in January, 1929, and declared adopted by him. This is the rule applicable to constitutional amendments which do not provide when they shall go into effect, but if the time is fixed in the amendment itself when it shall go into effect, that time controls. The amendment in question stated, that it should be self-executing, and go into effect immediately upon its adoption by the electors of the State. The question raised was raised and decided adversely to appellant's contention herein in the recent case of *Mathenv* v. *Independence County,* 169 Ark. 927, 277 S. W. 22. The trial court did not err in instructing the jury that nine members thereof, if agreed, could render a verdict in the case.

Appellant also contends for a reversal of the judgment for the alleged reason that instruction No. 1, given

by the court at the request of appellee, submitted an issue of whether or not appellant had failed or neglected to inspect the track where the wreck occurred, whereas the only issue of negligence alleged, and in the case, was the allegation that appellant had permitted its track to become defective and insufficient, thereby causing the locomotive and cars to be derailed. We do not so interpret the instruction complained of. The purport and effect of the instruction was to tell the jury that they could not return a verdict for appellee unless they found that the track was defective and insufficient, and that appellant either knew of the defective condition of the track, or could have known that fact by making a reasonably careful inspection. The instruction, as we read it, limited the jury to the sole issue of whether the wreck and consequent injury and death resulted on account of the unsound condition of the ties, and rails insecurely fastened thereto. The instruction was a correct declaration of the law applicable to the facts, and no error was committed in giving it to the jury.

Appellant also contends for a reversal of the judgment, because the court refused to give its requested instruction No. 4-A on assumed risk. The court gave instruction No. 4 requested by appellant upon the same subject, but it is argued that instruction No. 4-A went further by stating that: "While an employee does not necessarily assume the risk of injury on account of negligence on the part of the employer, yet, if in this case the defendant (appellant) was negligent in permitting its track to get in bad condition, and Bushey, knowing of this condition, continued in the service, appreciating the danger, then he would assume the risk of being injured on account of such conditions." The statement referred to in instruction No. 4-A was fully covered by instruction No. 6 given by the court at the request of appellee, when read in connection with instruction No. 4 given by the court, which was requested by appellant. Useless duplications in instructions tend to confuse rather than

help the jury, so trial courts are not required to multiply instructions of like tenor and effect. The court did not err therefore in refusing to give appellant's requested instruction No. 4-A.

Appellant also contends for a reversal of the judgment because the court refused to amend instruction No. 1 on the measure of damages, given by the court at appellee's request, so as to negative a recovery on account of grief or bereavement experienced by appellee and her son, or for loss of companionship and society of appellee on account of the death of her husband, but that the damages sustained, if any, should be confined to the pecuniary loss. The instruction as given by the court confined the damages, if any, which might be awarded, to a fair and reasonable compensation for the loss of pecuniary benefits they might have received had their intestate lived, as shown by the evidence, after reducing the amount to its present cash value, and to such further sum as the preponderance of the evidence might disclose would compensate them for the physical pain and mental anguish which their intestate endured in the interim from the time of his injury until his death. The restriction of damages which might be awarded to loss of pecuniary benefits was a clear, positive direction to the jury of every element they might include, and every element they must exclude in arriving at the amount of damages sustained. Any one of ordinary intelligence would understand from the limitation that appellee and her son could not have received money (pecuniary) benefits from grief, bereavement, deprivation of companionship or society. There was no necessity of negativing such elements of damages, because they were clearly excluded by necessary implication in the instruction given. The failure to amend the instruction as requested had no tendency to mislead the jury, so the court did not err in refusing to add the requested amendment thereto.

Appellant also contends for a reversal of the judgment, because the court refused to give its requested instruction No. 7, which is as follows:

"The court instructs you that if the evidence fails to establish by a fair preponderance thereof that the injury and death of the deceased was due to defendant's negligence, as alleged in the complaint, or that it is equally probable that the injury and death of the deceased were due to the criminal acts of an outsider by moving a rail of the track out of alignment, for whose act the defendant would not be responsible, then, in such event, your verdict should be for the defendant."

The jury was plainly told in other instructions given by the court, that appellee could not recover unless the preponderance of testimony reflected that the injury and death of appellee's intestate resulted from the defective condition of the track, nor if they believed from the evidence that the injury and death of her intestate resulted from the detachment and removal of a rail in the track by some person. These instructions which were given by the court squarely presented the same issue to the jury which instruction No. 7 would have presented had it been given. The court did not err therefore in refusing to give said instruction.

Appellant also contends for a reversal of the judgment, because the verdict was excessive. It is argued that, because appellee's intestate was 53 years of age, and only suffered for three hours from the time of the injury until his death, that the jury, in arriving at the verdict, necessarily considered other elements of damage than those which could be measured by a money standard. This conclusion does not necessarily follow, for, the present cash value of the pecuniary loss to appellee and her son, ascertained on the basis of the legal rate of interest in this State, and under or in accordance with the rule laid down by the Supreme Court of the United States in the case of *Chesapeake & O. R. Co.* v. *Kelly,* 241 U. S. 485, 36 S. Ct. 630, would be $39,037. The expectancy of appellee was 18.79 years, and he was earning a salary of $3,600 a year, all of which he contributed to the support of appellee and his minor

child, except $340 a year. The verdict was for the gross amount of $48,500, and it is therefore impossible to tell the exact amount awarded for the loss of benefits, and that awarded for pain and suffering of appellee's intestate. If the present cash value of the loss of future contributions be deducted from the total award, the jury awarded $9,463 for pain and suffering of appellee's intestate. Considering the intensity and duration of the suffering of the intestate, it cannot be said that a verdict for even very much more than said amount would be excessive. If the present cash value of the amount of total loss of contributions to appellee and her son should be figured on a basis of a lower rate of interest for the use of the money than six per cent. per annum, it would proportionately increase the present cash value thereof, and reduce the amount of the award for pain and suffering. We do not think, under the testimony in the case, that the total amount of the verdict for the loss of contributions and for the pain and suffering of appellee's intestate was excessive.

No error appearing, the judgment is affirmed.

HULBERT SPECIAL SCHOOL DISTRICT *v.* COOPER.

Opinion delivered October 7, 1929.

Berry, Berry & Berry, for appellant.

S. V. Neely, for appellee.

HUMPHREYS, J. This is an appeal, under § 10,028 of Crawford & Moses' Digest, from an order of the circuit judge in vacation affirming the approval of the collector's bond by the county court of Crittenden County on December 12, 1928. The bond filed and approved on that date was in regular form, signed by the sheriff and four sureties, each of whom made affidavit to the effect that they were residents of Crittenden County, Arkansas, and each worth over $250,000 in real and personal property above his liabilities and exemptions. The affidavits did not state the amount of real estate and its value, nor the amount of the personal property and its value that each owned, and that same was subject to execution. In these respects it failed to comply with § 8076 of Crawford & Moses' Digest. The circuit judge permitted the affidavits to be amended to meet these requirements before finally approving the bond on appeal. The bond contained the following conditions:

"Now, if the said Claud W. Cooper shall faithfully perform the duties of collector of revenue for the county aforesaid for the year 1928, and shall well and truly pay over within the times prescribed by law, to the proper officer designated by law to receive the same, all moneys collected by him, etc., etc., then this bond shall be void, otherwise to remain in full force and effect."

Appellants herein, who were not parties to the proceedings in the county court when said bond was approved, upon application to the county court were made parties on May 17, 1929, and granted an appeal to the circuit court in vacation. In their petition to be made parties to the proceedings for the purpose of appealing from the order approving the bond, they alleged that the bond was void: First, because the affidavits of the sureties did not comply with the requirements of § 8076 of Crawford & Moses' Digest; second, that the bond was for the year 1928 instead of 1929; and third, that the penalty of the bond was insufficient. Other allegations were made attacking the bond, but these are the only ones insisted upon by appellants for the reversal of the judgment of the circuit judge. Appellee, however, contends that this appeal should be dismissed without passing upon the validity of the bond, because appellants were not parties to the county court proceedings when it approved the bond, and did not go into said court at the time and object to the approval of the bond.

This is not an appeal under the general statute, § 2287, Crawford & Moses' Digest, but under § 10028 of Crawford & Moses' Digest, which states that "any person may, when he deems the security on said bond insufficient, appeal to the circuit court of the proper county, if in session, if not, to the circuit judge in vacation, from the order of the county court, or act of the county judge in vacation approving said bond" * * *. There is a marked difference between the statutes, the latter being much broader than the former, extending the right of appeal to any person who has an interest in the lawsuit, even though not a party to the proceeding, and even though he made no objection to the approval of the bond at the time. We also think and hold that school and drainage districts are persons within the meaning of the statute, and had a right to appeal from the county court judgment, and the judgment of the circuit judge in vacation.

We now proceed to a consideration of the objections made to the validity of the bond.

(1). Until the act of March 31, 1883, collectors' bonds were executed and approved like the bonds of other county officers in accordance with the requirements of the act of March 1, 1875, §§ 8076 to 8085 of Crawford & Moses' Digest; but on that date the Legislature enacted a separate and independent act governing the execution and approval of collectors' bonds, and prescribing their duties and liabilities. It was a complete act within itself, and repealed all acts in conflict therewith. The act of March 1, 1875, required that affidavits be filed by sureties stating, in addition to other requirements, the amount of the real estate and its value, the amount of the personal property and its value, owned by each surety, and that said property was subject to execution, but the latter act, or act of March 31, 1883, relative to collectors' bonds, required no affidavit at all relative to the property owned by the sureties. As no affidavits were required at all by the sureties on collectors' bonds after the passage of the act of 1883, the collector's bond in question was not void, because the affidavits filed by the sureties did not comply with the requirements of the act of March 1, 1875.

(2). We do not construe the collector's bond in question as a guaranty for the faithful performance of his duties for the year 1928, and the accounting of taxes collected by him during said year. The revenues referred to in the bond as revenues of 1928 necessarily were the taxes assessed in 1928 which were to be collected in 1929. The contention of appellant that the bond did not cover taxes which the collector should and did collect in 1929 that were assessed in 1928, is contrary to the holding of this court in the case of *Moose* v. *Bartlett,* 169 Ark. 963, 277 S. W. 340. The bond was filed and approved in ample time, as the collector's term of office did not begin until January 1, 1929, for the collection of the 1928 revenues.

(3). The penalty in the bond was $550,000, more than one and one-fourth times the amount of the State,

county, city and school district taxes charged against the collector on the abstract of the taxbooks of Crittenden County, which abstract was introduced as evidence by agreement. It was not one and one-fourth times the amount charged against him if the special improvement district assessments should be included, as they alone amounted to $209,935.59, which, added to the taxes charged against him for the purposes aforesaid, would exceed the penalty of the bond. It is true that the duty of collecting these taxes was superimposed upon the collector, but the statute placing this duty upon the collector did not increase the penalty of his bond. It was ruled in *Moose* v. *Bartlett, supra,* that the bondsmen were liable for any default in collecting these assessments, although no increase in the penalty on the bond was required. The penalty of the bond in question was therefore sufficient.

No error appearing, the judgment is affirmed.

KIRBY, J., dissents.

BOARD OF DIRECTORS OF ST. FRANCIS LEVEE DISTRICT *v.* HAGAN.

Opinion delivered October 7, 1929.

Mann & McCulloch, for appellant.

W. D. Gravette, for appellee.

KIRBY, J., (after stating the facts). Appellant insists that there was such an unreasonable delay in the presentation of the check by appellee for payment to the bank upon which it was drawn, and wherein it had funds on deposit sufficient to cover it, as to cause the loss to fall on appellee and discharge it from liability thereon.

It is true a check must be presented for payment within a reasonable time after its issue, or the drawer will be discharged from liability thereon (§ 7952, C. & M. Digest), but what is a reasonable time will depend upon

the circumstances of the particular case, the rule generally requiring that it be presented within banking hours not later than the day following its receipt by the payee, where he resides or does business in the same town where the bank on which the check is drawn is located. *Burns* v. *Yocum,* 81 Ark. 127, 98 S. W. 956; *Pelt* v. *Marler,* 95 Ark. 111, 128 S. W. 554; *Federal Land Bank of St. Louis* v. *Goodman,* 173 Ark. 493, 292 S. W. 659; *Geo. H. McFadden Bros. Agency* v. *Keesee,* 179 Ark. 510, 16 S. W. (2d) 1001.

Appellee had directed, however, that the money for the purchase price of the lands sold and conveyed by him to the district be paid to B. F. Gay, the mortgagee, and had no reason to think that it had not been done until he received notice from Gay's letter, after the bank had failed, to come in and indorse the check, which had been made payable to his order as well as Gay's. Nothing could be done, after receipt of the notice of the check's being made payable jointly to his order, about its indorsement or collection, before the bank, which failed before the letter was written, had closed its doors. Gay was not his agent to receive the check, and appellee was in no wise negligent in the failure of presentation of it for payment, having had no knowledge that the check had not been made payable to Gay, as was directed should be done.

The court correctly directed a verdict in appellee's favor, and the judgment must be affirmed. It is so ordered.

STEELE *v.* RURAL SPECIAL SCHOOL DISTRICT NO. 15.

Opinion delivered October 7, 1929.

[redacted]

George Steel, Will Steel, Reed & Beard and *Chas. W. Mehaffy*, for appellant.

Chas. A. Walls, for appellee.

KIRBY, J., (after stating the facts). The undisputed testimony shows that after improvements were made and the school established on the ground in controversy, several school districts were consolidated in 1924, and a larger schoolhouse, centrally located, was erected, containing four rooms, and adequate to the needs of the district; only three of the rooms of the new building being occupied for school purposes, and a teacher living in the fourth. The school that had been held in the house in controversy was moved on the 1st of January, 1925, to the new building in the consolidated district, the old building remaining vacant from January, 1925, until the summer of 1926, when appellant, after serving notice on the district, re-entered the premises and boarded up the old building, which was in a very bad condition, it being necessary to repair it in order to prevent its total destruction. No objection was made by the district when appellant took possession of the premises, which remained boarded up in the condition as already said until the summer of 1926, nor anything done before or afterwards indicating a waiver of his right, at which time extensive repairs were made on the building by appellant, and his tenant placed therein. Thereafter the president of the school board suggested that appellant should pay the board something for the building, and appellant stated

that this was the first intimation that he had that appellee had expected to claim any pay for the building. The insurance on the building had been allowed to lapse by the district, and it was in a very dilapidated condition when appellant gave notice that he would take possession, some of the posts of the gallery having fallen down, and the roof was sagged down, the window casings broken around, and all the blackboards had been detached from the walls and removed along with all the school apparatus and equipment to some of the other school buildings.

The directors testified, Dr. Bowers, chairman of the board, stating that it would have cost more to repair the building than it was worth, and it would not take care of the pupils in the district, "so the board conceived the idea of abandoning this building and building a larger one near the center of the district. * * * We consolidated the district, and decided to build a larger schoolhouse near the center of the district, and after the new building was completed we moved into it." He admitted that the insurance had been allowed to lapse, and no other insurance taken out, that the building was in bad repair, and no school had been held in it for 18 months, as already stated, but said the board had not taken any official action in abandoning the site for school purposes, and, over objection, that he had in mind, when they quit holding school in that building and consolidated the schools in the new building, that they might use it again, "but the board never had any definite plan for using the Steel building. We had no use for it, and that is why we did not keep it up. We conceived the idea of using the building later. We moved all the school supplies to the negro school. We thought several months thereafter we might have some use for it."

Another director stated that they intended to keep the Steel building for church purposes, if it was needed, but that he never knew of any church services being held there, and that the school board had not authorized or permitted the holding of any; that no effort had been

made to use the building since January, 1925, and the board had no idea of using the building in January, 1927.

The court refused to give a peremptory instruction in appellant's favor, and gave and refused other instructions that were objected to.

Appellant contends that the court erred in not directing the verdict in his favor, and, after a careful examination of the testimony, we have concluded that the contention must be sustained. It was not necessary to show official action by the board declaring the property abandoned to prove abandonment. This was done by the undisputed evidence showing the school was moved out, and no longer held on the premises after the district was consolidated, and the new and more commodious and centrally located schoolhouse was erected, and all of the school apparatus and equipment removed from this building to the negro school. The insurance policy too was allowed to lapse, and the house left so long unoccupied as to fall into such disrepair that it could not be used for any purpose without expensive repairs being made; nor was objection from the school board made upon appellant's giving notice that he would resume possession because of abandonment of the premises until more than six months after he had done so and boarded up the dilapidated old building, and finally completed the improvements thereon.

It is undisputed that he took possession of the building after he had notified the school board that he would do so, claiming it to have been abandoned, and a reversion thereof to himself under the express terms of his grant. This completed a vestiture of the title in him which cannot have been divested or affected by notice from a member of the school board six months thereafter, when the extensive repairs were about completed, that he might have trouble with the board for resuming possession. *St. L. S. W. Ry. Co.* v. *Curtis,* 113 Ark. 92, 167 S. W. 489; *Terry* v. *Taylor,* 143 Ark. 209, 229 S. W. 42.

The court does not therefore find it necessary to pass upon any other of the questions raised, and does not do so. For the error in refusing to give the peremptory instruction the judgment must be reversed, and, the case appearing to have been fully developed, will be remanded with directions to enter judgment in favor of appellant, and dismiss appellee's cause of action. It is so ordered.

MEHAFFY, J., disqualified, and not participating.

MOORE *v.* WILSON.

Opinion delivered October 7, 1929.

Berry, Berry & Berry, for appellant.

J. C. Brookfield, for appellee.

MEHAFFY, J. The appellees brought suit in the Crittenden Circuit Court against the appellant, James Moore, and Mrs. J. C. Moore, for damages which they alleged were caused by the negligence of James Moore in driving his automobile, and running into and striking the automobile in which the plaintiffs were riding.

It is unnecessary to set out the evidence, because the record fails to show that James Moore, a minor, was served with process. The record shows that complaint was filed and summons issued and directed to the sheriff, but it does not show that the appellant had been served with process.

"There is no recital in the judgment of the court or in the record showing that the appellant had been duly served with process in the last action instituted against him, No. 72. Taking all the recitals of the record together, there is no showing that the appellant was ever properly served with process in the last action instituted against him. The court therefore erred in allowing this cause to be consolidated with action No. 40 and in proceeding to the trial of the consolidated causes without the presence of the minor defendant. Under the showing made in the answer of the guardian *ad litem* in action No. 72, in which he expressly reserved 'to the defendant, Jack Ross, all his rights herein of reasonable notice and opportunity to defend,' we are convinced that the trial court should have granted the motion of the guardian *ad litem* for a continuance of the cause. There is nothing in the record to show proper service on the minor defendant, Jack Ross." *Ross* v. *Stroud,* 173 Ark. 66, 291 S. W. 996.

"An infant can neither acknowledge nor waive the regular service of process upon him, though in some instances a regular service of summons slightly irregular in form was held to be a substantial compliance with the statute, and sufficient to give jurisdiction. * * * It is held in most of the cases that the lack of service of the infant is a fatal, because jurisdictional, defect, and cannot be cured by the appointment of a guardian *ad litem* and his making actual defense for the infant; and this ruling seems consistent with the lack of power on the part of the guardian to bind the infant by his admissions or stipulations. A few courts have held, however, that even a lack of legal service does not render the judgment void, if the infant appeared, a guardian was appointed, and a proper defense was in fact made." 14 R. C. L. 284.

"It seems that the minor joined in the application here for an appeal, but, if not *sui juris,* he cannot be bound by that, and probably his name was included *pro forma.* The decrees must be reversed and the cause remanded to give the defendant, Robt. L., day in court. He must be served by some appropriate mode, have a guardian *ad litem* appointed after service, who must put in an answer, denying all material allegations of the bill." *Freeman* v. *Russell,* 40 Ark. 56.

"But there is nothing in the record to show that there was any service of summons upon these minor defendants. This being a direct attack upon the judgment by appeal, the same presumptions in favor of the regularity of the judgment do not arise as in a collateral attack. If the record does not recite or show service upon the minor defendants, we must take it that no summons was issued to or served upon them. The court had no right to appoint a guardian *ad litem* until after service of summons upon the infant defendants; and the guardian *ad litem* had no right to enter their appearance by filing an answer in the absence of such service." *Gannon* v. *Moore,* 83 Ark. 196, 104 S. W. 139.

"The rights of infants can in no case be judicially affected, except upon proper issues and proof, and upon statutory service, where they are defendants, and ought not to be upon their own application by next friend or guardian, without reference to the master or the chancellor's own careful examination, to ascertain whether or not the thing asked be really for the benefit of the infant." *Evans* v. *Davies,* 39 Ark. 235; *Haley* v. *Taylor,* 39 Ark. 104.

"No judgment should be rendered affecting the interests of an infant until after defense by guardian, and this defense should not be a mere perfunctory and formal one, but real and earnest. He should put in issue, and require proof of, every material allegation of a complaint prejudicial to the infant, whether it be true or not. He is not required to verify the answer, and can make no concessions on his own knowledge. He must put and keep the plaintiff at arm's length." *Pinchback* v. *Graves,* 42 Ark. 222.

A guardian *ad litem* was appointed by the court to defend in this case, and specifically denied every material allegation, and did all that he was required under the law to do or that could be expected of him. In fact, there is no doubt but that a genuine defense was made. But the statute authorizing the appointment of a guardian *ad litem,* among other things, provides: "The appointment cannot be made until after the service of summons in the action." Section 1114, Crawford & Moses' Digest.

It will be observed that the statute says "until after service." The only way we can tell whether service was had is by the record, and there is no recital in the record showing service of summons in this case. 31 C. J. 1130.

It may be that summons was served on the appellant. It probably was, but there is no such recital in the record, and the court cannot assume that summons was served because the record shows that one was issued. In fact, no guardian *ad litem* can be appointed under our statute until the summons has been served. However, this

court has decided that, since the purpose of the appointment is to have a real defense made for the infants, although the guardian *ad litem* was appointed before service had on the infant, the case will not be reversed where it appeared that the guardian filed a sufficient answer after service on the infants. *Bostleman* v. *Hinkle,* 152 Ark. 628, 239 S. W. 30.

It is next contended by the appellant that infants are not liable for torts in cases of this character. It has been many times held by this court, as well as other courts, that a minor is liable for injuries caused by his negligence. 31 C. J. 1093.

"It is well established that an infant is liable for his torts in the same manner as an adult. Hence infancy is no defense to an action *ex delicto* for assault, etc. Neither will infancy constitute a valid defense to an action for libel, for slander, for negligence, for seduction, or for trespass." 22 Cyc. 618; 31 C. J. 1090; *Lytle* v. *State,* 17 Ark. 608; *Watson* v. *Billings,* 38 Ark. 281; *Worthen* v. *Ratcliff,* 42 Ark. 330.

Appellant, however, contends that an infant cannot be liable for punitive damages, and quotes from 8 R. C. L. 595, as follows: "Exemplary damages are not recoverable against infants or persons of unsound mind, even though such persons are liable in compensatory damages for their torts."

But in a note to the above section we are referred to "Infants" in 14 R. C. L., and we find the rule there stated as follows:

"As the general rule applicable to contracts is that the infant is not liable thereon, so the general rule in the law of torts is that he is liable. Liability in a civil action is imposed not as a mode of punishment, but of compensation. If property has been destroyed or other loss occasioned by a wrongful act, it is just that the loss should fall upon the estate of the wrongdoer rather than on that of a guiltless third person, and that without reference to the question of moral guilt. Consequently, for

every tortious act of violence or other pure tort, the infant tort-feasor is liable in a civil action to the injured person." 14 R. C. L. 259, § 36.

And while infants are not usually liable for punitive damages, it is because they are not criminally responsible. But an intelligent young man the age of this young man may be responsible for punitive damages the same as an adult person.

A majority of the court are of the opinion that the evidence is insufficient to justify a verdict for punitive damages. The law as to the sufficiency of the evidence on the question of punitive damages is, however, well settled by the decisions of this court.

"We think error was committed in submitting the question of liability for punitive damages, and the judgment therefor must be set aside. The testimony warranted a finding of the grossest negligence; but this court is thoroughly committed to the doctrine that negligence alone, however gross, is not sufficient to justify the award of punitive damages." *St. L. S. W. R. Co.* v. *Owings,* 135 Ark. 56, 204 S. W. 1146; *St. L. I. M. & S. R. Co.* v. *Dysart,* 89 Ark. 261, 116 S. W. 224.

The court directed a verdict in favor of Mrs. Coates, and from that there is no appeal. Therefore Mrs. Coates is no longer a party to the suit.

Because the record does not show that the minor was served, the judgment is reversed, and the causes remanded for a new trial.

ALGER *v.* BEASLEY.

Opinion delivered October 7, 1929.

Duke Frederick, for appellant.

C. H. Herndon, for appellee.

MEHAFFY, J. The appellees, on the 30th day of July, 1928, filed in the Montgomery Chancery Court a complaint, and summons was issued, and on the 31st of July served on the defendants. The complaint is as follows: Comes the plaintiffs, H. V. Beasley, trustee for P. J. Ahearn, Robert Buchanan, H. V. Beasley, Mrs. Irene Offenhauser and W. L. Hickman *et al.,* and W. Spear Harris, and respectfully state: That all of the above plaintiffs, except the said W. Spear Harris, are the owners of the following claims in Montgomery and Polk counties, Arkansas: Nos. 1 and 2 east, and Nos. 1 to 8, inclusive, in sections 8-9-10, township 4 south, range 27 west, and also one placer claim No. 1 east on south; that all work has been done to perfect patents therefor. Also one upright boiler and piping; cars and tracks for carrying ores; pipe wrenches and cables; buildings located thereon; also six tunnels, and other property. That on June 1, 1927, the last-mentioned plaintiffs leased said property to said W. Spear Harris for a period of ten years; that said W. Spear Harris entered into possession thereof and went to work; that the defendants, Alger, whose given name is unknown to plaintiffs, and

Reinhart, whose given name is also unknown to plaintiffs, came on to said lands, without plaintiffs' permission, placed notices thereon, took possession of the buildings located thereon, and have destroyed plaintiffs' railroad track, ordered plaintiff W. Spear Harris off said property, and cussed and used abusive language about said W. Spear Harris; that said defendants, Alger and Reinhart, had no claim or right to said lands, premises or property; that said defendants are threatening and about to destroy other property, and are irresponsible, and a judgment against them would be of no value. Plaintiffs have no adequate remedy at law.

"Wherefore plaintiffs pray that said defendants be forever enjoined from trespassing thereon or from interfering with plaintiffs' claim thereto, and for other relief, including all damages sustained by plaintiffs."

At the same time that summons was served a notice was served on appellants that an application would be made for an injunction on August 6.

The appellants appeared on August 6, but did not file any answer or any pleadings except a motion to require appellees to give bond. This application and motion was heard before the circuit judge, and the injunction issued returnable to the chancery court. Bond was filed on August 13. On August 15 defendants were cited to appear in court for violating the order of the court. On September 22 the defendants were given ten days in which to file answer, but they did not file any answer or any pleadings. The regular term of the chancery court began in Montgomery County at Mt. Ida on the 5th of November. The defendants not having answered, the cause was submitted upon the pleadings, oral testimony and proof of service of summons. The court gave judgment against the appellants for $210.25 damages, and enjoined the appellants and their agents, employees and servants from going on the premises except by consent of plaintiffs.

Thereafter the appellants filed a motion to set aside the decree, and allege, among other things, that they had

no knowledge that court would convene on the 5th of November, and were not advised that the cause was set for trial or would be subject to trial, and they had no knowledge that a judgment had been rendered until an execution had been issued and placed in the hands of the sheriff. Appellants alleged that they resided at Mena, Polk County, and had engaged the services of W. L. Parker as their attorney, and understood that he would file an answer and advise them when court would convene; that he failed to file such answer, and appellants did not know of such failure until after judgment had been rendered and execution issued. They alleged that they had no knowledge of the order of the court giving them 10 days to answer, and believed their attorney was taking such steps as were necessary to protect their rights. They further alleged that they were each seriously ill and unable to attend court during the month of September, and also from the 15th of August to the 10th of October. They also alleged that the petition for injunction did not contain any allegations of damages to plaintiffs, and that the appellants therefore had no notice of any kind that a money judgment for damages against them was being sought. They deny that they violated the injunction, or that their employees did with their knowledge or consent. They alleged that they immediately, after the service of the injunction, removed from the property and have remained away ever since, and deny that they destroyed the railroad track, or that the appellees suffered any damage because of anything they did. They also alleged that the judgment for damages was rendered without any complaint being filed, and was rendered prematurely, and before the expiration of 90 days after the pleadings had been completed. Appellants alleged they had a meritorious defense, and set up in their motion their defense.

The chancery court overruled the motion, and defendants excepted, and prayed an appeal to the Supreme Court, which was granted.

Appellants in their brief state that the only questions to be determined are, first, whether or not sufficient facts are alleged in the complaint to constitute a cause of action entitling the plaintiffs to injunctive relief; second, whether or not the allegations of the complaint are sufficient to warrant a default judgment or decree for damages.

It will be observed that the complaint alleges that appellants came on to said lands, placed notices thereon, took possession of the buildings located thereon, and have destroyed the railroad track, and ordered appellees off said property. It further alleged that appellants were threatening and about to destroy other property, and that they are irresponsible, and a judgment against them would be of no value.

On demurrer or default the complaint was sufficient not only to authorize the court to take proof on the question of the injunction, but also as to damages. The complaint states specifically that a judgment against appellant would be of no value. That means, of course, that they are insolvent, and this allegation is not denied.

The complaint also alleged that they had already destroyed the railroad track, and were threatening and about to destroy other property. These were sufficient allegations to permit evidence to be introduced on both allegations. And, since the evidence taken by the court is not brought up in the record, it will be presumed that there was sufficient evidence to sustain both allegations.

This court has said recently: "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 allegations

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." *Driesbach* v. *Beckham,* 178 Ark. 816, 12 S. W. (2d) Series 408. See also *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; *Farrell* v. *Elkins,* 159 Ark. 31, 251 S. W. 380.

The court also said in the case of *Driesbach* v. *Beckham*: "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."

Tested by these rules, the complaint was sufficient both for an injunction, and for damages for the destruction of property. Complaint was filed on the 30th of July, service was had on the 31st of July, and in September the appellants were given ten days to answer, and, as we have already said, no pleadings were ever filed.

Court met at Mt. Ida on the 5th of November. This was the beginning of the regular term. Appellants say that the case was not properly for trial until 90 days after the pleadings were made up, but the pleadings were not made up. No pleadings were ever filed by appellants. Section 1285 of Crawford & Moses' Digest provides: "Judgment by default shall be rendered by the court on any day of any regular or adjourned session in any case where the defense has not been filed within the time allowed by §§ 1208 and 1209, provided that the court may for good cause allow further time for filing a defense."

Section 1208 of Crawford & Moses' Digest provides that "the defense to any complaint or cross-complaint must be filed before noon of the first day the court meets

in regular or adjourned session after service: (1) Where the summons has been served twenty days in any county in the State; (2) where the summons has been served thirty days outside of the State; (3) in the case of constructive service," etc.

There is no complaint about the service in this case, and there is no dispute about the fact that the appellants were given ten days to answer, and that they never filed any answer. To be sure, they say that they did not know this, but their attorney did.

"It is the general rule that an attorney, acting within the scope of his authority, represents his client, and his acts of omission as well as of commission are to be regarded as the acts of the person he represents, and therefore his neglect is equivalent to the neglect of the client himself. In accordance with this view, courts of equity will not usually relieve a party against the fault or negligence of his attorney, and the rule is frequently applied in the case of application for relief against judgments, though in some States the negligence or mistake of an attorney is not imputable to his client, and does not debar him from obtaining relief from a judgment due thereto. So also it has been held that the negligence of an attorney in failing to bring suit within the statutory period is the neglect of the client, and therefore that such negligence is no excuse for the failure to bring the suit in time." 2 R. C. L. 965.

The above rule is the rule in this State. The attorney did not testify, and, so far as this court knows, there is no reason why he should not have filed the answer within the time given by the court.

The case was heard by the chancery court on oral testimony which is not brought into the record, and this court will presume that the chancery court had evidence sufficient to justify the order made.

The decree of the chancery court is affirmed.

ELLIS & LEWIS *v.* WARNER.

Opinion delivered October 7, 1929.

Chas. A. Walls, for appellant.

Trimble, Trimble & McCrary and *Reed & Beard,* for appellee.

McHANEY, J. Ellis & Lewis, a partnership composed of A. C. Ellis and C. S. Lewis, appellants, were contractors engaged in the construction of a rock road from Lonoke, in Lonoke County, to Beebe, in White County. They employed about thirty persons with trucks for the purpose of hauling crushed rock or gravel from Lonoke to be distributed along the public highway as and where directed by appellants. These haulers furnished their

own trucks, paid all expenses of their operation, worked as and when they desired, and were paid twenty cents per ton per mile haul. Among those so employed was one Jack Cooper, who, in September, 1928, was seventeen years of age. On September 27, 1928, while driving his empty truck south back to Lonoke for another load, and while driving through loose rock or gravel on said highway at a speed of about thirty miles per hour, said Cooper ran his truck against appellee, causing serious bodily injuries. This suit was brought against said Cooper and appellants to recover damages for said injuries, but before the trial appellee dismissed as to Cooper. The trial proceeded against appellants, resulting in a verdict and judgment against them for the sum of $2,000.

The first question we are called upon to decide is whether, under the facts, the court should have told the jury that Cooper was an independent contractor, as a matter of law, and therefore that appellants were not liable for his negligent acts.

"An independent contractor," says Judge Elliott, "may be defined as one who, in the course of an independent occupation, prosecutes and directs the work himself, using his own methods to accomplish it, and represents the will of the company only as to the result of his work." 3 Elliott on Railroads, 3d ed., § 1407, page 70. This definition was quoted with approval in *St. L. I. M. & So. Ry. Co.* v. *Gillihan,* 77 Ark. 117, 92 S. W. 793, and in *J. W. Wheeler & Co.* v. *Fitzpatrick,* 135 Ark. 117, 205 S. W. 302. Continuing the quotation from the above section, the learned author says: "Generally, when an independent contractor is employed to perform a work lawful in itself and not intrinsically dangerous, the company, if it is not negligent in selecting the contractor, is not liable for the wrongful acts or negligence of such contractor, and, in order that the company shall be liable in such a case, it must appear that it either exercised, or reserved the right to exercise, control over the work, or had the power to choose, direct and discharge the employees of the contractor. In general, it may be said that the liability of

the company depends upon whether or not it has retained control and direction of the work."

In 14 R. C. L., page 75, it is said that: "Cartmen, truckmen and draymen are generally held to be independent contractors, though the contrary view is sometimes taken of their employments where their employers exercise considerable control over them." A case cited to support this statement of the law is *Burns* v. *Michigan Paint Co.*, 152 Mich. 613, 116 N. W. 182, 16 L. R. A. N. S. 826, where "a licensed expressman, who delivered goods for defendant for $15 a week, furnishing a horse and wagon, not being bound to do the work personally, being free to do similar work for others, and placing defendant's sign on his wagon when working for it, was an independent contractor, and not defendant's employee, and hence defendant is not liable for injury to a third person caused by his negligence."

A number of our own cases have been cited by appellant's counsel, which we have carefully considered. We have reached the conclusion that the trial court did not err in refusing to instruct a verdict for appellants, and in refusing to declare as a matter of law that Cooper was an independent contractor. But we have also reached the conclusion that the court did err in refusing to submit this question to the jury.

In the case of *Wheeler* v. *Fitzpatrick, supra,* the court quoted with approval from *Overhouser* v. *American Cereal Co.*, 128 Iowa 580, 105 N. W. 113, the following:

"The expression 'an independent contractor', within the popular understanding which the words import, is wholly descriptive. The expression serves merely to point out one of a class, and when so used it may be conceded that no words of definition are needed. But in the law of negligence the expression is used, not merely in a descriptive sense, but as well to designate a relationship, in the presence of which, when established, the law undertakes to prescribe distinctive rights and liabilities. It is for the court then as a matter of law to define the

relationship, and for the jury to make finding of the fact as to its existence."

So here the court should have declared the law defining the relationship, and have left the question of its existence to the jury. Even though the jury should find that this relationship did exist, still appellant might be held liable, if the jury should further find that appellants were negligent in employing Cooper as an independent contractor to do this work. He was only seventeen years old, was driving rapidly in loose rock over an important highway, which appellants knew—one much used by the public, and which the public had the right to use. The jury would or should take into consideration all the facts and circumstances in the case in determining this question.

Other questions are argued in the brief of appellants, including the improper questions asked the physicians as to who paid his bill, and whether the insurance company paid him. We think they were improper, and should not have been asked. It was sufficient for the jury to know that the bill had been paid, and that it was not an item of expense incurred and paid by appellee. The record shows, however, that the court sustained counsel's objection to the question regarding payment by the insurance company, and instructed the jury not to consider it. No objection was made to the previous questions, and we would not reverse the case on this account. Nor do we think appellee was guilty of contributory negligence as a matter of law, but that it was a question for the jury. The court properly submitted this question.

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

McCULLOUGH *v.* EAST ARKANSAS LUMBER COMPANY.

Opinion delivered October 7, 1929.

Cunningham & Cunningham, for appellant.

Smith & Blackford and *G. M. Gibson,* for appellee.

McHANEY, J. On October 27, 1925, G. H. Stanage was granted a judgment against E. E. and Fairbelle Mitchell in the Lawrence Chancery Court for $729.03, and a decree foreclosing a mechanic's lien on two houses and one acre of land surrounding each house located on the north half northeast quarter section 1, township 15 north, range 1 west, lying south of Village Creek. At the foreclosure sale, January 9, 1926, Stanage became the purchaser of the houses and two acres of land for a sum less than the amount of the judgment, leaving a deficiency of $323.90, with interest from that date at 6 per cent. On March 5, 1926, the Mitchells executed and delivered to Ponder and Cunningham two notes amounting to $750, which were indorsed by appellant, who, to secure him on this indorsement, took a mortgage from the Mitchells on the land above described, also lot 1, block 18, town of Minturn, and other lands. The Mitchells defaulted in the payment of said notes, and appellant paid same, as also some other indebtedness of the Mitchells for which he was secondarily liable. On October 8, 1926, appellee obtained judgment in the circuit court against the Mitchells for $829.72.

This suit was instituted by Sharum-Benningfield Company against the Mitchells, appellants, appellee Stan-

age, and others, to foreclose a mortgage given it by the Mitchells, in which all parties having or claiming liens were made defendants. Appellant filed an answer and cross-complaint, setting up his mortgage as above stated, and made all others cross-defendants. He claimed a prior lien to all parties other than Stanage, who filed answer and cross-complaint claiming a prior lien to all parties by reason of his judgment.

On July 21, 1927, Stanage sold and conveyed to Gage & Company the two acres of land and houses he had acquired under the foreclosure sale. Either on May 23 or July 27, 1927, an execution was issued by the clerk on the deficiency judgment of Stanage in the sum of $354, delivered to the sheriff, who levied on the two pieces of property above described, advertised it for sale, and on August 27, 1927, sold it to Stanage for the amount of his judgment, interest and costs, for which a certificate of purchase was issued by the sheriff to Stanage. On August 30, 1928, after the period of redemption had expired, Stanage sold and assigned to appellee his certificate of purchase, and on the same day the sheriff executed and delivered to appellee his deed to said land. Thereafter appellee filed its answer and cross-complaint against appellant and all others claiming liens, setting up these facts. It further alleged that, by error of counsel for appellant, the execution issued on the Stanage judgment recited the judgment was obtained in the circuit instead of chancery court, and that it was obtained on May 23, 1927, instead of October 27, 1925; and that like errors were made in the certificate of purchase and deed, as also error in the description of the land in said deed. The prayer was for reformation, and that the sale be confirmed, and quieted in it.

After hearing all the testimony, including nearly all the lawyers on both sides, the court found for appellee, and entered a decree in accordance with the prayer of its cross-complaint.

Appellant says there was no valid sale to Stanage, and that appellee acquired nothing by reason of the as-

signment of the certificate of purchase from him and the sheriff's deed. He admits that "Stanage had a valid decree of the chancery court rendered October 27, 1925, and upon which there was a balance of some $354 with interest, unpaid. That the clerk of the chancery court issued an execution on the 23d day of May, 1927, and that an advertisement was published August 11, 18 and 25, 1927, advertising the property in controversy in this suit for sale on August 27, 1927, under the execution above referred to." Appellant also concedes the rule that the sheriff's deed was *prima facie* evidence of a valid sale, which is correct, and, when this fact is considered in connection with all the other evidence, we are unable to say that the finding of the court that the sale was valid is against the preponderance of the evidence. We do not set this evidence out, as we can see no useful purpose to be served, and, while we are left in some uncertainty regarding the sale, we find that the evidence supports the court's decree.

But appellant says, even if the sale was made under the execution exhibited, it was void for the reason the execution was dated May 23, 1927, and the sale held August 27, 1927, which was more than thirty days after the return day of the execution. Here appellant assumes as a fact that the execution was dated May 23. In this we agree with the trial court that he is in error. An execution appears in the transcript dated July 27, 1927, which we think correctly reflects the true date thereof. It is true the clerk testified that his record showed the execution to have been issued May 23, and the notice of sale recites such to be the fact, yet there are so many facts and circumstances which contradict this evidence, including the errors of the date of the judgment and the court in which it was secured, we think the chancery court was justified in disregarding it and in holding as he did against the appellant.

Other questions are argued which we have considered, but do not discuss. We find no error, and the decree is accordingly affirmed.

FITZPATRICK *v.* HANKINS.

Opinion delivered October 7, 1929.

[redacted]

J. H. Carmichael, Jr., for appellant.

C. V. Holloway and *Morris & Barron,* for appellee.

McHANEY, J. At Paris, Texas, on March 13, 1922, appellee and his brother, R. L. Hankins, executed and delivered to appellant their promissory note for $2,500 for money borrowed, payable one year after date at 8 per cent., and to secure same gave appellant a mortgage on their undivided two-thirds interest in certain filling station equipment, they being engaged as wholesalers in the distribution of oil and gas and each owning a one-third interest in the business. In February, 1925, the note not having been paid, appellant, secured judgment against R. L. Hankins for the amount of the note and interest and a decree foreclosing the mortgaged property. The property was sold, the sale price credited on the note, and there was left a balance of $800 remaining unpaid. This suit was instituted by appellant against appellee to recover said amount as either joint maker or surety on said note.

Appellee denied that he was indebted to appellant in any sum, although he admitted the execution and delivery of the note and mortgage. He further alleged

by way of defense that, by agreement with appellant, a short time after execution and delivery of said note and mortgage, he turned over to R. L. Hankins all his interest and equity in the mortgaged property on condition that he was to be released from all further liability on said note. On a trial to a jury there was a verdict and judgment for appellee.

Appellee testified, in accordance with his answer, that, sometime after the execution and delivery of said note and mortgage, he had an agreement with appellant whereby he should turn over to R. L. Hankins for the benefit of appellant all his equity in the mortgaged property and would be released from all further liability thereon; that the mortgaged property was worth $7,500 which would make his one-third interest in the property of the value of $2,500. This would give appellee an equity in the one-third interest in the property of $1,250. He further says that in pursuance of this agreement, he surrendered his equity in the property to R. L. Hankins, moved from thence to England, Arkansas, in 1922 and heard no more about the note until 1926, about three years after the note was due, when appellant's counsel wrote him demanding payment. Appellant denied that he had any such agreement with appellee, but a jury has determined this issue against him. Appellant says that there was no consideration to support such agreement, and no accord and satisfaction, and that the court should have therefore given his request for a peremptory instruction.

This court, in *Feldman* v. *Fox,* 112 Ark. 223, 164 S. W. 766, stated the correct rule as follows: "If no benefit is received by the obligee except what he was entitled to under the original contract, and the other party to the contract parts with nothing except what he was already bound for, there is no consideration for the additional contract concerning the subject-matter of the original one." Citing *Thompson* v. *Robinson,* 33 Ark. 44; 1 Brandt on Suretyship and Guaranty, § 387; 1 Page on Contracts, § 312. The Feldman case was distinguished

in *Johnson* v. *Aylor,* 129 Ark. 82, 195 S. W. 4, in *Easley* v. *Vaughn,* 170 Ark. 887, 281 S. W. 670, and in *Nakdimen* v. *First National Bank,* 177 Ark. 303, 6 S. W. (2d) 505.

Under the rule announced we cannot say as a matter of law that there was no consideration for the new agreement testified to by appellee. The court submitted this question to the jury in the following instruction:

"The defendant admits signing the note in controversy, but contends that he was released from same by plaintiff by turning over to his brother, under the directions of the plaintiff, the property that was put up by him and his brother as security for the loan. Now, before the defendant can be released on this note, he must have had this agreement with the plaintiff, and further, it must have been for a valuable consideration. The burden is upon the defendant to establish this fact."

Appellant might have thought that it would be to his advantage to have appellee's equity in the mortgaged property in R. L. Hankins' control. True, he had the same security for his debt after the agreement testified to by appellee as he had before, but by consolidating the two undivided interests in one person, especially when appellee was removing from the State, he might have considered it to his advantage to release appellee. Nor can we say that appellee surrendered nothing by reason of the agreement, as the proof shows that he had a valuable equity in his undivided one-third interest in the property over and above one-half of the indebtedness. The court therefore correctly submitted this question to the jury, and did not err in refusing to give a peremptory instruction as requested.

Appellant also argues that the court incorrectly instructed the jury. The court first told the jury that: "If you find the defendant turned over this property to his brother, this will be sufficient consideration, and you should find for the defendant." However, the record shows that the court withdrew this instruction from the jury, and gave the one hereinabove set out. We do not think that the jury could have been misled by this action

of the court, and, if appellant was not satisfied with the instruction as finally given, for the reason that it did not define what would constitute a sufficient consideration, he should have submitted to the court a correct declaration on the subject, which was not done.

We find no error, and the judgment is affirmed.

TEAL *v.* THOMPSON.

Opinion delivered October 7, 1929.

Paul Crumpler, for appellant.

Henry Stevens, for appellee.

BUTLER, J. Plaintiff, Willie Teal, appellant here, filed in the Columbia Chancery Court, on the 5th day of April, 1927, a complaint in which he alleged that he was the owner of certain promissory notes given for the purchase money of forty acres of land in Columbia County, and that the deed executed retained a vendor's lien to secure their payment, the defendant, Needie Thompson, being the maker of them, and the grantee in the deed. The notes were described in the complaint, their dates given, when due, with the allegation that plaintiff had paid the same at the request of the defendant, Needie Thompson. Plaintiff also alleged that in 1921 he had advanced to defendant on three separate occasions money to be applied to the payment by her of her purchase money notes, which sums amounted to $165.70, and that defendant had agreed to apply this to the payment of the notes. He also alleged that he had paid the taxes on the land. Plaintiff prayed for judgment against the defendant for the sums loaned the defendant, and for the amounts expended in the payment of the notes and for the taxes paid, in a total sum of $461.01, with interest, and that he be declared to have a lien upon the land to secure the payment of said judgment *et cetera.*

The defendant answered, denying that plaintiff had paid the notes and that he had paid the same at her request; denied that she had borrowed any money from plaintiff in 1921; denied that he had paid any taxes on the land, or that he had done so at her request; admitted the purchase of the land and the execution of the deed with the notes for the purchase money recited therein, and that a vendor's lien was retained for the payment thereof. Defendant admitted that she had not paid the purchase money notes due November 1, 1924, to and including November 1, 1928, the same being five notes which plaintiff alleged that he had paid at defendant's request. Further answering, defendant pleaded in bar for the debt made in 1921 the statute of limitations.

A motion was filed by the defendant to make the complaint more specific, but no action seems to have

been taken by the court thereon. Proof was taken by the parties, and the cause submitted to the court for its decision. After the submission, and before the court had made its decision, plaintiff became aware that on March 20, 1928, Needie Thompson executed to W. B. Stevens a deed of trust to secure payment of a small indebtedness due Henry Stevens, and that she had executed a deed of trust to Will Rushton, as trustee for Walter Kearney, to secure an indebtedness due by Needie Thompson to Walter Kearney in the sum of $200, and asked that the submission be set aside and that his motion be treated as an amendment to his complaint, and that the said Stevens and Kearney be made parties defendant, and that the cause be continued, *et cetera.*

The motion to withdraw submission and to make Stevens and Kearney parties was denied, and a decree was rendered dismissing the complaint for want of equity.

It appears that the parties to this case are both negroes, Needie Thompson, the defendant, being a resident of Magnolia, Arkansas, and Willie Teal, the plaintiff, living at Homer, Louisiana, about twenty-five miles from Magnolia. These persons had become acquainted about eight years previous to March 9, 1928, the date upon which the deposition of Willie Teal was taken. The testimony adduced on the part of the plaintiff was to the effect that in 1921 he loaned Needie Thompson $165 at different times, which sums she was to apply to the payment of the purchase money notes, and that after this she asked him to pay the notes remaining, which he did. The first note he paid was for $56, with interest at eight per cent. from November 1, 1924, until paid. This note he paid on November 5, 1924, and was indorsed on the back, "Transferred to Willie Teal without recourse to me, November 4, 1925. (Signed) Calvin R. Mower." (Mower was the grantor in the deed to Needie Thompson). Plaintiff also paid the note due November 1, 1925, amounting to $52.80, and this note was indorsed, "Trans-

ferred to Willie Teal without recourse," and bore date of May 9, and was signed, "Calvin R. Mower Estate, by Clarendon Mower, attorney in fact for the executrix." A note for $49.60, due November 1, 1926, one for $46.40, due November 1, 1927, and one for $43.20, due November 1, 1928, all bore indorsements on the back, "Transferred to Willie Teal, without recourse," dated November 4, 1925, and signed by Calvin R. Mower, the last three notes being evidently paid before their maturity. These notes were introduced and filed as exhibits. On several occasions plaintiff demanded payment of these notes, visiting the defendant for that purpose. Plaintiff paid the taxes for the year 1925, in the sum of $4.44, for the year 1926 in the sum of $4.02, for the year 1927 in the sum of $3.95, the total amount for money advanced to plaintiff, money paid on the notes and taxes being $436.71.

The banker who handled these notes testified that they were sent by Calvin R. Mower to the bank for collection, and that with the notes was sent a copy of a letter written defendant, notifying her of the deposit of the note with the bank for collection; that he had had conversations with the defendant regarding the notes and their payment, and that she had told him that plaintiff had paid part of the notes for her; that he took care of the notes for her, and that he had advanced her money to pay off some of the notes. She made no statement as to the number of the notes that plaintiff had paid.

The defendant testified, admitting that she had borrowed money from the plaintiff, as nearly as she could remember, to an amount something like $105, and admitted that a part of the money borrowed was to be used in paying off some of the purchase money notes; that she did take some of the money thus obtained, and with her own paid some of the notes which were then due. She also testified that she had never requested plaintiff to pay the last five notes that were mentioned in his testimony and in his complaint, and that she knew nothing about his paying them; that the conversation she had

with the banker was that she called on him for her notes, and was told that Willie Teal had paid them; that she asked the banker to telephone to Homer to Willie Teal and direct him to send the notes back—that she could take care of them—and that the banker replied that if Willie Teal wanted to pay them off she ought not to worry about it. Defendant also testified that she had never authorized plaintiff to pay any taxes for her; that she had endeavored to make payment herself, but was informed by the collector that the taxes were already paid. She denied that Mr. Mower had ever written her any letters or that plaintiff had ever requested her to repay him the money expended by him in satisfaction of the notes, but that he demanded that she make him a deed to the land.

This was all of the material testimony in the case.

The appellee insists that the complaint was not sufficient to entitle appellant to a declaration of a lien in his favor on the five notes mentioned in his complaint and testimony, not having alleged ownership of the notes in himself or that the vendor's lien retained in the deed and notes was assigned to him. Courts regard substance rather than form, and we are of the opinion that the complaint, taken in connection with the testimony of plaintiff, introduced without objection, fully and fairly presented the issues to the trial court, and neither it nor the defendant could have been deceived in any particular.

The real question in the case, as we see it, is whether or not Willie Teal was a mere volunteer in these transactions, or whether he was acting in behalf of the defendant. Willie Teal and the defendant were both interested parties. One affirmed, and the other denied. Therefore the chancellor might have considered that their testimony was evenly balanced. But there is other testimony in the case tending to show that Willie Teal paid the notes and retained them in his possession, that he secured the indorsements upon them, and these facts support him in his testimony; and he is further corroborated by the tes-

timony of the banker to the effect that defendant told him that Willie Teal would pay the notes for Needie Thompson. We think this is sufficient to outweigh the bare denials of defendant, and that the finding of the chancellor was against the preponderance of the testimony.

The point is made that the indorsements were made at a different time from the date of payment, and that the purported assignments were not sufficiently proved. This is immaterial. The preponderance of the evidence warrants the conclusion that plaintiff paid off the notes at the request of defendant, and his conduct in retaining the notes in his possession manifested an intention to keep the lien alive for his protection. He was therefore entitled to be subrogated to the lien of the vendor, and was entitled to the relief prayed. *Rodman* v. *Sanders,* 44 Ark. 504. The chancellor should have set aside the submission and made the subsequent mortgagees parties to the proceeding. The deeds of trust under which they claimed, having been executed and filed for record pending this case, are inferior to the lien of plaintiff.

The decree of the chancellor is reversed for further proceedings in conformity with the principles of equity, and not inconsistent with this opinion.

FOX *v.* PINSON.

Opinion delivered October 7, 1929.

Powell, Smead & Knox and *Coulter & Coulter*, for appellant.

Marsh, McKay & Marlin and *Joiner & Stevens*, for appellee.

BUTLER, J. A decree was rendered in this case by the chancery court by which judgment was rendered on two mortgages given by Yetta C. Fox to J. W. Pinson.

The mortgages were foreclosed, the property described therein ordered sold, and a commissioner appointed to make said sale. An appeal was prosecuted to this court from the judgment and decree, without the same having been superseded. Pending the appeal in this court, the commissioner appointed by the chancery court proceeded to carry out the decree by advertising the property for sale on a stated day, and on the day fixed in the decree and notices the property was offered for sale, and appellant, George W. James, became the purchaser for the sum of $24,500, which was paid. The commissioner made report to the court, the sale was approved, and a deed to the purchaser executed and delivered. The purchase money was ordered paid into the court, with an order and directions to the clerk to make distribution. The money was paid into the court, and the clerk distributed it as directed. There were no exceptions filed to the report of the commissioner or objections made to the order of distribution, all the parties appellant and appellee being parties to the proceedings hereinbefore recited, except appellants Anders, Samuels, Coleman, McGlasson, Coulter and McNeil.

Subsequent to the sale, confirmation, payment of purchase price and its distribution, the judgment and decree of foreclosure was reversed, and the cause remanded. *Fox* v. *Pinson,* 172 Ark. 449, 289 S. W. 329. After the remand, plaintiff Yetta C. Fox filed her cross-bill against appellants Pinson and James. A demurrer was sustained, and an appeal taken from the order sustaining the demurrer, which was by this court reversed, *Fox* v. *Pinson,* 177 Ark. 381, 6 S. W. (2d) 518, and, after the second remand, additional testimony was given. At the conclusion of the testimony, and before the submission, Yetta C. Fox took a voluntary nonsuit as to her cross-complaint. The court rendered its judgment and decree, and this case is here on its third appeal.

By reason of the number of parties to the action and their conflicting claims, the decree is voluminous and in-

volved, and will not be copied here in its entirety, but such portions of it and the facts established necessary for the determination of the rights of the parties will be hereinafter stated.

At the threshold of this appeal the question arises, what are the rights of George W. James, purchaser at the sale made by virtue of the orders contained in the first decree of the chancery court? Appellant Fox and others say he has no rights and no interest in the property, because the decree was a nullity, being void *ab initio,* and they cite as authority an expression of this court in *Fox* v. *Pinson,* 177 Ark. *supra,* in which reference is made to the sale to James as "a void foreclosure sale." The question of the validity of the decree or the sale made pursuant thereof was not before the court, nor was the court attempting to pass thereon. The language was clearly descriptive in its character, and related to James, a new party to the action. It is clear also that the word "void" was not used in its meaning of nullity, but in the sense implying error, which use is well recognized by courts and lexicographers. Words & Phrases, p. 876; Bouv. Law Dict. Rawles 3d Rev. *3406; *Mobbs* v. *Millard,* 106 Ark. 563, 153 S. W. 821; *U. S.* v. *Winona, etc. Co.,* 67 Fed. 948; *State* v. *Richmond,* 26 New Hamp. 232-237. This was the only sense in which the word could have been used in 177 Ark. *supra,* because the court had in mind its decision in 172 Ark., *supra,* where the reasons for reversal are stated and where the decree was held "erroneous," as such in fact it was, because the trial court had jurisdiction of the subject-matter and the parties, so that the decree was not *coram non judice* and void, but because of errors committed, the decree was merely one which might be avoided. *Hudson* v. *Union Mercantile Trust Co.,* 148 Ark. 254, 230 S. W. 281, and cases cited.

James was a stranger to the suit, and, having purchased at a sale made in due conformity to a decree in full force, unsuspended and unreversed, is protected in

his purchase as against all persons parties to the proceedings, though the decree was afterward set aside. *Moore* v. *Woodall,* 40 Ark. 42. All the parties to this proceeding, except the six hereinbefore named, were parties to the litigation resulting in the decree. Neither they nor any one of them obtained a supersedeas of the decree. They failed to object to the sale, its confirmation, the execution of the deed to James, a stranger to the proceeding, or to the distribution of the money paid by him, and, having elected to prosecute their appeal without obtaining a suspension of the decree, it would be inequitable for them, having suffered James to part with his money, to now divest him of the land, and he is fully protected as to them. *Boyd* v. *Roan,* 49 Ark. 397, 5 S. W. 704, and cases cited; *Hudson* v. *Union Merc. Trust Co., supra.*

■ In passing on the rights of the appellee Chas. O. Austin, Bank Commissioner, successor to the First State Bank of Texas, it will be necessary to discuss the facts existing prior in point of time to the institution of this proceeding. Whatever rights he had came through John T. Finn, who, appellant Austin claims, was the owner of a one-half interest in the property, and whose mortgage to the First State Bank of Texas was executed and recorded prior to the mortgage of Pinson to the First National Bank of El Dorado and prior to the deed from Pinson to Fox, and is paramount to the claims of the other parties to this suit. The correctness of this conclusion will depend upon the interest Finn owned in the property at the time of his mortgage, which is conceded to be the elder of the various conveyances and transactions upon which the claims of the other parties are based. Before and until July 19, 1922, Finn was the owner of a leasehold covering the east 75 feet of lot 4, block 17, in the city of El Dorado. A suit was brought by various creditors of Finn wherein liens were claimed against the property, which suit, after having been pending for about a year, was terminated by a judgment and decree ren-

dered July 19, 1922, awarding judgments for large sums against Finn, declaring a lien on the property, and barring and foreclosing his equity of redemption in said leasehold interest in and to the property described above, appointing a commissioner, and ordering sale of the "leasehold interest" to satisfy the said judgments.

On the 29th day of August, 1922, Finn executed a mortgage to the State Bank of Paris, Texas, conveying "a third mortgage and all rights, claim, title and interest owned by him in the Franklin Hotel building, now known as The States Hotel, situated on the east 75 feet of lot 4, block 17, in the city of El Dorado, together with the ground lease on the said described tract of land," to secure an indebtedness of $..... On October 10, 1922, sale of the property by virtue of the aforesaid decree was made, and W. J. Pinson became the purchaser, the sale being confirmed on the 13th of the same month, and deed executed and delivered to him, thus merging the leasehold interest with the fee of which he was and had at all times been the owner. The execution of the mortgage to the Texas State Bank was made at a time when Finn had no interest in the property, as that had been foreclosed by the decree of July *ante,* of which the bank was bound to take notice. After the foreclosure sale and purchase by W. J. Pinson, he entered into an agreement with John T. Finn as to the management of the property and its disposition. The building on the land was constructed and operated as a hotel, and was still incomplete in some of its details. Finn was a builder, and had in fact constructed the hotel, and doubtless had lost considerable money in the transaction. Pinson was desirous of disposing of the property, and agreed with Finn that the latter should finish the building, procure a purchaser, and out of the proceeds Pinson, after having deducted the value of the lot, which was fixed at $10,000, and the sums he had paid for the property at the foreclosure sale and other expenses he had incurred, would give Finn one-half of the remainder. Finn did

procure, through the appellant Dielman, a real estate broker, a purchaser, Mrs. Yetta C. Fox, who paid Pinson $5,000 in cash, and for the remainder, $50,000, executed 25 notes for $800 each, becoming due monthly, the first due January 1, 1929, secured by a first mortgage, and sixty notes for $500 each payable monthly, the first falling due January 1, 1924, secured by a second mortgage on the property. A settlement was made between Pinson and Finn by which twelve of the first mortgage notes and eight of the second mortgage notes were delivered to Finn, thirteen of the first mortgage notes and forty-eight of the second mortgage notes remaining in the hands of Pinson. It seems that before the settlement between Pinson and Finn four of the second mortgage notes had been paid, to whom and how the proceeds thereof were divided is not shown. There was an additional number of the second mortgage notes which would have gone to Finn, but Pinson being Finn's indorser on a note to a Drew County bank for four or five thousand dollars, these second mortgage notes were retained by Pinson to protect him as the indorser on said note. Finn is not now complaining of this settlement and has passed out of the case.

After the delivery of the first and second mortgage notes to Finn as aforesaid, he sold ten of the first mortgage notes to the Globe Petroleum Company and delivered two to the State Bank of Paris, Texas, which accepted same and applied them as a credit on Finn's note. The eight second mortgage notes passed into the hands of appellants, Anders, Coulter, and others. At no time was Finn's interest greater than the leasehold which was extinguished by the foreclosure of July, 1922, and consequently Finn had no interest to convey at the time of the execution of the mortgage to the Texas bank and intended to convey only such interest as he then had. For he expressly limited the interest conveyed by the words "now owned by me." *Blanks* v. *Craig,* 72 Ark. 80, 78 S. W. 764. The conveyance could not, therefore,

be extended so as to cover any after acquired interest. *Bunch* v. *Johnson,* 138 Ark. 396, 211 S. W. 551. It is clear that the only right of Austin is to the proceeds of the two first mortgage notes now in the custody of the clerk of the court below, and the court below erred in decreeing otherwise. All the other notes in the possession of Finn had passed into the hands of innocent purchasers for value before the institution of this suit, to which Austin's predecessor was a party, and, having acquiesced in the sale and distribution of its proceeds, he cannot now assert a claim inconsistent with such action.

■ The facts relating to the transactions of W. J. Pinson with Yetta C. Fox are sufficiently set out in the case of *Fox* v. *Pinson,* 172 Ark., *supra,* in which the court held that she was entitled, before Pinson could foreclose his mortgage against her, to have her title cleared as to outstanding prior incumbrances, and that foreclosure could not then be had except as to notes due, there being no acceleration clause contained in any of said notes, and that the chancellor erred, and the case was remanded for further proceedings in conformity with the opinion rendered. However, Yetta C. Fox, by failing to maintain the *status quo ante* of the property, has made it impossible to obtain the relief granted her. She failed to supersede the decree appealed from, permitted the property to be offered for sale, the sale to be made without objection, and suffered the money to be distributed. She must therefore be remitted to some other and further proceeding to assert her rights and recover for her injury, if any.

■ Having disposed of the contention of the appellant Austin, it follows that the rights of the First National Bank of El Dorado were paramount to that of all the parties to this litigation. The mortgage executed to it by W. J. Pinson was prior to the deed to Mrs. Fox, and contained a parcel of land in the city of El Dorado in addition to the property conveyed by Pinson to Mrs. Fox. This mortgage was made to secure a note of $20,000,

which, at the time of the institution of this suit, had been reduced to the sum of $..... It is contended that it should first exhaust its security as to other property not involved herein before being allowed to participate in the proceeds of this litigation. On the last trial of this case the court so found, but its finding and decree in that particular were not based on any evidence taken on trial, and the decree was afterwards corrected. We think this decree of the court was correct, because, as before stated, the decree in that particular was not based on any testimony given, and further, all those complaining were parties to the suit from its beginning, and participated in the distribution of the proceeds arising from the sale to James, and the motion for the marshaling of the securities was not made until long thereafter, and until after the First National Bank had been fully paid.

W. J. Pinson has died since the beginning of this suit, and the case was revived in the name of his administrator and heirs, and by the decree of the trial court appellant F. M. Dielman was awarded judgment against John T. Finn, and against the administrator of W. J. Pinson. The preponderance of the testimony establishes the fact that the connection Dielman had with the transactions involved in this case grew out of a contract between him and Finn for the sale of the Pinson property, and that Finn, at the time of his conversations with Dielman, represented himself to be the owner of the property. Pinson knew nothing of the arrangement between Finn and Dielman—had no connection with it. Certain of the notes of Mrs. Yetta C. Fox were given to Finn as commission for making the sale. These were delivered by Finn to Dielman, who claimed $2,000 commission. There was credit given by Dielman on his claim, and he sued for the balance of $650, with interest at six per cent. from February 13, 1925. Pinson did not agree with Finn or Dielman to pay Dielman any part of his commission, and the decree of the chancellor awarding judgment against Pinson was against a preponderance of the testimony.

The trial court held that appellants M. J. Samuels, J. A. Anders, C. R. Coleman, E. H. McGlasson, E. H. Coulter and F. McNeil were entitled to judgment against Yetta C. Fox as follows:

M. J. Samuels	$ 703.44
J. A. Anders	703.44
C. R. Coleman	703.44
E. H. McGlasson	1,406.88
E. H. Coulter	1,406.88
F. McNeil	703.44

The aforesaid appellants were not parties to the suit at the time of the rendition of the first decree, but, after the remand, they intervened, claiming the ownership of eight of the second mortgage notes for the sum of $500 each, with accrued interest, and asserted their right to judgment against Mrs. Fox and W. J. Pinson, and that their claims should have priority over James as to any fund derived from the sale of the property under the Fox second mortgage; that judgment should be rendered against John H. Pinson on all notes involved in this action, and executed or indorsed in blank by the decedent, and that they have priority over James as to any funds derived from the sale of the west five feet of the property in controversy under the Fox second mortgage. It appears that all of the notes held by them, except perhaps two or three, were indorsed by Pinson without recourse. W. J. Pinson died, and John H. Pinson was duly appointed administrator, gave the necessary notices, and none of these several notes were presented to the administrator for allowance or rejection within a year after the grant of the letters of administration. So that, in any event, these notes would not be claims against the estate of W. J. Pinson, and are barred by virtue of the statute of nonclaim. *Davis* v. *Kramer,* 133 Ark. 224, 202 S. W. 239; Crawford & Moses' Digest, § 97 subdiv. 5.

As we have seen, James is the owner of the land involved in this suit as against all the parties to the

original proceeding, all of whom are parties to this suit, except Anders and others above named. By reason of the sale and purchase by James he became the equitable assignee of the rights of the parties to the original suit, and by the deed executed to him he acquired the title and interest of all the incumbrances which the sale discharged. Therefore, as to the appellants Anders and others, while not the owner of the title as against them, he will be deemed to have acquired the notes mortgaged to the National Bank of El Dorado, and the first and second Fox mortgage notes owned by the parties to the first suit. While appellants Anders and others are entitled to a judgment against Yetta C. Fox, and for foreclosure of the property on which said notes are a lien, the proceeds of the sale, before being applied to the satisfaction of their notes, should be applied to the payment of the 25 first mortgage notes, the payment of the sums due and collected by the First National Bank of El Dorado on the balance due it under its mortgage from W. J. Pinson, with interest on all of said sums according to the face of the note, and the remainder, if any, should be divided proportionately between James, owner of forty-eight second mortgage notes under his aforesaid purchase, and Anders and others, owners of eight of the second mortgage notes.

■ It seems that, under the original decree ordering a distribution of the proceeds of the sale to James, a portion of it was paid as accrued taxes on the property and costs of the proceeding, and the remainder distributed as follows: $4,593.75, sum due First National Bank of El Dorado, with accrued interest; $9,015.23, amount of ten first mortgage notes to Globe Petroleum Co.; $8,589.39 to W. J. Pinson as his distributive share; $1,801.63 to First State Bank of Paris, Texas. Each of these parties have received said sums, and the evidence shows that they were entitled to same as their share of the distributive fund arising from the purchase by James, but appellant Austin, under the court's order,

returned the amount received by his predecessor bank to the clerk of the court, to which sum he is now entitled.

We have concluded that this cause should be reversed, and remanded with directions to the chancellor to order the return of the money in the hands of the clerk to the appellee Austin, and that his intervention be then dismissed; that Yetta C. Fox take nothing in this action, and that James, Anders, Coleman, Coulter, Samuels, McGlasson and McNeil have judgment against her, each for the amount of the second mortgage notes now due held by them, or to which James is entitled by reason of his purchase; that Dielman have judgment against John T. Finn for $650, and his complaint as to Pinson, administrator, be dismissed; that the interventions of Anders and others, interveners, parties since the second remand of this cause, be dismissed as to Pinson, administrator; that the said appellants Anders and others, owners of the eight second mortgage notes, may have a lien declared, subject to the rights of James under the mortgage of Pinson to the First National Bank of El Dorado, and may have a decree of foreclosure, subject to the aforesaid rights of James, and the proceeds shall be paid to James, and to the said interveners proportionately; that all the interventions as to and against the First National Bank of El Dorado, the Globe Petroleum Company, and the estate of W. J. Pinson be dismissed for want of equity.

BELL *v.* STATE.

Opinion delivered October 7, 1929.

W. J. Lanier and *Roy D. Campbell,* for appellant.

Marvin B. Norfleet, Special Counsel for State, for appellee.

BUTLER, J. Robert Bell and Grady Swain, two negro boys, were indicted for the murder of Julius McCullom by drowning. The crime is alleged to have been committed in St. Francis County, and, on a trial in the circuit court of that county, they were convicted of murder in the first degree, sentenced to death, and, on appeal to this court, the case was reversed and remanded. 177 Ark. 1034. Afer the reversal, the case was transferred to the circuit court of Woodruff County, on change of venue, where the cases were severed, and Robert Bell was placed upon trial. That trial resulted in a verdict of guilty of murder in the first degree, with a sentence to the penitentiary for life, from which an appeal has been duly prosecuted to this court.

In the opinion rendered in the case of *Bell and Swain* v. *State, supra,* the facts were stated, and therefore there will be no restatement of the facts here, except such as are necessary for the consideration of the case now before us.

On the first appeal there were two assignments of error pressed upon the court for a reversal of the judgment. It was insisted, first, that the confessions introduced in evidence were obtained by coercion, and were not freely and voluntarily given; and, in the second assignment of error, it was insisted that the evidence was not legally sufficient to warrant the verdict. The court reversed the case on the second ground of error, holding that there was no independent evidence, aside from the confessions, that any one drowned Julius McCullom and Elbert Thomas, and that the evidence was not legally sufficient to warrant a verdict of guilty. The court said:

"For the reason that we have reached the conclusion that the evidence is not legally sufficient to support the verdict, it will not be necessary to decide whether or not the confessions were extorted from the defendants by whipping them. In this connection, however, we again call attention to the fact that this court is committed to the rule that confessions used in evidence against the defendant must be free and voluntary, and they must not be extorted from them by whipping them or by any inquisitorial method."

On the second trial of this case there was additional testimony introduced on the part of the State tending to establish the *corpus delicti.* One German Jones, a negro man, who was not a witness in the case of *Bell and Swain* v. *State,* was introduced, and testified to the fact that, on the day when Julius McCullom and Elbert Thomas were drowned, he was hunting in the afternoon of that day along the shores of the bayou in which the bodies of the two boys were later found, and, hearing a splash in the water, thought it might be ducks, and slipped through the bushes to where he had a view of the bayou, and saw two colored people standing in a boat, facing each other, and in the act of throwing, and did throw, a white "human" in the water; and, seeing this, witness turned and ran away.

Another witness, who was not a witness at the first trial, one A. H. Davidson, gave testimony in the case. He testified that, some time in the afternoon of the day the boys were drowned, he had taken Mrs. McCullom to her home in his car. This appears to have been around three o'clock in the afternoon, and, in something like a half or three-quarters of an hour, he returned to the store, where he saw Bell and Swain going toward the bayou. This testimony, together with the other testimony in the case, is perhaps sufficient to warrant the submission to the jury, so that it is necessary to pass upon the admissibility of the confession made to Campbell and McCollum and detailed by them to the jury, over

the objections and exceptions of defendant, and which was assigned as error in the motion for a new trial.

On the 29th of December, 1927, at some time in the afternoon—probably between three o'clock and sundown —Julius McCullom, a white boy about twelve years old, and a negro youth about nineteen or twenty years of age, were drowned at a point directly in front of the store of the white boy's father, in a small bayou, which at that time contained a great deal of water. Little Julius was discovered missing about dusk, and a search made for him. He had been seen going toward the bayou with Elbert Thomas, and the waters of the bayou were searched, where, about eight or nine o'clock that night, the body of Julius was found. It developed later that the body of Elbert Thomas was lying in deeper water, and several feet away from the body of Julius. It was first thought that Elbert Thomas had drowned Julius, and an active search was made for him throughout the country, Grady Swain, one of the defendants, having stated, after having been whipped at the jail, and asked if Elbert Thomas had not drowned Julius, that Elbert Thomas had in fact drowned Julius, and that he (Swain) had assisted him. About ten days later, after the water had gone down somewhat, the body of Elbert Thomas was found. In the meantime both Robert Bell and Grady Swain had been arrested and put in jail, and, when the body of Elbert Thomas was found, they were conveyed to the State Penitentiary at Little Rock for safekeeping. Shortly after having been placed in the penitentiary, Bell made a confession, in which he professed to have been in company with Swain, and that the two of them had drowned Thomas and Julius McCullom, stating that he had drowned the negro, Thomas, and that Swain drowned the white boy. Swain, on the other hand, stated that he had drowned the negro, and that Bell had drowned the white boy. Bell gave the details as to how the acts were committed, and this confession was at a later date written down and signed by Bell, while he was

still in the penitentiary. On a trial of the case this written confession was offered in evidence, but excluded by the court. W. J. Campbell, the sheriff of St. Francis County, and B. McCullom, the father of Julius, however, were permitted to testify before the jury as to an oral confession made to them by Bell substantially the same as the written one.

The defendant claimed that all of the confessions made to Warden Todhunter and to Sheriff Campbell and to Mr. McCullom were extorted from him through and by means of whipping, administered to him by Warden Todhunter while defendant was confined in the penitentiary, and that the confessions were not true, and that he did not drown or assist in the drowning of either Julius or the negro, Elbert Thomas; that he knew nothing about it; didn't know that Julius had been drowned until after his body was discovered and brought to the store of Mr. McCullom. Bell described the manner in which he was whipped and the instrument of torture applied to him, and insisted in his testimony that he denied and continued to deny for a while any knowledge of the alleged murder, but that, little by little, in answer to repeated questions and statements made to him that he did murder Julius and drown him, in order to escape the torture he confessed to the commission of the crime. He told how he was made to lie upon the floor, clad only in a thin shirt and trousers, and was whipped with a leathern strap attached to a handle—the strap was three and a-half feet long and three inches wide. This testimony is virtually uncontradicted. The warden who administered the whippings stoutly averred that the confessions were freely and voluntarily made, and, while admitting the whippings, stated on his direct examination that Bell was beaten to make him tell where the money —some fifteen or twenty dollars which Bell had confessed to having taken from the body of Julius—was hidden or disposed of, and that he whipped him also for insubordination; that "he was a mean, hard-headed nig-

ger." But, after a time, the warden stated that the whippings were begun in a day or two—or some three days—after Bell was brought to the penitentiary, and, while the warden said that Bell was not beaten very severely, he stated that he "whipped until he conquered." He stated that he began to question Bell soon after his admission into the penitentiary as to his connection with the drowning of Julius and Thomas, and that this was at the request of the sheriff, Mr. Campbell; that the whippings were given upon Bell's failure to talk and to answer questions regarding the drowning, and that "he finally told me little by little—until he finally told me all." While at one time the warden stated that he whipped Bell not to make him confess about the drowning, but only because he was insubordinate and to make him tell where he had put the money, he was asked this question:

"Q. Did you whip him at any time because he wouldn't confess and give details? A. I whipped him to try to make him tell where the money was. Q. Not about the killing of Julius McCullom? A. Well, I don't know—probably I might have done that. I don't know; maybe it was in connection with the case. Q. Did he make a free and voluntary confession or not? A. Well, I don't know that I could say Bell ever made a free and voluntary confession. I got a confession out of him by piecemeal—it was never very free. There never was any voluntary confession coming from this big nigger."

The following questions were asked him by the court and answers made in response thereto:

"Q. Did you get this statement by persistent questioning from time to time? A. Yes sir. Q. The whippings you gave him were based upon his failure to talk to you and answer questions when you propounded to him questions relating to this matter as well as to his conduct? A. Yes sir. Q. After defendant told you what he did about this confession, whom did you advise that the confessions were made? A. The sheriff, Mr. Campbell."

The sheriff, J. M. Campbell, testified also as to a confession made to him. He stated that Bell was transferred to the penitentiary by his (the sheriff's) son, and afterward he went over to the penitentiary and talked to Bell about it; that he made two trips to the penitentiary; that the first trip when he talked with Bell he was not able to get anything from him, but on the second trip Bell confessed, saying, "I am going to tell you the truth about this," and then proceeded to detail his confession, and Swain also made a confession at that time; that this confession was obtained within the walls of the penitentiary, and the only persons present were himself and Mr. McCullom.

The sheriff was asked the following questions:

"Q. At what time did you get this statement? A. What do you mean—what day? Q. How long after Bell had been taken to the penitentiary? A. I guess somewhere about ten days or two weeks. Q. You don't know when Todhunter whipped him—before or after you got the confession? A. No sir, I don't know."

It is contended that, although a confession might have been extorted from Bell by whipping him, a subsequent confession was made to Sheriff Campbell in the presence of Mr. McCullom, and that these confessions were admissible because made later in point of time, and that there were no threats made to him at the time of the confession or whippings administered to him, and that the confession was free and voluntary. The trial court adopted this view, and the testimony was admitted, although, as we have stated, the written confession, made subsequent to that made to Mr. Campbell, was excluded.

It is clear that the confessions made to Todhunter were the result of coercion, and that the whippings were anterior to any confession, for the warden admits that these whippings were begun within a few days—perhaps the first day, and not later than the fourth day of Bell's

incarceration—while the confession to Campbell, according to his testimony, could not have been obtained earlier than ten days or two weeks afterward. The environment of Bell had not been altered; he was still within the penitentiary, surrounded by the white man's walls, guarded by the white man's guns, and in terror of the white man's lash, when the confessions to Campbell were made.

In the case of *Love* v. *State,* 22 Ark. 336, which is the leading case in this State on the admissibility of confessions, the rule is laid down that confessions are not admissible against the party charged with crime, unless freely and voluntarily made, and the onus is upon the State to prove them of this character; and, when the original confession has been made under illegal influence, such influence will be presumed to continue and color all subsequent confessions, unless the contrary is clearly shown. That was the case where a murder had been committed, and a crowd of more than a hundred persons had gathered where the dead body was found, with the avowed purpose of ascertaining the murderer. A committee of twenty was formed to give shape and concert to the efforts to be made for the discovery of the perpetrator of the crime; by these a special committee of three was detailed to prosecute the inquiry. Suspicion was fixed upon the defendant, Love; he was sent for, brought to the place of assemblage, and put in charge of the committe of three. He was taken away from the crowd, was told that the committee was satisfied that he had killed deceased, and that it would be better for him to confess; that his brother had confessed, and a written statement of his was read to him. He was told that the committee would do all they could to save him, although they did not know that they could do so; that he was not the person they were after, but that such person was one Ackridge, who, they believed, had instigated the defendant to commit the murder. Up to this time the defendant denied the charge, when he was confronted with his brother, who had made the written statement

mentioned, and who said to the defendant concerning it, "Jarrett, you know it is true." Then the defendant confessed the murder, after having for a half or three quarters of an hour protested his innocence, and after he had been assured of protection by the committee. Defendant appeared to be afraid of Ackridge, from whom the committee promised he should be protected, as also from everybody else who might be incensed at him or should desire to injure him on account of his confessions.

These confessions were made the day before the defendant was taken to Fayetteville, where he was confined for a month in default of bail. During the month the defendant was confined at Fayetteville, he made frequent confessions like the one he made to the committee, always admitting that he shot the deceased, that he did it at the instance of Ackridge. These confessions are spoken of by the persons to whom he made them as being made freely, without any promise or threat from them, but without caution by them to the defendant against the consequences of the confessions. The court said:

"These latter confessions made at Fayetteville, if the only confessions that had been made by the defendant, would have been evidence against him, although the defendant was not warned that his confessions would be used against him. The confessions made to the committee were inadmissible. The confessions made at Fayetteville were incompetent evidence on account of the incompetency of the first confessions, unless it had been clearly shown by other evidence that the influences which induced the first confessions had ceased to operate upon the mind of the defendant. In this case there were no circumstances, such as length of time, an interval for reflection, a criminal accusation, information or warning not to depend upon the promises of protection the defendant had received, or anything else tending to break the uniformity of the confessions he had made to the committee; but the natural effect of his condition, and of all the attendant facts disclosed in the transcript, was

to induce him to a continuance of the confession, his fears of a summary punishment from an exasperated community, and of private injury from Ackridge, and his hopes of protection from all these impending evils, had extorted from him. Hence in this case the subsequent confessions, after proof of the original confession and its circumstances, should have been excluded from the jury.

"It is in precisely such cases, where the atrocity of the crime makes the criminal abhorrent, that the safeguards of the law must be well protected, that the just punishment of the guilty may not be a precedent or excuse for the illegal conviction of the innocent. Doubtless an adherence to such rules of law as the court below failed to observe, and as we are called upon to enforce, may sometimes screen the undeserving from merited punishment; but there is no safety for the greater portion of society, that is, the observers of the law, without preserving with strictness the integrity of legal rules that protect against perjury and wickedness, as well as against the weakness of those who are wrongfully suspected or accused of criminal acts."

This case has been approved and uniformly followed by a long line of decisions, and we hold the principles therein announced to be the settled rule of evidence in this State. *Smith* v. *State*, 74 Ark. 397, 85 S. W. 1123; *Turner* v. *State*, 109 Ark. 332, 158 S. W. 1072; *Pearrow* v. *State*, 146 Ark. 201, 225 S. W. 308; *Greenwood* v. *State*, 107 Ark. 568, 156 S. W. 427; *Dewein* v. *State*, 114 Ark. 472, 170 S. W. 582.

We think the facts in the case at bar stronger than those in the case of *Love* v. *State*, *supra*. Here we have a negro boy, whom the testimony of Mrs. McCullom, the mother of the unfortunate little Julius, characterizes as "a good Christian boy, if ever there was one." Her testimony showed that he had been the humble friend and companion of her children for six years; that he was obedient, kind and helpful; that he shared his horse, the pride of his heart, with Julius, whom he loved like a

brother; that he would carry the little children around on his horse, and in every way manifested a gentle and affectionate spirit. This is the "mean, hard-headed nigger" of whom Mr. Todhunter spoke. This negro boy was taken, on the day after the discovery of the homicide, while he was at his usual work, and placed in jail. He had heard them whipping Swain in the jail; he was taken from the jail to the penitentiary at Little Rock, and turned over to the warden, Captain Todhunter, who was requested by the sheriff to question him. This Todhunter proceeded to do, day after day, an hour at a time. There Bell was, an ignorant country negro boy, surrounded by all of those things that strike terror to the negro heart; he was told that he had drowned Julius McCullom, and that he must admit it, and asked if he hadn't done so; when he denied it, he was whipped by the warden, who "usually conquered when he began," according to the warden's own testimony. Under these conditions Bell finally made his confession. Then the sheriff came, and again he told of how he had drowned Julius and taken $20 from his person, and where he had hidden the money. When search was made, no money was found; he was visited again, and again whipped; he told of another place where the money was hidden, and, when it was not found at that place, he was whipped again, until he told of another place, saying that he had been lying, and not to whip him any more, and he would tell them where the money was; he told them another place, and yet the money was not found.

As in the case of *Love* v. *State, supra,* there was no change in the circumstances or anything else tending to break the uniformity of the conditions under which he had made the confessions to Todhunter, but the natural effect of his condition and all the attendant facts disclosed was to induce him to a continuation of his confessions; he was still in the penitentiary, and might justly fear further punishment from the man who "whipped until he conquered;" his hope to escape from the sting-

ing blows of the leathern strap, and the terror of the dread presence of one before whom he must have quaked as in the face of death itself must have powerfully influenced him and impelled him to repeat the confession already made.

It was the duty of the State to affirmatively show that the confessions made to the sheriff and McCullom were given free from the undue influence under which the prior confessions were made, and this it has wholly failed to do. The only reasonable inference, from all the facts, is that such influence did remain and produce the confession to Sheriff Campbell and Mr. McCullom, and is on a parity with the written confession later made, and should also have been excluded by the court.

For this error the case is reversed, and the cause remanded.

WARREN COTTON OIL & MANUFACTURING COMPANY *v.* SULLIVAN.

Opinion delivered October 14, 1929.

D. A. Bradham and *Duval L. Purkins,* for appellant.

Clary & Ball, W. D. Jones, John E. Hooker and *T. M. Hooker,* for appellee.

HART, C. J., (after stating the facts). The record shows that appellant obtained judgment against appellee L. L. Sullivan, before a justice of the peace, and, after a return of *nulla bona* on an execution issued by the justice, the transcript of the judgment was filed in the office of the circuit clerk in the county where the lands in controversy are situated. The judgment obtained before the justice of the peace, and filed in the office of the circuit clerk, was a junior lien to a mortgage executed by the owner of the lands to the Bank of Rison. An execution was issued by the circuit clerk upon the transcript of the justice judgment, and levied on the lands in controversy. The lands were sold by the sheriff, and bid in by appellant. When appellant purchased the lands at the execution sale, he acquired title thereto subject to the mortgage which appellee had executed on said lands to the Bank of Rison. In other words, appellant

acquired the equity of redemption in the lands purchased at the execution sale, and held the lands subject to the mortgage of the Bank of Rison. The judgment of appellant was a junior lien, and therefore subject to the mortgage of the Bank of Rison. Having purchased the lands at the execution sale, appellant became the owner of the equity of redemption and succeeded to the rights of appellees to redeem the lands from the mortgage of the Bank of Rison. *Turner* v. *Watkins,* 31 Ark. 429; *Cohn* v. *Hoffman,* 56 Ark. 119, 19 S. W. 233; and *Dalton* v. *Brown,* 130 Ark. 200, 197 S. W. 32.

The same principle was decided in *Smith* v. *Simpson,* 129 Ark. 275, 195 S. W. 1067, where the court held that the purchaser under foreclosure proceedings instituted by the junior mortgagee has the right to redeem from the first mortgage.

As we have already seen, appellant became the owner of the equity of redemption by purchase at the sheriff's sale; and, not having been made a party to the foreclosure proceedings against appellee instituted by the Bank of Rison, it is difficult to see how its right to redeem could be affected by the foreclosure proceedings. In *Cohn* v. *Hoffman,* 56 Ark. 119, 19 S. W. 233, it was held that an execution purchaser of a mortgagor's interest in land is entitled to redeem upon payment of the mortgage debt, and cannot be required to pay any other debts of the mortgagor not a charge upon the premises when the judgment lien attached.

This is in application of the general rule laid down in *Jackson* v. *Weaver,* 138 Ind. 539, 38 N. E. 166, so that, when appellant became the owner of the equity of redemption of appellees by purchase at the sheriff's sale, not having been a party to the suit of the bank to foreclose its mortgage, the decree in that case in no wise affected its rights. Its title could not be divested in a foreclosure proceeding to which it was not a party.

In 42 C. J. 361, it is said that, where lands subject to a mortgage are sold in execution against the mortgagor,

the purchaser succeeds to the rights of the mortgagor in such sense as to be entitled to redeem from the mortgage, unaffected by any transaction between the mortgagor and the mortgagee subsequent to the judgment. The case of *Cowling* v. *Britt,* 114 Ark. 175, 169 S. W. 783, is cited in support of the text.

The reason for the rule is that, if the purchaser of the equity of redemption of the mortgagor could be compelled to pay all subsequent liens without his consent, the mortgagee could deprive him of the value of his judgment lien by extending credit to the mortgagor, and judgment debtor after the lien of the judgment had attached. This would greatly lessen the value of a judgment lien, and would necessarily impair the rights of the judgment creditor and the purchaser at the execution sale.

In 19 R. C. L., par. 456, page 640, it is said that the purchaser of the equity of redemption sold under execution has the right to redeem, and, where real estate is sold on execution and is afterwards sold on the foreclosure of a prior mortgage, the purchaser at the execution sale, if not made a party to the foreclosure proceedings, may redeem and treat the deed made on foreclosure as a mortgage, and the purchaser on foreclosure sale as the mortgagee in possession. Among the cases cited in support of the rule is that of *Insley* v. *United States,* 150 U. S. 512.

In the application of this general rule to the undisputed facts in the present case, it is clear that the Bank of Rison and appellees, as the mortgagors, could not, by any action or agreement, affect the rights of appellant by foreclosure proceedings had subsequent to the purchase at the execution sale by appellant of the equity of redemption of appellee L. L. Sullivan in the lands in question. Otherwise, as we have already seen, the Bank of Rison, as mortgagee, and appellees as mortgagors could, by agreement, deprive appellant of a valuable right which it had secured by purchase at the execution

sale. If the value of the equity of redemption which had become vested in appellant could be lessened or impaired by subsequent foreclosure proceedings to which appellant was not a party, it is very clear that it would thus be deprived of a valuable property right. By its purchase at the execution sale, appellant acquired the title to the lands in controversy, subject to the mortgage of the Bank of Rison. It had the right to redeem from this mortgage; and, when the mortgage was assigned to it by the Bank of Rison, appellant acquired a complete title to the lands in controversy, and was entitled to the possession thereof. The Bank of Rison could not have executed a quitclaim deed to appellee divesting appellant out of the title which it had already acquired.

In this view of the matter it does not make any difference whether the case was tried in law or in equity. The facts are undisputed, and the decision must be the same in either court. *Shapard* v. *Lesser,* 127 Ark. 590, 193 S. W. 262, 3 A. L. R. 247. Therefore the decree will be reversed, and the cause will be remanded with directions to grant the prayer of appellant for possession of the lands, and for such other relief as in equity it is entitled to. It is so ordered.

MERCHANTS' TRANSFER & WAREHOUSE COMPANY *v.* GATES.

Opinion delivered October 14, 1929.

[redacted]

Robinson, House & Moses and *Harry E. Meek,* for appellant.

Hal L. Norwood, Attorney General, and *Walter L. Pope,* Assistant, for appellee.

HART, C. J., (after stating the facts). The correctness of the decree of the chancery court depends upon the construction to be given act No. 62, passed by the Legislature of 1929, to amend an act of the Legislature of 1927 providing for the regulation, supervision and control of motor vehicles used in the transportation of persons or property for hire, and act No. 65, passed by the Legislature of 1929, for the purpose of amending and codifying the laws relating to State highways. Acts of 1929, vol. 1, pp. 137 and 264.

In the case of *State* v. *Haynes,* 175 Ark. 645, 300 S. W. 380, we had under consideration the act of 1927 providing for the regulation, supervision and control of motor vehicles used in the transportation of persons or property for compensation in the State of Arkansas. The particular part of the statute to be construed in that case was the proviso in subdivision (d) of § 1 of the act, which reads as follows:

"Provided the terms 'motor vehicle' or 'motor-propelled vehicle,' as used in this act, shall only include motor vehicles operating a service between cities or towns." See Acts of 1927, p. 257 *et seq.*

The court held that the Legislature only intended to place within the jurisdiction of the Arkansas Railroad Commission common carriers operating motor vehicles over a fixed route between cities or towns. It was said that the cities or towns were required to be the termini of the route, but that stations at the termini might be established within the cities or towns, or at reasonable distances without the limits of said cities and towns, for the purpose of receiving and discharging passengers or loading or unloading freight.

In the case of *Duncan* v. *Jonesboro,* 175 Ark. 650, 1 S. W. (2d) 58, it was held that taxicab operators,

operating motor vehicles as common carriers between cities or towns under the provisions of the act, which had secured a permit from the Railroad Commission, were not required to have a license from a city which was one of the termini of their fixed route, although most of the revenue was derived from passengers within the corporate limits of such city.

The Legislature of 1929 passed an act to amend the statute of 1927 just referred to, Acts of 1929, vol. 1, p. 137. That act, just as the original act passed in 1927, provided that the terms "improved public highways," wherever used in the act, means every improved public highway in this State, which is or may hereafter be declared to be a part of the State highway system, or a part of any county highway system, or the streets of any city or town. This clause is subdivision (f) of each act.

Subdivision (d) of § 1 of the amendatory act of 1929 reads as follows:

"The term 'motor vehicle carrier,' wherever used in this act, means every corporation or person, or their lessees, trustees or receivers, owning, controlling, operating or managing any motor-propelled vehicle used in the business of transporting persons or property for compensation over any improved public highway in this State. The terms 'motor vehicle' or 'motor-propelled vehicle' as used in this act shall apply to all motor vehicles engaged in transporting passengers or property for compensation over improved public highways of this State."

It will be noted that the amendatory act provides that the term "motor vehicle," as used in the act, shall apply to all motor vehicles engaged in transporting persons or property for compensation over the improved public highways in this State, instead of the proviso in the act of 1927, that a motor vehicle shall only include a motor vehicle operating a service between cities and towns.

This court has uniformly held that acts passed upon the same subject must be taken and construed together, but the obvious import of the language cannot be disregarded. The intention of the Legislature must, if possible, be carried into effect; but it must be derived from the language used in the act, if it be clear and unambiguous. *Ex parte Trapnall,* 6 Ark. 9; *In re Burrow,* 55 Ark. 275, 18 S. W. 170; and *Miller* v. *Yell & Pope Bridge District,* 175 Ark. 314, 299 S. W. 15.

When the court construed the act of 1927 in question, such construction became as much a part of the statute as if written in it. It is a fundamental rule of construction that the Legislature is presumed to have enacted a statute in the light of all judicial decisions relating to the same subject. Thus the Legislature is presumed to have passed the act of 1929 under consideration with the full knowledge that this court had construed the act of 1927 relating to the same subject to give the Arkansas Railroad Commission jurisdiction over common carriers operating motor vehicles over fixed routes between cities and towns. The court said that the act required the cities or towns, as the case might be, to be the termini of the route.

Another necessary presumption that follows is that the Legislature of 1929, when it amended the act of 1927, intended for the amendatory act to change the original act when read in the light of the decision of the court construing it. Since the Legislature knew that the act of 1927 only gave jurisdiction to the commission over motor carriers operating between cities and towns, if it had intended the amendatory act to have the same meaning, it would have used the words which had been construed by this court. As stated, by the use of other and different language it evidently meant to give the commission jurisdiction over motor carriers operating over the public highways of this State.

Streets in cities and towns may, by legislative enactment, be made a part of the public highways of the

State, the same as rural highways. The court has repeatedly held that the public streets of a city or incorporated town may by the Legislature be made a part of the public highways of the State. They belong to the people of the State, and the Legislature may delegate to municipal corporations and other governmental agencies the power to regulate and control traffic on them. *Adkins* v. *Harrington,* 164 Ark. 281, 261 S. W. 626; *Pine Bluff* v. *Arkansas Traveler Bus Co.,* 171 Ark. 727, 285 S. W. 375; and *Hester* v. *Arkansas Railroad Commission,* 172 Ark. 90, 287 S. W. 763.

Each of the appellant carriers held itself out to the public as ready to undertake for hire the transportation of goods or passengers from place to place in the city of Little Rock, or from points in the city of Little Rock to places in the city of North Little Rock, or to places along the public highways in the country, and thus solicited the patronage of the public, although it claimed the right to reject customers for cause. Its general business was with the public, and each solicited customers from the general public. The same was true of the undertaking establishment. It operated ambulances carrying sick and injured persons to hospitals, homes, and railway stations, at uniform charges. Each of the appellants solicited business from the general public by advertisement. Hence we are of the opinion that the court did not err in holding that appellant came within the regulatory provisions of the statutes. *Arkadelphia Milling Co.* v. *Smoker Merchandise Co.,* 100 Ark. 37, 139 S. W. 680, and *Lloyd* v. *Haugh & Keenan Transfer & Storage Co.,* 223 Pa. 148, 72 Atl. 516, 21 L. R. A. (N. S.) 188.

It is argued with much force that the statute will be burdensome on small operators of motor busses. We cannot consider this argument, for the reason that it would be an invasion by the judiciary of the province of the legislative department of the State. When acting within constitutional limitations in the passage of a statute upon a given subject, the Legislature is the sole judge

of the wisdom, expedience and necessity of its enactment, and its action is not the subject of review by the courts. The action of the Legislature is declaratory of the public policy of the State. *Sims* v. *Ahrens,* 167 Ark. 557, 271 S. W. 720. This rule is of such universal application that a further citation of authorities is unnecessary. As quoted from an earlier decision of the Supreme Court of Pennsylvania, in *Busser* v. *Snyder,* 282 Pa. 440, 128 Atl. 80, 37 A. L. R. 1515, the judiciary "cannot run a race of opinions upon points of right, reason and expediency with the lawmaking power."

It is next contended that the chancellor erred in holding that appellants are required to pay four per cent. excise or privilege tax under the provisions of § 67 of act 65, instead of three per cent. under § 6 of act 62, both of which acts were passed by the Legislature of 1929. There is no direct repeal of the former act by the later one, but it is claimed by the State that there is an implied repeal. Section 6 of act 62 amends § 6 of act 99, passed by the Legislature of 1927. It provides for the levying of an excise or privilege tax on the business of each person or corporation operating any motor vehicle for compensation, in the sum of three per cent. on the gross amount received by such carrier of all fares and charges collected for the transportation of persons, property, freight, either or both. The section further provides that said tax shall be paid monthly to the Commissioner of Revenue, and that, if it is not paid within fifteen days after the same is due, a penalty of ten per cent. is added. Acts of 1929, vol. 1, p. 137. This act was approved February 27, 1929. Section 67 of act 65 provides for a levy and collection of four per cent. by the Commissioner of Revenues, and imposes a penalty of twenty per cent. if the tax is not paid within fifteen days after date. Acts of 1929, vol. 1, p. 264. This act was approved February 28, 1929.

It is true that repeals by implication are not favored, and the repeal will not be allowed unless the implication

is clear and irresistible. *Massey* v. *State,* 168 Ark. 174, 269 S. W. 567; *Babb* v. *El Dorado,* 170 Ark. 10, 278 S. W. 649; and *State* v. *White,* 170 Ark. 880, 281 S. W. 678.

Another cardinal rule of construction is that, where two acts were under consideration by the Legislature at the same time, and were passed at the same session, this strengthens the presumption that there was no intention to repeal one by the other. *Mays* v. *Phillips County,* 168 Ark. 829, 275 S. W. 5; and *Standley* v. *County Board of Education,* 170 Ark. 1, 277 S. W. 550.

In order that a later act upon the same subject may operate as a repeal of a former act passed at the same session, there must be an invincible repugnancy between the two, and the implied repeal operates only so far as the conflicting provisions are concerned. In the application of this cardinal rule of construction, it is clear that there is invincible repugnancy or irreconcilable conflict in the two sections of the statute under construction. They both operate upon the same class of persons and corporations, and the tax levied and collected under the two sections are for the same purpose, and payable to the same officer. They both cannot stand, and we must hold that § 67 of act 65, the later act, repeals § 6 of act 62, the earlier one, both of which acts were passed by the Legislature of 1929. Hence the chancellor did not err in so holding.

In this connection it may be stated that no proof was taken as to whether the amount of the tax was so great as to be excessive, arbitrary and discriminatory or confiscatory in its nature. Hence we will not pass upon that question, but leave it open for further consideration in a case where the question is properly raised and argued.

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

PINE BLUFF COMPRESS & WAREHOUSE COMPANY *v.* ANDREWS.

Opinion delivered October 14, 1929.

Coleman & Gantt, for appellant.

Wooldridge & Wooldridge, for appellee.

SMITH, J. Appellant company is engaged in the business of compressing and storing cotton for hire at its compress and warehouse in the eastern portion of the city of Pine Bluff, and in the month of April, 1927, appellee had several hundred bales of cotton stored in one of the warehouses. The plant was in two parts, each having a capacity of about twenty thousand bales of unpressed

cotton. One of these, known as the upper warehouse, was designed for the reception of cotton shipped over railroads, and its floors were on a higher level than those of the other, which was known as the lower warehouse. Each plant consisted of several different sheds, having separate numbers. There were about eight thousand bales of cotton in the lower warehouse, and something less than that number in the upper.

In April of the year mentioned there began what later proved to be the most disastrous flood known in that section, and on April 13 flood warnings were sent out by the United States Weather Bureau. The Federal Government maintains at Little Rock a weather bureau, in charge of H. S. Cole, who has general supervision of the meteorological, climatological and river work in the State of Arkansas, where records are made and kept of the rainfall, and the rise and fall of the rivers, and other related subjects. There is a substation at Pine Bluff and at other places in the State, which make daily reports to the Little Rock office, and receive daily reports from it. A Miss Scheu was in charge of the Pine Bluff office. The reports to which we have referred were made by wire, or were made in that manner during the time herein referred to, and were so made for the obvious purpose of communicating the information without delay.

On April 13, 1927, at 10 A. M., flood warnings for the Arkansas River, on which Pine Bluff is situated, were telegraphed to Miss Scheu for dissemination in the territory served by that office. This warning meant simply that the crest of the river would exceed the flood stage, which was defined to be the flood level at which the river left its banks, and began to do some damage. It is an annual event for the river to exceed its flood stage, which of itself causes no apprehension, as most of the territory subject to this damage had what was supposed to be protection by levees. Other territory was supposed to be above the reach of the floods, and such was the land upon which appellant's warehouses were located. No overflow had ever reached them prior to 1927. These

flood warnings were renewed during the succeeding days, and accompanying them were reports on the stage of the river at points higher up than Pine Bluff, which excited general alarm, but the managing officers of appellant company thought the elevation of the ground upon which their plant was located was such that a sufficient margin of safety was assured. Prior to 1927 the highest flood stage of the river at Pine Bluff had been 29.6 feet, but on the 21st of April a stage of 32.4 feet was reached. A stage of 31 feet was reached on Monday, April 18, and this flood level was high enough to put water in the lower warehouse, and the cotton which had not been removed from it prior to that time was damaged on that account. Appellee had 137 bales of cotton in this warehouse, which was damaged, and this suit was brought to recover damages to compensate this loss. A judgment was recovered, from which is this appeal. No question is made as to the amount of the recovery if there is liability, but it is very earnestly insisted that appellant is not liable at all, for the reason that the loss was occasioned by an act of God, which could not have been averted by ordinary care and diligence on appellant's part.

From what we have said it is apparent that the flood did not come suddenly and unexpectedly, as in the case of a break of a levee which was thought to be secure. There were repeated warnings, and the question of fact in the case is whether, after such warnings were given as must have apprised appellant that its warehouse was in danger, proper diligence was thereafter used to remove the cotton to the upper warehouse, a place of safety.

The court gave elaborate instructions defining the duty of the appellant under the circumstances, which are conceded to be substantially correct, and which we find to be so, although it is claimed that one of these instructions should have been modified in the manner hereafter discussed, and that another instruction, numbered 4, should not have been given, because it left out of consideration the question of time in which to remove the cotton after knowing it was in danger. It is also insisted that

error was committed in refusing to exclude certain parts of a deposition taken in appellee's behalf. These assignments of error will be considered in the order stated.

In regard to the assignment of error that the testimony does not show any negligence on the part of appellant, the following facts may be stated in addition to those already recited:

Miss Scheu testified that upon receipt of the reports from Little Rock she furnished copies thereof to the daily papers in Pine Bluff, which published them, and that these reports excited the widest interest, and her telephone rang continuously for three days, and she was kept busy answering inquiries concerning the river. It is not contended that appellant was unaware of the situation; on the contrary, it is stipulated that the officials of the company kept up with the stage of the river every day from the 11th of April to the 21st, inclusive. The insistence is that it was not until Friday, the 15th, that these reports became sufficiently ominous to suggest that such an unprecedented stage would be reached as would put water in the lower warehouse; and it is further insisted that, when this report was received, appellant exercised the greatest diligence to remove the cotton to the upper warehouse.

Appellee testified that on April 11 he discussed the river reports with Mr. Roane, the secretary of the appellant company, and advised him that if the river reached the stage at Pine Bluff which the reports from points higher up the river indicated it would do, the cotton in the lower warehouse would be flooded, and that Mr. Roane replied that he would notify Mr. Grant, the superintendent in charge of the plant. Mr. Roane denied that this conversation occurred.

The testimony is to the effect that the predictions of the weather bureau were not always verified, but that they were generally approximately correct; sometimes the predicted stages were exceeded, while in other years they were not. The factor entering into this equation was the continuance or cessation of rainfall; but a rainfall of 4.2

inches at Pine Bluff on April 15 gave no promise that the predictions would not be verified as to the maximum stages. The rise at Pine Bluff from the 12th to the 21st was rapid and constant, and on the 15th the river went above the flood stage at Pine Bluff, which is 25 feet.

Hale, a civil engineer, testified on behalf of appellant. This witness was familiar with the surface levels at the warehouses, and of the flood levels of the river. He, with many others, was observing the reports concerning the river, and he testified that Friday, the 15th, was the earliest day on which there was any occasion to be alarmed at Pine Bluff, but he admitted that between the 13th and 14th the river rose 6 feet at Dardanelle, and reached a stage of 26.4 at that place on the 14th, and was continuing to rise there. He also testified that at that stage from three to four days were required for the water to flow from Dardanelle to Pine Bluff.

The testimony is conflicting as to the time when appellant began moving the cotton. It was necessary that the cotton in the upper warehouse be rearranged to receive that from the lower, and this was first done. The testimony on the part of appellant is to the effect that the work was begun on Friday, while on appellee's behalf it is to the effect that the work was not begun until Saturday. When the work was first begun, from twenty to thirty men were employed, but the number was increased until finally about one hundred men were engaged when the work was suspended about 4 P. M. Sunday. An abundance of labor was available. After the work of removing the cotton started, it was prosecuted diligently until it was suspended Sunday afternoon. The testimony is conflicting as to why it was then suspended, that on the part of appellee being to the effect that Mr. Grant, the superintendent, said the crest of the flood had been reached, and that an additional rise was not anticipated. The gauge then stood at 29.5 feet, and there was a rise of a foot and a half that night, and during the night the water entered the lower warehouse. On behalf of appellant it was denied that the work was suspended, because it was thought

the crest of the flood had passed, and appellant's officers stated that the reason for so doing was that the men had become exhausted, and it was thought that a suspension would renew the efficiency of the laborers, and that the work was resumed very early Monday morning and continued without interruption until about 3 P. M. Tuesday, when the water had become so deep, and the current so swift, that it was not then safe to attempt to even float the cotton. A large number of witnesses gave testimony elaborating the facts herein recited, which we do not further review, as we have stated the salient points. These, we think, show that there was a question for the jury as to whether appellant began removing the cotton as early as ordinary care would have suggested, and employed from the beginning the necessary help to accomplish that purpose. When the work was suspended Sunday afternoon the cotton was being moved at the rate of from 160 to 200 bales per hour, and when the work was finally suspended only 200 or 300 bales remained in the lower warehouse, and appellee's cotton was a part of that number.

The court gave, at appellee's request, an instruction numbered 2, which reads as follows:

"If you believe from a preponderance of the evidence in this case that the flood waters from the Arkansas River, which reached the defendant's warehouse in the eastern part of the city of Pine Bluff, during the month of April, 1927, and damaged any cotton which plaintiff had stored therein, was the result of an act of God, still this would not relieve the defendant of liability, if you further find from a preponderance of the evidence that the damage to plaintiff's cotton, if any, was caused by the combined effect of an act of God, and the concurring negligence, if any, of the defendant."

Appellant requested that this instruction be modified by adding the following words: "and that without such negligence said damage would not have occurred."

This modification might well have been made, as it is, of course, the law that appellant would not be liable unless it were negligent, and this negligence was an effi-

cient cause of the damage, without which the loss would not have been sustained. But the instruction does not ignore or controvert that proposition. It required that the finding that the damage was caused by the combined effect of an act of God, and the concurring negligence of appellant, before any recovery could be had. Other instructions given at the request of appellant as well as those on behalf of appellee elaborated this requirement to the extent that the jury could have been under no misapprehension on this subject. Indeed, the court gave, at appellant's request, an instruction numbered 9, dealing with this phase of the case alone, which reads as follows:

"Unless you find that the defendant was negligent, and that such negligence was the direct cause of the injury and damage to plaintiff's cotton, the burden of proving which rests upon the plaintiff, you will find for the defendant."

Instruction numbered 4, which was objected to as leaving out of consideration the question of time within which to remove the cotton, reads as follows:

"Even though you may find from the evidence in this case that the flood waters from the Arkansas River which reached the defendant's warehouse in the eastern part of the city of Pine Bluff, during the month of April, 1927, resulted from an act of God, this would not relieve the defendant of responsibility if, by the exercise of ordinary care and diligence, it could have removed the cotton which plaintiff had stored in defendant's warehouse to a place where it would not have been reached by the flood waters, and if you find that defendant failed to exercise such care and the plaintiff's cotton was thereby damaged, you will find for the plaintiff."

We do not think the instruction is open to the objection made. It deals with the separate ground of alleged negligence that, even when it was certainly known that the water would enter the lower warehouse, there was negligence in failing to promptly remove the cotton. Liability might have been predicated upon that issue, and

we think the instruction a correct declaration of the law on that subject.

The deposition of A. R. Stone was read at the trial. Stone had been the plant foreman, and as such had supervision of the moving of the cotton. He resided in Texas at the time of the trial, and his deposition was taken on interrogatories. In answer to interrogatory No. 11 he made the following response:

"A. 11. No, the flood waters of the Arkansas River did not reach into the upper warehouses of the plant during the 1927 flood. *I am sure that it was apparent to the officials of the Pine Bluff Compress & Warehouse Company that these flood waters were going to reach the plant; and especially all of the lower warehouses, and damage or carry away the cotton which we had stored there, if it were not removed;* because Mr. Grant, the manager of the warehouse company, discussed with me the matter several days prior to Easter Sunday, and had told me it was necessary that we clear the lower warehouses; and on Saturday, part of Saturday night, and on Easter Sunday, the day following that Saturday, we were busy, with extra help, moving the cotton out of the lower warehouses into the upper warehouses. The flood warnings which had been issued, as well as the conditions and the information we had with reference to the river, were discussed by Mr. Grant and myself several times, *and we had every reason to believe that the flood waters would reach into our lower warehouses.* We of course also knew that, if the waters of the river came in contact with the cotton which we had stored there, it would be lost, destroyed or damaged."

A motion was made to strike out the portion of the answer appearing in italics, upon the ground that this part of the answer was argumentative and opinionative, and undertook, not only to state the opinion of the witness himself, but that of Mr. Grant as well.

We do not think the answer is open to the objection made to it. Appellee was endeavoring to show, as a ground upon which to predicate the charge of negligence, that the managing officers of the appellant company, a

corporation, knew, or should have known, that the flood waters were going to reach the plant, and, having this knowledge, failed to exercise due care to protect the cotton. That they finally had this knowledge is an undisputed fact; but to support a recovery of damages it was necessary to show that these officers had, or, in the exercise of ordinary care, should have had, this information in time thereafter, by due diligence, to have removed the cotton. It was competent therefore for appellee to show that Mr. Grant had this information, and the time when he obtained it. The effect of the answer set out above is to show that Grant had this information, and the witness so stated, not as a matter of opinion but as a matter of fact, known so to be by the witness after discussing this very question with Mr. Grant. We think therefore, that no error was committed in refusing to exclude this testimony.

As no error appears from a consideration of the record in its entirety, the judgment is affirmed.

ST. LOUIS SOUTHWESTERN RAILWAY COMPANY *v.* LEDBETTER.

Opinion delivered October 14, 1929.

J. R. Turney, A. H. Kiskaddon and *Wooldridge & Wooldridge,* for appellant.

Geo. F. Brown and *Geo. H. Holmes,* for appellee.

SMITH, J. Appellee brought two suits against the appellant railway company, which were consolidated, and tried as a single case. In the first of these suits he alleged that on October 3, 1927, one of appellant's passenger trains had negligently killed one of his cows; and in the second suit he alleged the negligent killing of his dog on October 13, 1927.

The railway company admitted killing each of these animals, and no question was made as to their value, but it was alleged that the killing was unavoidable in each instance, and was not caused by any negligence on the part of any employee of the railway company.

It was disclosed that both animals were killed by an engine which was being operated by the same engineer and fireman in each instance. The testimony in regard to the cow was that it came on the track on the engineer's side at a point so near the engine, that it was impossible to stop the train after the presence and peril of the cow was discovered, although an efficient lookout had been maintained. The cow came out of an alley, and the engineer testified, that when he saw that she was about to come on the track "the only thing I could do was to kick the cylinder cocks open, and blow the whistle. What I mean by kick cylinder cocks open, we have a lever right at our feet, in case of stock or anything like that. It's put there to try to scare them away. I did not use that until the animal was approaching towards the engine; if the animal had stayed right where it was, it would have been all right. You understand that I did not kick the cylinder cocks open to scare the animal until she started approaching the engine. Then I did what I thought was

best. There was no way for me to have stopped the train within seventy to eighty feet, and I did what I thought was the next best thing to do.'' The jury evidently accepted this testimony as true, and returned a verdict in favor of the railway company in the suit for the cow.

The testimony in regard to the dog was that it came upon the track from the fireman's side, and was first seen at a distance of about 125 feet. The train consisted of seven or eight coaches, and was running at a speed of about forty miles per hour. The engineer did not see the dog, and could not have seen it from his side of the engine, and did not know it had been killed until he was told of that fact when the train stopped at the next station. The fireman testified, however, that there was nothing which could have been done to avoid striking the dog after he discovered that it was coming on the track.

The fireman did not testify in the dog case—as the engineer did in the cow case—that he had opened the cylinder cocks, and the jury evidently concluded that this was a precaution which, if taken, might have stopped the dog from coming on the track. Of course, the dog might have continued as the cow did, even though this precaution had been taken. Nevertheless, here was an agency provided for just such an emergency, and it was not employed. The noise and sight of escaping steam which would have followed the opening of the cylinder cocks might have checked the dog in his mad career, although the cow was heedless of her fate. The dog may have had more sense than the cow, and may have prized its life more highly. At any rate, there was at hand an agency which, as we understand the testimony, was available to the fireman as well as to the engineer, which was used in one case, and not employed in the other, and we think this testimony is sufficient to support the finding of the jury that the railway company did not overcome the statutory presumption of negligence which arose when it was shown that the train had killed the dog. It was the duty of the fireman to do what a reasonably prudent man would have done, and the failure to do this was negligence.

What we have just said explains the modification which the court made of defendant's instruction numbered 3. All the other instructions asked by the defendant, except that a verdict be directed in its favor, were given by the court. Instruction numbered 3, as asked by the defendant, reads as follows:

"The mere fact that the fireman on the defendant's train which struck and killed plaintiff's dog saw the dog as he jumped on the trestle ahead of the approaching train, about 125 feet in front of the engine, would not justify you in finding for the plaintiff, if you believe from the evidence that at the time the defendant's fireman saw plaintiff's dog it was then too late for him to cause the engineer to do anything that would bring his engine to a stop, and thus avoid the killing of the dog."

This instruction was modified by adding the words: "or otherwise prevent the injury." This modification permitted the jury to determine whether the failure of the fireman "to cause the engineer to do anything that would bring his engine to a stop, and thus avoid the killing of the dog," was the full measure of the fireman's duty under the circumstances. Under the facts stated we think the modification was proper, and that the jury was warranted in finding, that the fireman did not do all that a reasonably prudent man would have done.

The testimony is sufficient to support the verdict, and, as the instructions correctly declared the law, no error appears, and the judgment must be affirmed. It is so ordered.

BUTLER, J., disqualified, and not participating.

UNITED STATES FIDELITY & GUARANTY COMPANY *v.* HICKS.

Opinion delivered October 14, 1929.

[redacted]

O. A. Featherston and *Alfred Featherston*, for appellant.

Pinnix & Pinnix, Feazel & Steel and *McMillan & McMillan*, for appellee.

HUMPHREYS, J. On the 18th of November, 1918, Lavisa A. Mitchell was appointed guardian of her minor daughter, Ruby May Ozment, by the Pike County Probate Court, and appellant became surety on her bond. In 1919 Mrs. Mitchell and her husband, V. B. Mitchell, bought a farm in said county from R. D. Stewart, paid down $350, and executed their notes in the sum of $2,650

for the balance of the purchase money. He left the notes in the Bank of Amity for collection. The bank collected partial payments on them from time to time, as a matter of accommodation. The bank did not know, until after it purchased the notes in December, 1921, from R. D. Stewart, that Mrs. Mitchell had been appointed guardian for her minor child, nor the source from which she received the money with which she made payments upon the notes. As a matter of fact, the money was paid to Mrs. Mitchell by the United States Government, on account of the father of the minor child being killed during the World War while serving as a soldier. She received altogether monthly payments in the sum of $45, $20 of which was allowed her by the Veterans' Bureau and $25 by the War Insurance Bureau. The monthly payments came in the form of checks payable to Mrs. Mitchell, as legal guardian for Ruby May Ozment. On April 12, 1920, the probate court of Pike County made an order allowing Mrs. Mitchell, as guardian, $25 a month for the care and maintenance of the ward. The bank purchased the land notes against the Mitchells on December 21, 1921, and prior to that time had collected thereon for R. D. Stewart $1,450. The money was paid to the bank in cash, and credited upon the notes. After the bank purchased the notes on December 21, 1921, Mrs. Mitchell paid it the total sum of $1,295 upon the land notes in cash. All the payments, both before and after December 21, 1921, were made by Mrs. Mitchell out of the funds she received from the government after she collected the checks. None of the checks themselves were indorsed over to the bank as payments upon the land notes, and none of the proceeds of the government checks were deposited in the Bank of Amity. It cashed many of the checks for her, but the money was not deposited in its bank. The Mitchells never paid all that was due upon the land notes, and the bank foreclosed its lien for the balance due thereon, and the proceeds from the sale of the land under the fore closure proceedings were credited upon the judgment

lien. During the continuation of the guardianship Mrs. Mitchell filed annual settlements, which were approved by the probate court of said county.

Mrs. Mitchell married a Mr. Hicks, and her daughter married a Mr. Copelin. After these marriages, Ruby May Ozment Copelin brought a suit in the chancery court to set aside the guardianship settlements for fraud, and upon the trial of the cause obtained a judgment against her mother for $1,669.53. She then sued her mother and her bondsman, appellant herein, for the amount found due by the probate court, and on March 20, 1928, obtained a judgment in said court against her guardian and said bondsman for $1,829.53. The bondsman, appellant herein, paid this judgment March 31, 1928, and immediately filed the present suit against the guardian and the Bank of Amity for the amount it had paid, upon the theory that it was entitled to be subrogated to the rights of the ward, Ruby Ozment Copelin. In addition to making said judgment the basis of this suit, it alleged that the judgment was obtained against the guardian, and it is as the guardian's surety under the allegation and upon the ground that the guardian had used her ward's funds in payment of her individual debts in the amount of the judgment, said amount having been paid to the Bank of Amity, and that said bank received the same knowing it was trust funds in the hands of the guardian for said ward. The prayer of the complaint was for judgment against both the appellees for the amount of the judgment it had paid to the ward.

The guardian filed a separate answer, denying that she paid the Bank of Amity or that it received any trust funds held by her for her ward, or that she was indebted to appellant in any sum. She interposed other defenses which it is unnecessary to mention.

The Bank of Amity filed an answer, also denying that the guardian paid it or that it received any trust or guardianship funds, and in the alternative pleading "that, should it appear that an alleged trust came into its pos-

session, that said funds were used by the said Lavisa Mitchell Hicks as guardian for said minor for the use, maintenance and benefit of said minor, and that this defendant, the Bank of Amity, had no knowledge of the trust character of said funds, and received no benefit therefrom."

The chancery court heard the cause upon the pleadings and testimony adduced by the respective parties, which reflected, in substance, the facts stated above. The judgment rendered in the chancery court canceling the annual settlements of the guardian and surcharging the account, and the judgment rendered in the circuit court in favor of the ward against the guardian, appellant here, were introduced in evidence. All the checks from the government to the guardian were also introduced in evidence. The guardian was permitted to testify, over the objection and exception of appellant, that the monthly allowance of $20 allowed to her by the Veterans' Bureau was for the care and maintenance of her ward. The objection to this piece of evidence was that it contradicted the written checks, which stated that they were paid to her as the legal guardian of her ward. The purpose of the allowance did not contradict the checks. The checks did not undertake to state the purpose for which the allowance was made by the government. Irrespective of the purpose for which it was allowed, it necessarily had to be paid to the legal guardian for the ward. The ward was an infant, and could not transact business except through her legal representative. The evidence was therefore admissible.

The trial court rendered judgment in favor of appellant against the guardian, Lavisa Mitchell Hicks, for the amount it paid in satisfaction of the judgment in favor of the ward, Ruby Ozment Copelin, against them, from which no appeal has been prosecuted, and dismissed appellant's complaint against the Bank of Amity, basing the dismissal upon a finding that the Bank of Amity did not receive the guardianship funds from the guardian, Lavisa Mitchell Hicks, and apply them in payment of an

individual debt due it by her, knowing the funds to be trust funds, from which finding and consequent judgment of dismissal is this appeal.

The finding and judgment of the trial court was correct. A knowledge on the part of the officers of the Bank of Amity of the source from which the funds came and that, after cashing the government checks, Mrs. Lavisa Mitchell Hicks used the money to pay her individual land notes to it, did not render said bank liable for receiving and misapplying the trust funds. According to the weight of the testimony the money, although received by Lavisa Mitchell Hicks from the United States Government in her capacity as legal guardian for her ward, Ruby Ozment Copelin, was allowed to her for the support and maintenance of said ward. The government itself allowed her the monthly payment of $20 for that purpose, and the probate court of Pike County allowed her $25 for said purpose. The testimony reveals that after these allowances were made the guardian supported and maintained her ward, and sent her away to school a part of the time, and also that she spent more than the allowance upon her ward.

It is argued that the judgment surcharging the accounts of the guardian is *res judicata* of the question involved. It clearly was not *res judicata* as to the Bank of Amity, for it was not a party to that proceeding.

No error appearing, the judgment is affirmed.

KIRBY, J., dissents.

RIGSBY *v.* RURALDALE CONSOLIDATED SCHOOL DISTRICT NO. 64.

Opinion delivered October 14, 1929.

Houston Emory and *B. H. Randolph,* for appellant.

C. T. Cotham, for appellee.

HUMPHREYS, J. This suit was brought by appellant in the chancery court of Garland County, for the benefit of himself and others, to enjoin appellees from constructing a school building upon the site purchased by the directors of Ruraldale Consolidated District No. 64, for the alleged reasons:

(1) That the bonds authorized to be issued to raise a fund to make said improvements were sold below par, contrary to § 8984 of Crawford & Moses' Digest; and, (2) that the directors and officers of the district were about to proceed to build the school building upon a site in said consolidated district not first authorized by an election held in accordance with law.

A number of defenses were interposed, but it will only be necessary, in our view of the case, to set out the defense of *res judicata* interposed by appellees, which is as follows:

"Further answering, these defendants state that this is the second suit in this court for the purpose of enjoining the issuance of said bonds, and the selection of said school site, and the building of a schoolhouse for said district on said school site. That on the 9th day of January, 1929, in a certain cause pending in this court, numbered 9740 on the chancery docket, wherein R. M. Johnson was plaintiff, and the directors of Ruraldale Consolidated School District No. 64 *et al.* were defendants, this court rendered a final order or decree, finding that the site selected by the board of directors of said district is approximately in the center of the school population of said district; that said board had a right to borrow money and issue bonds for the building of said schoolhouse, and had a right and did exercise the right to select a site for

the building, having purchased the real property upon which to build the same. These defendants therefore state that the matters now sought to be litigated in this action by the plaintiff have already been determined by this court adverse to plaintiff, and they state the decree rendered by this court in said action, numbered 9740 on the chancery docket, and found of record in chancery record book W at page 534, is *res judicata* as to all matters involved in this suit. That, in said suit lately determined in this court, notice was given of an appeal to the Supreme Court of the State of Arkansas, and that said appeal is still pending and undetermined."

In support of the plea of *res judicata* set out above appellees introduced the pleadings and decree rendered upon them, and the evidence in the Johnson case by the Garland Chancery Court.

The trial court in the instant case dismissed appellant's complaint for the want of equity, from which is this appeal.

The action of the trial court in dismissing appellant's complaint was proper. The plea of *res judicata* and testimony introduced in support thereof justified the court's action.

Appellant contends for a reversal here because the plea of *res judicata* in no wise affected the right of appellant, C. J. Rigsby, as he was not a party to the former action. In this they are mistaken. The only authority he had to bring the suit was under § 13, article 16, of our State Constitution, which reads as follows:

"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."

C. J. Rigsby instituted the instant case under the same authority, and all citizens in the district were bound by the result of the suit brought against appellees by R. M. Johnson upon all issues presented by the pleadings and testimony in the Johnson case. 15 R. C. L., pp. 1026 and 1035.

Appellant also contends for a reversal here because the court in the former case did not pass upon the issue of whether an election had been held for the purpose of locating the site, and directing the construction of the building thereon. The complaint in the R. M. Johnson case sufficiently presented that issue, and in rendering the judgment in that case the court made the following finding and adjudication:

"The court further finds that the site selected by the board of directors is approximately in the center of the school population of said district; that said board has a right to borrow money and issue bonds for the building of said schoolhouse, and had a right and did exercise the right to select a site for the building, having purchased the real property upon which to build the same."

No error appearing, the judgment is affirmed.

SINGER SEWING MACHINE COMPANY *v.* WAGGONER.

Opinion delivered October 14, 1929.

John S. Gatewood, for appellant.

Joe P. Melton and *Bogle & Sharp,* for appellee.

HUMPHREYS, J. This suit in replevin was brought by appellant against appellees, in the court of W. J. Beard, a justice of the peace in Lonoke Township, Lonoke County, to recover the possession of two electric sewing machines, valued at $300, claiming title thereto. Appellees

claimed title to the machines under sale and purchase thereof, evidenced by a bill of sale executed to them by appellant's agent, Harvey O. Brasfield, for a cash consideration of $100. The cause was tried on the issue joined in the court of common pleas of Lonoke County, on change of venue from the justice of the peace, resulting in an adverse judgment to appellant, from which an appeal was prosecuted to the circuit court. The cause was tried to a jury in the circuit court upon the pleadings, testimony and instructions of the court, with the same result, from which is this appeal.

At the conclusion of the testimony appellant asked the trial court to instruct a verdict in its favor, which the court refused to do, over its objection and exception. The undisputed evidence in the case warranted the request, and the court erred in not giving it.

Appellant employed Harvey O. Brasfield to sell sewing machines for it at Lonoke. He had been in its employment for quite a while in that vicinity. On December 7, 1927, he was fined $100 in the municipal court at North Little Rock for transporting liquor. Being without money to pay his fine, he requested the officer in whose custody he was to take him to appellant's office in Little Rock, where he applied for assistance. The manager refused to grant his request, and demanded that he turn over the machines stored at Lonoke, and to pay it what money he had on hand belonging to appellant. After Brasfield did this, the manager of appellant discharged him. Brasfield then prevailed upon the officer to take him to Lonoke for the purpose of raising money to pay his fine. After reaching Lonoke, some hour and a half after his discharge, he applied to Joe P. Melton to borrow money upon his insurance policy to pay the fine, and, when Melton refused to lend him any money, he offered to sell him the two sewing machines in question, which machines had been listed and constructively delivered to the manager by Brasfield before he left Little Rock. Melton declined to buy them. About that time appellees came in, and, after some negotiation with Brasfield, in the

presence of Melton and the officer, they purchased the machines for $50 each, about one-third of their value. No examination or inspection was made of the machines by appellees. They were stored at some other place in Lonoke. Appellees took a bill of sale to the machines, and, after receiving same, laid the $100 on the table, which the officer picked up, and released Brasfield. Brasfield was not seen again by the manager of appellant.

The substance of the testimony, above detailed, discloses, beyond cavil or question, that Brasfield disposed of appellant's sewing machines for the purpose of paying his individual fine, and that appellees purchased the property with knowledge of the purpose for which it was to be used. The sale was not in due course. On the contrary, the machines were sold without inspection or examination, for one-third of the sales price, by an agent, while under arrest, for the purpose of paying his fine, and obtaining his release.

The law is that every one who deals with an agent must take notice of the want of authority on the part of the agent to use the proceeds arising from the deal for the agent's individual purposes. The proceeds could only be used or appropriated to the use and benefit of the principal, the employer. *Smith* v. *Janes,* 53 Ark. 135, 13 S. W. 701; *Groom* v. *Neff H. Co.*, 79 Ark. 401, 96 S. W. 135; *Bank of Hoxie* v. *Hadley Milling Co.,* 119 Ark. 53, 177 S. W. 891; *Briggs* v. *Collins,* 113 Ark. 190, 167 S. W. 1114, L. R. A. 1915A, 686.

The rule of law peculiarly applicable to the undisputed facts in the instant case is aptly stated in the case of *F. & T. Lumber Co.* v. *Devine,* 50 Cal. App. 102, 194 Pac. 754, 21 R. C. L. 913, in the following language: "A person who knowingly receives money or property of a principal from an agent, in payment of the latter's debt, does so at his peril, and if the agent acted without authority, the principal may recover."

On account of the error indicated the judgment is reversed, and the cause is remanded with instructions to the trial court to render judgment in favor of appellants

for the return of the machines, or their value in the sum of $275.

KIRBY, J., dissents.

[redacted]

STEPHENS *v.* HARRIS.

Opinion delivered October 14, 1929.

[redacted]

E. F. McFaddin and *U. A. Gentry,* for appellant.

KIRBY, J. Appellees brought this suit against appellant to quiet the title to 80 acres of land in Hempstead County (east half southeast quarter, section 35, township 10 south, range 24 west). J. H. Harris disappeared from Hempstead County sometime in 1923 and had not been heard from since to the filing of this complaint by Maggie Harris, his wife, and the other appellees, their children.

Defendant denied allegations of the complaint, alleged his own chain of title, pleaded as *res judicata* a judgment rendered against Margaret Harris, Chester Woodberry, Cherry Harris and Charlie Harris for possession of the lands, and, upon judgment being rendered against him, appealed.

It appeared from the testimony that John Harris, husband and father of appellees, left home in 1923, and had never returned or been heard from by his family; that he had lived on the lands since 1898, and raised a

family on these lands since their purchase from the Missouri Trust Company, under contract and conveyance thereof by deed in December, 1904, which was lost, and not recorded. That the successor to his grantor and owner of its assets, the Missouri-Lincoln Trust Company, executed and delivered its substitute deed "to the heirs and legal representatives of the said John Harris, in lieu of the lost or destroyed deed theretofore executed by the Missouri Trust Company conveying said lands." Tax receipts were exhibited for the years 1907-1913, 1915-1918, 1922, 1927. Maggie Harris testified that her husband had paid the taxes on the lands every year since her marriage in 1898, except one year. The county clerk testified from the records that J. H. Harris paid the taxes on these lands for 1914. Several witnesses, one a justice of the peace, testified that John and Maggie Harris had lived on the lands from the time he had known them for years and until John Harris disappeared; that no one else had, to his knowledge, lived on or been in possession of it while he knew Harris. One witness stated he had lived on the adjoining farm to Harris, helped him to move on the place, where he lived for 25 or 30 years under claim of ownership, until he disappeared about four years ago. Another on an adjoining farm said Harris lived there for 24 years until he disappeared, another for 20 years, and one had known of his possession for 15 years. Summons was served in this case on December 22, 1924.

The court held that J. H. Harris acquired title by adverse possession, which inured to his widow and children, appellees, and that the decree against Cherry Harris and Charley Harris, minors, was void.

It is insisted first that the court erred in refusing to consider the testimony of one of the attorneys of the defendant, appellant herein, that, in the fall of 1923, Chambless, grantor of Stephens, appellant, and John Harris were in his office, and had a discussion and argument about the title to the lands while Harris was liv-

ing on them, and shortly before his disappearance. Chambless stated he had bought the lands years before from the same company and sold it to Harris by oral contract, agreeing to deed it when paid for; that Harris said he couldn't pay for it, and agreed to surrender it to Chambless, with some personal property on which Chambless had a claim, which was taken into possession. Harris agreed to pay rent on the property for the previous year, to a settlement for rent accrued, and, a short time later, disappeared.

The record shows the court, after objection, said: "I think it is admissible. Go ahead and state it into the record." After the statement was made, and upon further objection that it was improper, since one man was dead and the other gone, and the conversation had occurred more than five or six years before, the attorney admitted that Chambless, his client, was dead, and said there was no way of proving the fact otherwise, the agreement made in his presence. He said he wanted "to make a record of it." The court said, "I doubt if it is admissible."

This is not a sufficient showing that the court held the testimony inadmissible or refused to consider it. He only expressed a doubt of its admissibility, after holding it admissible and hearing it, which is not sufficient to show it was disregarded. This statement is out of harmony with and contradictory of the evidence showing the purchase of the lands by Harris from the Missouri Trust Company, their occupancy by him and his family for years, and payment of taxes thereon, and the conveyance thereof by the successor of his grantor to his widow and children by a substitute deed for the lost deed, etc.

Neither did the court err in not holding the plea of *res judicata* a bar to appellees' right to recover. That suit was not against John H. Harris, owner of the legal title to the lands, and the minors sued therein were not represented in court, had no guardian, guardian or attorney *ad litem,* to defend for them, but made default, as

did also their mother, appellee herein, whose title, since acquired by the substitute deed, was not adjudicated therein, and could not have been, and, without regard to the judgment, the widow and minor children were entitled to hold the lands as a homestead, the husband and father having deserted them, and such judgment, had it been regularly rendered against John H. Harris, their father, would not have barred the right of the minors to possession of the homestead, nor their right to claim same after such judgment rendered.

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

SIBLEY *v.* PATRICK.

Opinion delivered October 14, 1929.

John M. Parker & Son and *Carmichael & Hendricks*, for appellant.

A. S. Hays, J. B. Ward and *F. W. Majors,* for appellee.

KIRBY, J. Appellant brought this suit to establish as a lost will a soldier's letter, alleged to be a holographic will, devising the entire estate to him as sole beneficiary, and from the finding that the soldier died intestate, and the decree dismissing his cause for want of equity, the appeal is prosecuted.

Appellant alleged that Alston K. Wilson, a soldier in the A. E. F., who died in France in 1918, had given him all his estate by a letter alleged to be a holographic will, written to him from the army camp at Chattanooga,

Tennessee, before going overseas. The letter reads as follows:

"I am sailing for France in a few days, and feel that I will never return, and I am leaving you my property. I have not seen my father for several years, as we had a misunderstanding, and I have been told that he went to Texas in the cattle business."

The petition alleged the loss or destruction of the will, and prayed that same be established and declared to be the last will and testament of Alston K. Wilson, etc.

The amendment to the complaint alleged that the will was either in existence at the time of the death of Alston K. Wilson or had been fraudulently destroyed in the lifetime of the testator; that he was the owner of certain real estate in the Dardanelle District of Yell County, describing it, and that Lalla Wilson Patrick and Park A. Patrick were wrongfully claiming said real estate by virtue of a forged deed filed for record July 29, 1913, and October 13, 1920, and that said parties had been in the unlawful possession of the said property; prayed an accounting for rents, and the cancellation of the deed.

The second amendment alleged that his mother, Mrs. Mattie Hughes, was an aunt of deceased, and entitled to inherit an undivided one-third interest in the land described in the complaint, if Alston K. Wilson died intestate; that since the filing of the amendment he had acquired his mother's interest by deed, and was now the owner thereof.

Appellee denied that Alston K. Wilson made a will devising his property to appellant; denied that the letter or purported will was in the handwriting of Alston K. Wilson, that it was in words or signature as alleged, and that same had been lost or destroyed; alleged that Wilson died intestate, and admitted that he died in France, leaving certain personal property, but denied that he possessed any real estate in the county of Yell, and alleged that appellant knew from the date of Alston K. Wilson's death that he had a war risk policy of $5,000, and had

made no effort to collect it, and made no claim to any part of it, notwithstanding he knew the other heirs of Wilson were making proof of their claims for such interest, and that he acquiesced therein.

There was a great deal of testimony introduced, the testimony on the part of appellant going chiefly to the form and contents of the letter alleged to be the will, while the experts in testifying confined their statements to the genuineness of the signature of the letter. None of the witnesses claimed to have been especially familiar with the handwriting of Wilson, nor did they relate any facts from which such knowledge of it could be inferred. The experts themselves did not testify that the whole instrument, the body of the letter and the signature thereto, were in the same handwriting, nor did any three disinterested witnesses testify to such fact. Appellant himself testified about the loss of the letter, charging one of the appellees with having wrongfully taken and concealed it, but in stating its contents said it read: "I am sailing for France, and don't think I will ever return, and I want you to have my property," and on cross-examination said: "I am sailing for France in a few days, and don't think I will return. I want you to have my property." He also introduced in evidence a second letter he claimed to have received from Alston K. Wilson in France, in which he said that he could not do the thing requested, and had not time, and that he had already given him his property before leaving here. Experts testified that the signature to this letter was genuine, and they and others that the entire letter was in the handwriting of the deceased.

There was testimony about the alleged forgery of a contract for conveyance of the lands by the soldier and his father and his aunt, Mrs. Patrick, for the sale of the lands, some of the experts and others testifying that the deed was a forgery, while the other testimony tended to show it was genuine; and there is no question, but that Mrs. Patrick had paid $2,700 upon a draft for the pur-

chase money of the lands, and that $50 had been paid upon the execution of the contract of sale by the parties. This was slightly less than the greatest amount some of the witnesses placed as the value of the property.

The statute, § 10495, part 5, provides:

"Fifth. Where the entire body of the will and the signature thereto shall be written in the proper handwriting of the testator or testatrix, such will may be established by the unimpeachable evidence of at least three disinterested witnesses to the handwriting and signature of each testator or testatrix, notwithstanding there may be no attesting witnesses to such will; but no will without such subscribing witnesses shall be pleaded in bar of a will subscribed in due form as prescribed in this act."

For the establishment of lost wills, § 10545 provides:

"No will of any testator shall be allowed to be proved as a lost or destroyed will, unless the same shall be proved to have been in existence at the time of the death of the testator, or be shown to have been fraudulently destroyed in the lifetime of the testator; nor unless its provisions be clearly and distinctly proved by at least two witnesses, a correct copy or draft being deemed equivalent to one witness."

This last section, however, only relates to the establishment of a lost or destroyed will, and does not relieve against the necessity of proving that the entire body and signature of the unwitnessed instrument or letter offered as a holographic will is in the proper handwriting of the testator, by the unimpeachable evidence of at least three disinterested witnesses to the handwriting and signature of the testator. In other words, such an unwitnessed instrument, testamentary in character, can only be proved to be a will by compliance with the said statute relating to the proof of wills in the proper handwriting of the testator. *Murphy* v. *Murphy,* 144 Ark. 429, 222 S. W. 721; *Cartwright* v. *Cartwright,* 158 Ark. 279, 250 S. W. 11.

After a careful examination of the testimony we are not able to say that the finding of the chancellor that the instrument or letter offered as a will was not proved as the statute requires it should be done, and that the testator died intestate, is against the preponderance of the evidence. Appellant, in stating the words of the will or letter, stated it neither on his direct or cross-examination as he had alleged it to be, "I am leaving you my property," but only, "I want you to have my property." The other witnesses testified, those who claimed to have seen the letter, that in form and meaning it was about as alleged. The construction of the language as alleged to have been used in the letter, "I am leaving you my property," and as stated by appellant and his witnesses, "I want you to have my property," might be different, the one expression indicating certainly more clearly a testamentary intention than the other, which might be held to indicate that the writer was only expressing his desire in the matter and indicating what might thereafter be done, while the other indicates the matter is finished.

We do not regard it necessary, however, to hold whether this proof meets the requirements of the statute (§ 10545) relating to the establishment and proof of lost or destroyed wills, since we do not find that the chancellor erred in not holding the letter proved as a holographic will, and that the writer thereof died intestate.

No good purpose would be served by a more extended analysis of the testimony in this case, and, having upheld, as we do, the decree of the chancellor, it becomes unimportant. The decree is accordingly affirmed.

BLUME *v.* LIGHTLE.

Opinion delivered October 14, 1929.

[redacted]

John E. Miller, for appellant.

Brundidge & Neelly, for appellee.

MEHAFFY, J. This is an action for $100 per month damages for the rental value of property in Searcy, Arkansas, belonging to the appellees. Appellees, who were plaintiffs below, allege that the appellants were indebted to them in the sum of $1,090, balance of rent due on the theater building in Searcy, for the months of February, March, April, May, June, July, August, September, October and November.

The appellees had brought suit in the White Circuit Court in January, 1928, to recover the possession of the

theater building, and damages for the unlawful detention of same. The appellants filed bond, and retained possession. The cause was tried, and resulted in a judgment for appellees for the possession of the property, and $150 for the retention of the possession of the property for the month of January, 1928. There was an appeal prosecuted to this court, and the judgment of the circuit court was affirmed. *Blume* v. *Lightle,* 177 Ark. 1134, 10 S. W. (2d) 45.

The facts are stated in the opinion above referred to, and it is not necessary to restate them here, but only the facts that have developed since the affirmance of the case in this court need be stated here.

After the affirmance of the case referred to by this court, the present case was tried, and it was agreed that the appellants had paid $150 a month for all the time that the theater building had been detained, but it is the contention of the appellees that they were entitled to $250 a month, and the case was tried before the circuit judge sitting as a jury, and the court found that the appellees were entitled to $250 a month during the time the building was detained by appellants; and, as they had only received $150, judgment was given for $100 a month during the time the building was wrongfully detained.

There are but two questions in the case. First, whether the judgment for possession and $150 a month for the property during January is a bar to plaintiff's right to recover in this case. In other words, the appellants contend that the identical question was determined in the trial of the former suit that is involved here. That is, the amount of damages per month that appellees were entitled to. And the second question is, if the appellees were entitled to recover here, whether they recover up to the time possession was delivered to them, which was on the 12th of the month, or recover for that entire month.

Res judicata is a doctrine of peace and the foundation principle upon which the doctrine rests is that par-

ties ought not to be permitted to litigate the same issue more than once; that when a right has been judicially determined by a court of competent jurisdiction, or if an opportunity for such trial has been given, the judgment of the court should be conclusive upon the parties. Public policy and the interest of litigants alike require that there should be an end to litigation, and the peace and order of society demand that matters distinctly put in issue and determined by a court of competent jurisdiction shall not be retried between the same parties in a subsequent suit. 15 R. C. L. 953.

It has been said that the doctrine of *res judicata* is not to be applied to a denial of justice or to deprive a party of a righteous defense. *E. Souther Iron Co.* v. *Woodruff Realty Co.*, 175 Mo. App. 246, 158 S. W. 69.

But where the parties are the same and the issues are the same, it is not the verdict that may be pleaded as estoppel, but the judgment rendered by the court. In this case the judgment rendered was not for $150 per month, but the court rendered judgment for $150 for the month of January.

The question of rent or the amount of rent subsequent to January was not in issue and was not litigated. If the question of the monthly rent subsequent to that time had been litigated, then the judgment in the former case would be a bar.

Where an issue sought to be litigated in a pending action has already been litigated and decided in a former action the issue is *res judicata*. *Bowman* v. *Sims*, 135 Ark. 450, 205 S. W. 820; *Davis* v. *Cook*, 189 Ark. 85, 251 S. W. 691.

The real controversy in the original suit was whether or not appellees were entitled to the possession of the property. The matter of damages from the time they were entitled to its possession up to judgment was incidental, only involved the rent for the month of January, and it was not intended to settle, and did not settle the controversy about the amount of the rent thereafter.

There might have been many things that would have changed the rental value of the property. The property might have been more valuable, and, after the judgment, appellees might have been able to rent it for $500 a month. On the other hand, it might have depreciated in value so that it would not have been worth $150 a month, and we do not think that the question of the rental value of the property subsequent to the month of January, for which a judgment was given, was involved in the former suit.

When the former judgment was rendered, appellants could have delivered possession of the property and paid the rent up to that time, and would not have been liable for anything further, but they did not do this. They not only appealed to this court, but gave a supersedeas bond, and retained possession of the property, and, in doing that, they made themselves liable for all the damages suffered by the appellees by reason of their detention of the property, and the undisputed proof shows that this was $250 a month, and, $150 only having been paid, they were entitled to a judgment for the $100 a month additional.

We do not think that the appellees were entitled to the $90 rent, which was the amount claimed for the balance of the month after possession was delivered to them, for the reason that there is no question of rental from month to month involved. It might as well be said that it was a rental from year to year, and that if they kept possession by reason of the supersedeas bond and delivered it in the middle of the year, they would be liable for the balance of the year's rent. We think that when they gave the bond and kept the property they were liable for the rental value up to the time that possession was delivered to the appellees.

The judgment of the circuit court, therefore, will be modified by disallowing the $90, and the case will be affirmed for $940. It is so ordered.

HART, C. J., and SMITH, J., think the judgment should be affirmed.

FOWLER *v.* UNIONAID LIFE INSURANCE COMPANY.

Opinion delivered October 14, 1929.

[redacted]

E. M. Fowler, for appellant.

J. V. Walker, W. B. Sorrels, Creed Caldwell, Bullion & Harrison and *Duty & Duty*, for appellee.

MEHAFFY, J. On the first day of October, 1914, the appellant, L. W. Fowler, made application for member-

ship in the Mutual Aid Union, and was issued a certificate by said company. The application stated that it was understood that the value and conditions of the certificate for membership to be issued on this application shall be as follows: The application then states that, if death should occur within the first six months, the benficiary shall receive $75, and that the value of the certificate would then increase $12.50 per calendar month until the value of the certificate was $1,000; provided that prompt and due payment be made of all assessments as provided by the by-laws and regulations of the Mutual Aid Union. The assessment was to begin at 38 cents and reach its maximum at $1.18.

This was a mutual assessment company, and the appellant paid his assessments from 1914 up until December, 1926, when the Mutual Aid Union entered into a reinsurance contract with the appellee.

The application also contained the provision that it should be considered a part of the contract for membership, and that, if the application was accepted and certificate issued, the applicant accepted the by-laws and regulations with all amendments governing the Mutual Aid Union, and appointed and constituted J. W. Walker, R. H. Whitlow and J. E. Felker, the officers of the Mutual Aid Union, jointly, and their successors, to be his lawful attorney in fact to cast his vote at the annual election on the first Tuesday in January of each year, not only on the question of the election of the directors, but any other question arising for consideration. This power of attorney was never revoked by appellant, and this application was a part of the contract and a warranty by the member.

From the application there was issued to appellant a certificate in Circle No. 3, certificate No. 822. It provided for the payment of the amounts mentioned in the application within thirty days after the receipt at the home office of satisfactory proof of the death of the applicant.

After the reinsurance contract was entered into between appellant and the Mutual Aid Union, the appellee wrote appellant a letter, and enclosed him a notice of the reinsurance agreement. It expressly stated in the letter that it assumed the liabilities of the Mutual Aid Union to its members and certificate holders, and would carry out the agreement of the Mutual Aid Union with the members, subject to the terms of the transfer.

The letter also stated: "Kindly attach the enclosed certificate of assumption to your membership certificate, which is all that is necessary, and hereafter address all communications and make your remittances for assessments to the Unionaid Life Insurance Company, Rogers, Arkansas."

The certificate of assumption accompanying said letter reinsured and assumed all liability under certificate No. 822, but expressly stated that this contract is made in conformity with the reinsurance contract between the Unionaid Life Insurance Company and the Mutual Aid Union, filed with and approved by the Commissioner of Insurance and Revenues of the State of Arkansas, etc.

Appellee sent appellant a notice on June 17, 1928, advising him that his rate for the month of June under the certificate that he held would be $1.92, and stated certain options that he might have.

The reinsurance contract provided that the payment of the premium or assessment should be determined by the acceptance of the terms and provisions.

The appellant in his application, as we have already said, provided that the application and certificate, together with the by-laws, are taken and construed as a part of the agreement. In other words, appellant's contract was not simply the certificate, but it was the application, the certificate and the by-laws of the company. This was the agreement of the parties. This was the contract.

The articles of incorporation of the Mutual Aid Union provided: "The board of directors shall have power to adopt and execute such plans and systems of

insurance as they may deem for the best interests of the corporation; to fix and determine the amount for which the policy or certificate shall be issued, rates and amounts of assessments or premiums, and the terms and manner of payment thereof; to make, alter or repeal by-laws, rules and regulations for the transaction of the business of the corporation, and as they may deem expedient."

At the time that appellant made his application and received a certificate in 1914, one of the by-laws in force provided: "Any amendment, alteration or addition to this instrument must be proposed by one of the directors, and must have the unanimous support of the board of directors before being accepted."

It further states: "The association retains the right and privilege to call increased, additional or extra assessments for those members belonging to circles or in the step-rate divisions, as is necessary or deemed expedient by the board of directors."

The appellant first contends that the lower court committed reversible error in finding that appellee had a right to adjust the rate of insurance premiums which appellant had been paying, and he bases this contention on the fact that the application and certificate fixed the amount of assessments, the minimum being 38 cents and the maximum $1.18, and contends that this was a written contract between the appellant and the Mutual Aid Union, and that appellant had no right to change this written contract without his consent.

If the certificate and application constituted the whole contract, appellant's contention would be correct. But the certificate and application did not constitute the whole contract. It was expressly agreed by the parties that the by-laws of the association should be a part of the contract, and the by-laws authorized the increase of rates.

Appellant first cites and relies on the case of *American Insurance Union* v. *Rowland,* 177 Ark. 875, 8 S. W. (2d) 452. In that case, among other things, we said:

"In the instant case the undisputed proof is that the appellant did not send to the insured a copy of the merger contract, and that it was not attached to the policy, but the letter sent stated that the appellant assumed the original contract, and that contract had the disability clause, and the insured was never notified until two years after the maximum assessment had been reached, and in the instant case the suit was based on the original certificate. In the Knight case it was based on the merger contract. * * * Mrs. Robinson never received the merger contract, and never heard of it. In the instant case, Mrs. Vandment never received it, and the only thing she ever heard about it was that the letter stated it was on file with the Insurance Department."

But we also said in that case: "Both parties to the contract are bound by it, but they are bound by all the provisions. The cardinal rule in the interpretation of contracts is to ascertain the intention of the parties and give effect to that intention, if it can be done consistently with legal principles." *American Ins. Union* v. *Rowland*, 177 Ark. 875, 8 S. W. (2d) 452.

Policies of insurance should receive a liberal and reasonable construction in favor of the beneficiaries. But that does not mean you can select the certificate or the application alone in cases where both parties have agreed that the application, certificate and by-laws shall constitute the contract. The intention of the parties manifestly was that the by-laws constituted a part of the contract, and the parties were bound to know that the by-laws authorized a change in the assessments. If any doubt existed as to the construction of the contract, it should be interpreted against the party who has drawn the contract, that is, the insurance company. But in this case there can be no doubt about the meaning of the contract.

It is also a well-settled rule in construing a contract that the intention of the parties is to be gathered, not from particular words and phrases, but from the whole

context of the agreement. In fact, it may be said to be a settled rule in the construction of contracts that the interpretation must be upon the entire instrument, and not merely on disjointed or particular parts of it. The whole context is to be considered in ascertaining the intention of the parties, even though the immediate object of inquiry is the meaning of an isolated clause. Every word in the agreement must be taken to have been used for a purpose, and no word should be rejected as mere surplusage if the court can discover any reasonable purpose thereof which can be gathered from the whole instrument. The contract must be viewed from beginning to end, and all its terms must pass in review, for one clause may modify, limit or illuminate the other. Taking its words in their ordinary and usual meaning, no substantive clause must be allowed to perish by construction, unless insurmountable obstacles stand in the way of any other course. Seeming contradictions must be harmonized, if that course is reasonably possible. Each of its provisions must be considered in connection with the others, and, if possible, effect must be given to all. A construction which entirely neutralizes one provision should not be adopted if the contract is susceptible of another which gives effect to all of its provisions. *American Ins. Union* v. *Rowland,* 177 Ark. 875, 8 S. W. (2d) 452; 6 R. C. L. 837-8.

And in the instant case, if the entire contract is considered, there can be no doubt that the right to change or raise the rates was agreed to, and that the appellant authorized the officers of the company to act as his attorney in fact and cast any vote that he might cast.

The appellant next calls attention to *American Insurance Union* v. *Robinson,* 170 Ark. 767, 281 S. W. 393. In that case the court said:

"The rider which the Home Protective Association of Springdale, Arkansas, attached to the certificate of insurance issued to Mary S. Robinson by the American Mutual Benefit Association of Jonesboro was an absolute

assumption of liability under certificate No. 908, class 4, issued by the latter fraternal organization to Mrs. Robinson. Her certificate and roll numbers were changed for the purposes of designation and reference, but the rider did not attempt to change her membership or the terms of her original contract. It contained no provision requiring her to accept the rules and by-laws of the Home Protective Association of Springdale, nor did it contain a notification that her certificate would be controlled or governed by them."

This contract is made in conformity with the reinsurance contract between the Unionaid Life Insurance Company of Rogers, Arkansas, and the Mutual Aid Union of Rogers, Arkansas, of date December 14, 1926, filed with and approved by the Commissioner of Insurance and Revenues of the State of Arkansas, and certified to by him as fully protecting the interest of all the certificate holders of the Mutual Aid Union of Rogers, Arkansas. The notice also provided that liabilities were assumed, and would be carried out subject to the terms of the transfer.

We agree with the appellant that appellee had no rights which the Mutual Aid Union did not have at the time the reinsurance agreement was entered into, but we do not agree that the Mutual Aid Union could not raise the rates. This, as we have already stated, was expressly provided for in the by-laws which were a part of appellant's contract.

Appellant calls attention next to the case in 173 Ark. where an attempt was made to adjust rates. In that case we said:

"These contracts provided that, when the assured became a member or policyholder of the association, he should pay an initial assessment, which thereafter should increase and be payable at the rate of one cent per month during the membership until the 78th month from the date of the policy, when the maximum assessment would be reached." *Mutual Relief Association* v. *Ray,* 173 Ark. 9, 292 S. W. 396.

And we also said in that case: "Section 5 of the by-laws provides, in part, as follows: 'The revenue of this association shall be derived from a policy or incidental fee, the amount of which shall be fixed by the board of directors, and may be raised or lowered at any time as necessity may require. This fee shall be paid when the application is made for membership, and shall be used in defraying expenses incurred in the completion of a company in this association.'

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

The difference between that case and this is that the authority given there was to raise the incidental fee, and, as the court held, had no reference whatever to assessments. In that case there was nothing to bind the policyholder to any by-laws or any rules or regulations. In the instant case the appellant contracted that the by-laws should be a part of the contract of insurance, and agreed for a change of rates; agreed to be bound by the by-laws of the association, and designated the officers as his attorneys in fact to vote for him at the annual election.

We therefore conclude that there was no violation of the contract by the appellee. Since we hold that the appellee had a right to change the rates under the contract, and that there was no violation of the contract by it, it becomes unnecessary to discuss or decide the other questions discussed by the attorneys.

The chancellor's finding is supported by the evidence, and the decree is therefore affirmed.

SOUTHWESTERN GAS & ELECTRIC COMPANY *v.* PATTERSON ORCHARD COMPANY.

Opinion delivered October 14, 1929.

Abe Collins and *Arnold & Arnold,* for appellant.

Lake, Lake & Carlton, for appellee.

McHaney, J. The principal facts involved in this controversy, as well as the history of this litigation, are well stated in the recent case of *Patterson Orchard Co.* v. *Southwest Arkansas Utilities Corporation,* 179 Ark. 1029, 18 S. W. (2d) 1028, and we will not repeat them here, except as may be necessary to a proper understanding of the issues here decided.

Appellant, Southwestern Gas & Electric Company, is a foreign corporation, but for some years has been doing business in this State in compliance with all laws regulating the admission of foreign corporations into this State. It is engaged in the business of supplying electricity to consumers, owning, constructing and operating high tension lines and distributing systems. In the construction of one of its high tension lines, it sought a thirty-foot right-of-way over and across the orchard lands of appellee, which it was unable to obtain by negotiation. It thereupon, on March 17, 1928, filed with the clerk of the circuit court of Sevier County its petition to condemn said right-of-way, and thereafter, on the same day, presented same to the circuit judge, and obtained an order directing a deposit with the clerk of a certain sum of money, and giving authority to enter upon said land and construct its lines. No notice was given appellee of this application. On March 20, on application of appellee, the judge made another order holding in abeyance his first order, which was served on appellants at a time when

the line was practically completed across the orchard. This second order was made by the judge for the reason that the Southwestern Company is a foreign corporation, and not authorized under the Constitution to condemn property. The Southwest Arkansas Utilities Corporation was then organized, and brought its action in the circuit court to condemn the same right-of-way across the orchard. On motion of appellee the cause was transferred to the chancery court, which proceeded to decree in plaintiff's favor, conditioned as follows: "Conditioned, however, upon the payment to the defendant by the plaintiff * * * one thousand dollars, covering all damages sustained by the defendant on account of the taking of said right-of-way by the plaintiff," etc.

The defendant in that action is the appellee here. That decree was affirmed by this court on July 8, 1929, as above stated, both on the appeal and cross-appeal, appellee contending in that case that the damages assessed were excessive.

In the original action by appellant, the Southwestern Company, appellee filed an answer and cross-complaint, alleging that said appellant had no authority to condemn its property, and that it had been damaged on account of the wrongful entry upon its lands in the sum of $500 actual damages and $5,000 punitive damages. On a trial to a jury there was a verdict and a judgment in favor of appellee for $700.

The Southwestern Company will be hereafter referred to as appellant, although there are several other appellants against whom the judgment was obtained.

The first question presented is whether a foreign corporation, having complied with our foreign corporation laws, may condemn private property. Section 11 of article 12 of the Constitution of this State reads as follows:

"Foreign corporations may be authorized to do business in this State under such limitations and restrictions as may be prescribed by law. Provided, that no such corporation shall do any business in this State except while it maintains therein one or more known places of busi-

ness, and an authorized agent or agents in the same upon whom process may be served; and, as to the contracts made or business done in this State, they shall be subject to the same regulations, limitations and liabilities as like corporations of this State, and shall exercise no other or greater powers, privileges or franchises than may be exercised by like corporations of this State, nor shall they have power to condemn or appropriate private property."

The Legislature of this State has never undertaken to extend the power of eminent domain to foreign corporations. By an act approved March 22, 1887, act No. 80, p. 110, entitled, "An act to prohibit foreign corporations from operating railroads in this State," it was made unlawful for any citizen or corporation of another State to "build, lease, own, maintain or operate a railroad within this State," and all such persons or corporations were required to organize domestic corporations for this purpose. By act 34, Acts of 1889, p. 42, certain sections of the act of 1887 were repealed, and other sections added which provided, among other things, that when a foreign railroad company complied with the law by filing with the Secretary of State a certified copy of its articles of incorporation or charter, it thereby "became a corporation of this State, anything in its articles of incorporation or charter to the contrary notwithstanding."

In *Russell* v. *St. L. S. W. Ry. Co.*, 71 Ark. 451, 75 S. W. 725, this court held that: "Upon a compliance with the act of 1889 a railroad corporation of another State becomes a corporation of this State, with all its rights and powers, and subject to all its duties and obligations," including the power or right of eminent domain. The opinion in that case is based upon the language of the act of 1889, which provides that, upon doing the things heretofore stated, a foreign corporation becomes a domestic corporation. This statute stood unamended and unchanged as § 8424, C. & M. Digest, until 1925, when, by act 254, Acts 1925, p. 745, it was amended to include pipe lines, but not power lines.

Of course, by complying with said statute, the foreign corporation does not surrender its identity as a foreign corporation, but continues for jurisdictional purposes to be a corporation of the State of its creation, and may remove proper cases to the Federal courts. It is, however, domesticated in this State, and, to all intents and purposes, in connection with its business in this State, is a corporation of this State. It becomes the adopted child of this State. But not so as to all other foreign corporations. Nowhere do we find in our foreign corporation laws any language that makes them corporations of this State. Upon compliance with our laws they are given all the powers of domestic corporations, except such as are prohibited by the Constitution. The power of eminent domain is expressly extended to traction, light and power companies organized in this State by § 4042 *et seq.*, C. & M. Digest, but not to foreign companies, the Legislature evidently considering that it had no power to do so without first requiring them to become domesticated.

The Russell case, *supra*, was cited in *L. & N. W. Rd. Co.* v. *State*, 75 Ark. 435, 88 S. W. 559, 5 Ann. Cas. 637, and on page 441 this language is used: "This court held in *Russell* v. *St. L. S. W. Rd. Co.*, 71 Ark. 451, 75 S. W. 725, that a foreign railroad corporation complying with the laws of this State becomes a domestic corporation, and capable of exercising eminent domain, which can only be exercised by domestic corporations." We therefore conclude that a foreign corporation, such as appellant, cannot exercise the power of eminent domain because prohibited by the Constitution of this State.

The next question for our determination is, was appellee entitled to recover any damages from appellant, a requested peremptory instruction having been refused it? It contends that appellant was a trespasser on its property; that counsel for appellant obtained the order from the circuit judge permitting it to enter in bad faith; and that fraud was practiced on the judge in procuring the order in that the fact that it is a foreign corporation was concealed from him, the allegation in the petition being

that it was a corporation authorized to do business in this State, without stating that it was a foreign corporation. It is further said that the petition was not filed with the clerk until the 20th, when appellant was ready to enter on the land, and that this is an evidence of bad faith. We do not agree with appellee. Mr. Collins, counsel for appellant, testified quite positively that he did file the petition with the clerk on the 17th, and before the matter was presented to the judge; that he did not know why it showed filed on the 20th; that he gave appellee no notice for the reason the statute does not require it. The clerk says he thinks the petition was handed him a few days before the 20th, the day it was actually marked filed; that he swore Mr. Leighton to the complaint on the 17th, and the complaint or petition was in his office at that time. His memory was uncertain as to what actually happened. This question is only material in determining whether the matter was before the judge. No question of the jurisdiction of the court is raised. The order was obtained by eminent counsel, who, in good faith, tried out the question as to the right of a foreign corporation, such as appellant, to condemn private property, both in the lower court and in this court. The argument made in this court is of such persuasive force that Mr. Justice KIRBY and the writer are not entirely satisfied they are not right about it. And, while we are holding that they are wrong in this contention, it does not follow that they are not in good faith in making it. Having obtained the order in good faith, and having constructed the line pursuant to it, appellant could not have been guilty of such a willful and malicious wrong by entering under a void order as to justify a recovery of punitive damages. It in good faith believed it had the right to enter, and there is a total lack of evidence of malice, either express or implied, which is necessary to support a recovery for punitive damages. *Texarkana Gas & Electric L. Co.* v. *Orr,* 59 Ark. 215, 27 S. W. 66, 143 Am. St. Rep. 30; *St. L. I. M. & S. R. Co.* v. *Wilson,* 70 Ark. 136, 66 S. W. 661, 91 Am. St. Rep. 74;

Ry. Co. v. *Stroude,* 77 Ark. 109, 91 S. W. 18, 113 Am. St. Rep. 130; *Moore* v. *Wilson, ante* p. 41.

Neither can there be any recovery for actual damages in this case. The decree in the case of *Patterson Orchard Co.* v. *S. W. Ark. Utilities Corp., supra,* specifically recites that the $1,000 paid shall cover "all damages sustained by the defendant (appellant here) on account of the taking of said right-of-way by the plaintiff." There is no showing that appellant did any damage to appellee's property outside of the thirty-foot right-of-way, and only slight damage to it, which was paid for by the Southwest Arkansas Utilities Corporation. The principal damage was the value of the property taken, and that, as well as all other actual damages, was recovered in the former suit. Manifestly appellee is not entitled to recover twice for the same property.

Nor is appellant entitled to recover from appellee the damage done by it in cutting down two of its structures after they were constructed on the land without authority of law. It sold its line in its then condition to the Southwest Arkansas Utilities Corporation, and its right to maintain such action passed to the latter. The court properly refused to submit this question to the jury.

The judgment will be reversed, and the cause dismissed. It is so ordered.

MEHAFFY and BUTLER, JJ., dissent.

UNIONAID LIFE INSURANCE COMPANY *v.* POWERS.

Opinion delivered October 14, 1929.

J. V. Walker, Bullion & Harrison, Creed Caldwell and *Duty & Duty,* for appellant.

George H. Holmes, for appellee.

McHaney, J. These are eight separate cases involved in separate appeals, which have been consolidated and briefed together as one case in this court. As regards the venue of the actions, they are all ruled by the recent case of *Unionaid Life Ins. Co.* v. *Smith,* 179 Ark. 164, 15 S. W. (2d) 321, where a like state of facts existed, like procedure followed, and conclusions of law reached, after analysis of the applicable statutes, contrary to the contentions of appellant, both in that appeal and in these. We are asked, however, to reconsider that case, and overrule it. We have given careful consideration to the argument of learned counsel for appellant, and decline to do so.

Another question is presented in these cases, "that the judgments were void because the suits were for claims for unliquidated damages for an alleged breach of contract, and there was no evidence offered or submitted to sustain the allegations." But the judgment of the court recites that the case was submitted to it on "the complaint filed, the exhibits thereto, and the summons issued thereon, and the evidence adduced by the plaintiff." The complaint alleged that the certificate of insurance was attached thereto as Exhibit A. This exhibit

does not appear in the transcript, and "the evidence adduced by the plaintiff" is not brought into the record by bill of exceptions. We must, therefore, indulge the presumption that the complaint stated a cause of action on the certificate of insurance, and that the evidence adduced was sufficient to sustain the judgment. There was no demurrer or other pleading to the complaint, and, even though the cause of action declared upon were defectively stated, there is a conclusive presumption that the evidence sustains the judgment, and this court will treat the complaint as being amended to conform to the proof. *Rowe* v. *Allison,* 87 Ark. 206, 112 S. W. 395; *Dumas* v. *Crowder,* 178 Ark. 489, 10 S. W. (2d) 43.

The record does not show that the court impaneled a jury to assess the damages. This was not necessary under § 6248, C. & M. Digest.

We find no error, and the judgment is affirmed.

BUTLER, J., disqualified.

BUTLER *v.* JOHNSON.

Opinion delivered October 14, 1929.

A. D. Murphy and *T. O. Abbott,* for appellant.

Herbert V. Betts and *N. A. Cox,* for appellee.

BUTLER, J. An illiterate negro man, Abe Johnson, purchased from one J. W. Young, in 1894, an eighty-acre tract of land in Union County, Arkansas, and went into possession thereof under his purchase, which was evidenced by the following instrument:

"Articles of agreement made the 19th day of....., 1894, between J. W. Young of Lisbon, Union County, Arkansas, party of the first part, and Abe Johnson of Lisbon, Union County, Arkansas, party of the second part, witnesseth: That the said party of the first part, for..... in consideration of the sum of one dollar, to him in hand paid, has contracted and agreed to sell to the said party of the second part all that certain piece or parcel or lot of situated in Union County and above said State, and described as follows: Northeast southwest section 28, township 16, range 17, 40 acres; southeast northwest section 28, township 16, range 17, 40 acres.

"And the said party of the first part agrees to execute and deliver to the said party of the second part a warranty deed for said land described above, provided and upon condition, nevertheless, that the said party of the second part, his heirs or assigns, pay to said party of the first part, his heirs or assigns, for the said land the sum of forty-two dollars ($42), to be paid on the first day of November, 1894, in lawful money, and forty dollars ($40) to be paid on the first day of November, 1895, to be paid to J. W. Young, of the first part. If the second party should fail to meet his payment, or his heirs or assigns, he then forfeits his claim on said land as described above. Then, and in such case, the said party of the first part, his heirs and assigns, shall be at liberty to consider the contract as forfeited and annulled, and to dispose of said land to any other person in same manner as if this contract had never been made.

"In witness whereof they have hereunto set their hands and seals, and delivered.

"J. W. Young,
his
"Abe X Johnson."
mark

At the time of the institution of the suit, both Young and Abe Johnson had been dead for some years. On the 23d of April, 1928, the appellees, Sylvester Johnson and others, as the heirs at law of Abe Johnson, deceased, brought suit in the Union Chancery Court to have their title quieted to the aforesaid lands, and for certain deeds, held by the appellants, A. J. Butler and A. W. Friend, to be canceled as clouds upon their title. The appellants, Butler and Friend, and one R. L. Edwards, who was joined as a party defendant, answered, denying the title of the appellees, and setting up title in themselves, A. J. Butler claiming the south forty acres of the land in controversy by virtue of a deed from the Ouachita Valley Bank, executed and delivered November 1, 1917, which bank claimed title under a deed from J. W. Young, dated May 8, 1916; and A. W. Friend claimed title to the north forty acres under a deed from J. W. Young, dated December 30, 1920.

R. L. Edwards was sued for the value of the timber cut from the land, and answered, admitting the cutting of the timber, but denying the quantity and value as alleged by plaintiffs, and alleging that he purchased same without any knowledge of plaintiffs' claim to said land or timber.

There was a decree for the appellees, canceling the deeds of Butler and Friend, and awarding judgment in their favor against the defendant Edwards for the sum of $195 for the timber cut by him on said land.

The appellants assert, as grounds for reversal, that the preponderance of the testimony failed to show that appellees or their ancestor had paid the consideration named in the instrument *supra;* that said instrument was not such color of title as to extend the occupancy of ap-

pellees to the boundaries of the land named therein; that the evidence failed to show adverse possession of the appellees or their ancestor for the statutory period; and that the decree of the chancellor as to all these particulars was against the preponderance of the testimony.

It is undisputed that Abe Johnson went into possession of the land in controversy in 1894, and remained in continuous possession until his death in 1921, and that since that time appellees' children have remained and are now in possession thereof. The facts disclosed by the testimony relative to the payment by Johnson of the purchase price are meagre, but we think, from a careful consideration of all the testimony introduced, that the preponderance of the testimony tended to establish the fact of payment, and the chancellor was correct in his finding in this respect. Johnson cleared and put in cultivation, a short time after his purchase, a small tract of land on the north forty, and kept the same inclosed and cultivated for many years. He built his cabin and outbuildings on the south forty soon after his purchase, and lived there until he died, and his children (appellees) still live there. The chancellor has found that the purchase price was paid by Abe Johnson, and that his possession, after the payment of the purchase price, was open, notorious, continuous, and adverse to the rights of the appellants and all others, which possession has remained uninterrupted from the date of purchase until the institution of this suit, an interval of some thirty-two years.

As suggested by the appellants, this court has held in *White* v. *Stokes*, 67 Ark. 184, 53 S. W. 1060, and *Beasley* v. *Equitable Securities Co.*, 72 Ark. 601, 84 S. W. 224, 228, that a bond for title is not color of title. But those were cases passing upon the right of the occupant to recover the value of improvements placed in good faith upon the land purchased and held under a bond for title the right to the improvements being based upon the statute, now § 3703, Crawford & Moses' Digest, giving those

in possession of land under color of title and claiming title in good faith right to recover for improvements when ousted by a paramount title. In *Beasley* v. *Equitable Securities Co., supra,* the court, among other things, said: "It does not appear in this case that the occupant, Beasley, who made the improvements, was or is entitled to a conveyance or title, according to the conditions of his bond. So it is not necessary to say what would have been the effect of his bond if he had complied with its conditions." But, as the facts in the case at bar and the claim of the appellees are different from that of the cases cited, the same are not in point. In this case the claim is ownership under a purchase, the consideration for which was paid, and the instrument executed by J. W. Young to Abe Johnson, heretofore set out in this opinion, is but one of the links in the evidence showing the purchase from J. W. Young, and it is immaterial whether it of itself would constitute a color of title; for the title claimed by the appellees does not rest upon the aforesaid instrument, but upon the payment of the purchase money and the possession taken by virtue of the purchase and continuing uninterruptedly from the time of the payment of the purchase price agreed upon. The sale and payment of the purchase price, perfected by possession for more than seven years, gave Johnson legal title (*Brown* v. *Norvell,* 74 Ark. 484, 86 S. W. 306), and where this possession has been open, peaceable, continuous and adverse for a long period of time, as in this case, the presumption arises that a deed to the property has been executed. *Carter* v. *Goodson,* 114 Ark. 62, 169 S. W. 806; *Carter* v. *Stewart,* 149 Ark. 189, 231 S. W. 887.

It follows that the title, having vested in the ancestor of the appellees, the possession of only a portion of each of the forties included in the purchase is extended to the boundaries of the lands described. *Brown* v. *Norvell,* 96 Ark. 609, 96 S. W. 609; *Connelly* v. *Dickinson,* 81 Ark. 258, 99 S. W. 82.

In this case, as to the south forty, on which was located the dwelling of Abe Johnson, the appellant Friend,

who is the claimant of that tract, contends that whatever title Johnson had to it was divested by reason of a sale for the taxes of 1918, and the deed made pursuant thereto, executed May 18, 1920, in which J. W. Young, his grantor, was named as the party grantee. It is insisted by the appellees that the tax deed was void on its face, and therefore conveyed nothing. It is not necessary to set out the deed or to discuss its validity, for the reason that, after its execution, the appellees and their ancestor remained in actual and adverse possession of the lands for more than seven years. *McCrary* v. *Joiner,* 64 Ark. 547, 44 S. W. 79; *Moorehead* v. *Dial,* 134 Ark. 548, 204 S. W. 424.

Appellant R. L. Edwards admitted cutting and converting the timber. He only questioned the amount and value, and the title of appellees. The evidence justified the finding of the chancellor as to the value of the timber; and, as the title was found to be in appellees, it follows that the judgment against him was correct.

There appearing no error, the decree is affirmed.

NORFLEET *v.* STEWART.

Opinion delivered October 21, 1929.

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Robinson, House & Moses and *C. W. Norton,* for appellant.

Coleman & Riddick, for appellee.

HART, C. J., (after stating the facts). The theory of appellee was that appellant was a member of the firm of Norfleet & Norfleet, who had been employed as attorneys by Pugh in the civil damage suit, and that, under the terms of the employment, the firm would continue to represent the appellee in the damage suit until the case was settled or decided in the Supreme Court of the State of Arkansas.

On the other hand, it was the contention of appellant that he was not a member of the firm of Norfleet & Norfleet, and that it was distinctly agreed that he should receive the sum of $1,000 for his legal services in effecting a compromise and settlement of the judgment against appellee in the damage suit.

Thus it will be seen that the record presents for our consideration the question of whether or not appellant was one of the attorneys for appellee in the damage suit, and, if so, what duties he owed to his client in effecting the settlement. The chancellor made a general finding of fact in favor of appellee, and this included the finding that appellant was a member of the firm of Norfleet & Norfleet, and was one of the attorneys for appellee at the time the compromise and settlement were effected. Appellant admits that his father was to continue as attorney for appellee if the case was carried to the Supreme Court. He denies, however, that he was a member of the firm.

We are of the opinion that the chancellor was justified in finding him to be a member of the firm of Norfleet & Norfleet. They had a common reception room, and private offices opening into it. Appellant admitted that they were employed in some cases together, and that he did all of his father's typewriting. Their stationery carried the name of Norfleet & Norfleet as a firm, with the names of the individual members on each side of the firm name. Appellant did some work in connection with the trial of the damage suit. He went with the other attorneys in the case to Memphis to see about a continuance of the case. The firm name was signed to the pleadings in the case. Appellant was present for a part of the time at the trial. He was understood to be a member of the firm, and was, on that account, called into conference about preparing the brief, and later acting for appellee in trying to effect a compromise and settlement of the judgment. He accepted the payment of $750 fee in the name of Norfleet & Norfleet as a firm, and carried on all the correspondence about the matter as if he was a member of the firm of Norfleet & Norfleet. Under these circumstances, it was natural for appellee to understand that he was a member of the firm of Norfleet & Norfleet and consequently one of the attorneys in the case. All the attendant facts tended to show that he was a member of the firm, and the chancellor was justified in so finding.

This brings us to a consideration of what were his duties about effecting the settlement and compromise. A fiduciary relation exists between attorney and client, and the confidence which the relationship begets between the parties makes it necessary for the attorney to act in the utmost good faith. He must not only not misrepresent any fact to his client, but there must be an entire absence of concealment or suppression of any facts within his knowledge which might influence the client, and the burden of establishing the fairness of the transaction is upon the attorney. This rule is of universal application, and is recognized by all of the text-writers on the subject.

The question was the subject of a thorough discussion and review of the authorities in the case of *Thweatt* v. *Freeman,* 73 Ark. 575, 84 S. W. 720. The court quoted with approval from other decisions that all transactions between attorney and client, to be upheld in a court of equity, must be in the utmost good faith, and the burden is on the attorney to show not only that no advantage was taken, but that he gave his client all the information and advice about the matter that was necessary to enable the client to act understandingly. In such cases the attorney must show that the transaction was perfectly fair and that it was entered into with such an understanding of the matter as would enable the client to know thoroughly the scope and effect of it. In other words, the attorney must show the transaction to have been the "pure, voluntary, and well-understood act of the client's mind, otherwise a court of equity will undo it as having been unduly obtained."

In the earlier case of *Jett* v. *Hempstead,* 25 Ark. 462, this court recognized that it was the duty of an attorney to advise the client promptly whenever he has any information to give which it is important that his client should receive.

The rule is on the ground of public policy, and prevails though the attorney may not intend to deceive, and

acts in good faith. Actual fraud in such cases is not necessary to give the client a right to redress. A breach of duty is constructive fraud, and is sufficient. *Baker* v. *Humphrey,* 101 U. S. 494.

This rule was recognized and applied in *Maloney* v. *Terry,* 70 Ark. 189, 66 S. W. 919, 72 S. W. 570, where it was held that chancery has jurisdiction of a suit by a client to have his attorney declared a trustee, where the attorney, in settling a claim against the client, fraudulently procured and retained a greater sum than was paid to settle the claim, although an action at law for money had and received would also lie.

The reason for the rule is clearly and comprehensively stated in *Baker* v. *Humphrey,* 101 U. S. 494, as follows:

"The legal profession is found wherever Christian civilization exists. Without it, society could not well go on. But, like all other great instrumentalities, it may be potent for evil as well as for good. Hence the importance of keeping it on the high plane it ought to occupy. Its character depends upon the conduct of its members. They are officers of the law, as well as the agents of those by whom they are employed. Their fidelity is guaranteed by the highest considerations of honor and good faith, and to these is superadded the sanction of an oath. The slightest divergence from rectitude involves the breach of all these obligations. None are more honored or more deserving than those of the brotherhood who, uniting ability with integrity, prove faithful to their trusts and worthy of the confidence reposed in them. Courts of justice can best serve both the public and the profession by applying firmly upon all proper occasions the salutary rules which have been established for their government in doing the business of their clients."

The instant case calls for an application of the rule. According to the testimony of the appellant himself, he misconceived his duty to his client, and thought he could deal with them at arm's length. He admits that

he was asked what he was going to do with the $1,000, but stated that it would have to be paid to him for his legal services before he would effect the settlement. This condition he had no right to impose. Under the authorities above cited, it was his duty to have effected the settlement without asking or imposing as a condition therefor that he should be paid an additional compensation. It does not make any difference whether he intended to defraud his client or not. Equity treats the case as one of constructive fraud, and it was his duty to have made a full and fair disclosure of everything connected with the settlement to his client, and to advise his client that the settlement could be made without the payment of an additional fee to him. His employment kept him from imposing such a condition to effect the settlement.

In this view of the matter no useful purpose could be served by a further discussion and review of the testimony. We deem it sufficient to say that it becomes our duty, in the application of the well-settled rule on the subject above announced, to declare that the decree of the chancellor was correct, and it will therefore be affirmed.

HOME LIFE INSURANCE CO. OF NEW YORK *v.* MASTERSON.

Opinion delivered October 21, 1929.

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Block & Kirsch and *C. T. Bloodworth,* for appellant.

F. G. Taylor and *M. P. Huddleston,* for appellee; *Oliver & Oliver,* for interveners.

HART, C. J., (after stating the facts). The first question which we shall consider is whether or not the $9,000 policy was a wager contract. This court is committed to the rule that the issuance of a policy of life insurance to one who has no insurable interest in the life of the insured, but who pays the premium for the chance of collecting the policy, is invalid, as the contract is a wager, and against public policy. *McRae* v. *Warmack,* 98 Ark. 52, 135 S. W. 807, 33 L. R. A. N. S. 949. In that case it was also held that the assignment of a policy of insurance to one having no insurable interest in the life of the insured, although issued to one having such interest, is invalid if made in pursuance of an agreement made at the time of the issuance of the policy.

Again, in *Page* v. *Metropolitan Life Insurance Company,* 98 Ark. 340, 135 S. W. 911, it was held that the assignment of a life insurance policy to one not having an insurable interest in the life of the insured is not objectionable as being by way of cover for a wager policy, unless, at the time the policy was taken out, the insured intended to make such assignment.

This court has adhered steadily to this ruling, and it has been uniformly held that a wagering contract of insurance is contrary to public policy, and void. *Cotton* v. *Mutual Aid Union,* 132 Ark. 458, 201 S. W. 124; *Southern Mutual Life Ins. Co.* v. *Perry,* 144 Ark. 512, 222 S. W. 1067; *American Insurance Union* v. *Mames,* 150 Ark. 315, 234 S. W. 496, 18 A. L. R. 1161; and *Mutual Aid Union* v. *White,* 166 Ark. 467, 267 S. W. 137.

The assignment of a policy to a party not having an insurable interest is as objectionable as the taking out of a policy in his name, where this is done as a cover for

the true transaction. The intention of the parties determines the character of the transaction, which the courts will unhesitatingly declare in accordance with the facts, reading the policy and the assignment together, in connection with the attendant circumstances, as forming part of one transaction. *Cammack* v. *Lewis,* 15 Wall. (U. S.) 643; *Warnock* v. *Davis,* 104 U. S. 775; and *Steinback* v. *Diebenbrock, Executrix,* 158 N. Y. 24, 52 N. E. 662, 44 L. R. A. 27.

It is true that the $9,000 policy was applied for on the 26th day of November, 1924, and was not assigned to R. F. Masterson until June 27, 1925, but the attendant circumstances indicated that it was one transaction. While Dr. Blackwood denied that he was interested in the policy, the evidence shows that he paid the first premium, and that he and Masterson were intimate friends. Masterson lived in the country, and never went to town without visiting him. He had no business except that of farming, and took the assignment of the policy to himself for a debt of $99. This of itself tended to show that the transaction was a mere wager. Masterson admitted that he knew at the time that Hays had a yellow, jaundiced look, and was not in very good health. He knew that Hays was in poor financial condition, and said that he would not lend him much money without security. In detailing the circumstances of the transaction, he said that he met Hays accidentally, and that the latter had the policy with him, and that he acted on his own judgment in taking the assignment. He did not ask Hays whether he had paid the first premium or how he obtained the money to do so. At this time Hays owed him a small amount of money, and had been unable to pay him. Hays at the time looked like he was full of malaria, or had liver trouble. He had nothing to do with making up the proof of death of the insured. This was done by Dr. Blackwood. He did not know that Gilbert Hays had made him a beneficiary in his will until after his death.

Under these circumstances the policy is none the less a wagering contract because of the form of it. It

does not make any difference that the policy was payable to the estate of the insured, and that the assignment was made several months after the issuance of the policy, where the attendant circumstances show that it was the intent of the parties to evade the law, and that the assignment was by way of cover for a wager policy. The transaction was so out of the ordinary and so contrary to business experience that the circumstances attending the transaction point to the fact that it was the intention of the insured and Dr. Blackwood and Masterson to take out a policy payable to the estate of the insured, and afterwards to have it assigned to Masterson as a cover for a wager policy.

Another policy for $5,000 had already been assigned to Dr. Blackwood, and both of these policies had been issued to a man whom the undisputed evidence shows not to have been able to make a living for his family. He was conducting a small barber shop, and was assisted by his father and brothers in supporting his family, because he was not able to do so on account of his bad health. The undisputed evidence shows that he came out of the war with a jaundiced look, and had either malaria or a bad case of liver complaint. Dr. Blackwood himself admitted that he had advanced him considerable sums of money for living expenses, and had been his physician without pay. Therefore we are of the opinion that the chancellor was correct in holding that the $9,000 policy was a wagering contract, but that he erred in holding that there was not sufficient evidence to connect the plaintiff with the transaction.

It is next insisted that the policy became incontestable after one year from the date of its issuance. Reliance is placed by counsel upon the case of *Missouri State Life Ins. Co.* v. *Cranford,* 161 Ark. 602, 257 S. W. 66, 31 A. L. R. 93, where it was held that a life insurance policy containing a provision that it shall be incontestable after a stipulated time cannot be contested by the insurer on any ground not excepted in that provision.

We do not think that case, however, is applicable under the present facts. There the court was talking about provisions inserted in the policy for the benefit of the insurer, such as false representations and other matters of that sort, which the company might waive. The court said that the parties to a contract may provide for a shorter statute of limitations thereon than that fixed by law, and that such an agreement is in accord with the policy of statutes of that character. Wager insurance policies, however, are void on the ground of public policy. The rule of law which avoids such contracts is not in the interest of the insurer, but has its foundation in sound public policy. The insurer cannot by an agreement change the policy of the law. Since it is the law which, upon grounds of public policy, pronounces the policy to be void, the doctrine of estoppel has no application. *Anctil* v. *Manufacturer's Life Ins. Co.*, A. C. 604, affirming Can. S. C. 103.

This distinction has been recognized by the Court of Appeals of Kentucky. In the Cranford case we cited the case of *Kansas City Life Ins. Co.* v. *Whitehead,* 13 Ann. Cas. 301, where the Court of Appeals of Kentucky held that an incontestable clause is valid, and that such clause, in depriving the insurer of benefits based upon the fraud of the insured, is not void as against public policy. That case is also reported in 123 Ky. 21, 93 S. W. 609.

In the case of *Bromley* v. *Washington Life Ins. Co.,* 122 Ky. 402, 5 L. R. A. N. S. 747, 121 Am. St. Rep. 167, 12 Ann. Cas. 685, the court held that a policy of life insurance, void because contrary to public policy as a wagering contract, was not rendered actionable by an incontestable clause. The court said that, if this were allowed, then the law might be evaded in all such cases, and the aid of the court might be secured in enforcing a contract which was illegal and void because against the public policy of the State. The contract being one that was contrary to public policy, the defense that it

was void is allowed, not for the sake of the defendant, but for the law itself. As said by the Supreme Court of the United States, the principle in such cases is indispensable to the purity of the administration of the law.

The Kentucky court quoted with approval from *Hall* v. *Coppell,* 7 Wall. (U. S.) 599, the following: "The defense is not allowed for the sake of the defendant, but of the law itself. The principle is indispensable to the purity of its administration. It will not enforce what it has forbidden and denounced. The maxim, *Ex dolo malo non oritur actio,* is limited by no such qualification. The proposition to the contrary strikes us as hardly worthy of serious refutation. Whenever the illegality appears, whether the evidence comes from one side or the other, the disclosure is fatal to the case. No consent of the defendant can neutralize its effect. A stipulation in the most solemn form to waive the objection would be tainted with the vice of the original contract, and void for the same reasons. Wherever the contamination reaches it destroys. The principle to be extracted from all the cases is that the law will not lend its support to a claim founded upon its violation."

The result of our views is that the decree of the chancery court as to the $9,000 policy will be reversed, and the cause remanded, with directions to the chancery court to dismiss the complaint of the plaintiff Masterson on the $9,000 policy, and to dismiss the intervention of Annie Hays, administratrix, on the same policy for want of equity.

On the $5,000 policy suit by the First National Bank of Corning, but little need be said. The principles of law announced above apply equally to the suit of the bank in that case, and the intervention of the administratrix of the estate of Gilbert Hays, deceased, but the facts call for an application of the principles in a different way. According to the testimony of Dr. Blackwood, which was not disputed, and which was found by the chancery court to be true, he had advanced Gilbert Hays something over

$1,800 in medical services, and in money given to him for living expenses. This amount was not so disproportionate to the amount of the insurance policy as to indicate that it was a mere wager. There was an absolute assignment by the insured of this policy to Dr. Blackwood, but the chancellor held that, under the circumstances, the assignment was not an absolute one, but was intended as collateral security to insure him against the indebtedness owed him by the insured. We think this view of the matter is reasonable. The policy was made payable to the estate of the insured. Dr. Blackwood was his friend and medical adviser. He was bound to have known that the insured was in bad health, and that his financial condition was not such as to warrant him in making a gift to any one. The entire attendant circumstances indicated that it was only the intention of the insured to transfer the policy to enable Dr. Blackwood to be secured in the indebtedness which the insured owed him and for any further advances he might make him during his lifetime. No doubt both parties realized that the state of health of Gilbert Hays was such that he would not live many years, and this proved to be the case.

When all the attendant circumstances are considered together, we think the court properly held that the assignment to the bank was to be used by it to collect that part of the proceeds of the policy which was equal to the amount owed by Gilbert Hays to Dr. Blackwood at the time of his death. When we consider that Hays owed Dr. Blackwood for medical services for a period extending over several years, and for advances made at different times during the same period of time for living expenses, it is reasonably certain that the only object of Hays in executing the assignment of the policy was to invest Dr. Blackwood with entire control of it, to the end that the insurance company might deal directly with him in collecting the premiums, and that upon the death of the assured he might have full authority to collect the policy, and apply so much of the proceeds thereof as

might be necessary for the repayment of such sum or sums as he had advanced to Hays upon the security of the policy. Any other view of the matter would place Dr. Blackwood in the position of being pecuniarily interested in the death of Hays, and we will not presume that he had any desire to speculate upon the life of Hays or to do more than secure the repayment of what Hays might owe him at the time of his death. *Page* v. *Burnstine,* 102 U. S. 664.

We think, however, that the court erred in holding that the balance of the proceeds of the policy should be held by the bank as executor under the will of Gilbert Hays, deceased, for the reason that we find that the execution of the will was secured by the undue influence of Dr. Blackwood, and that the will was not a valid and binding one.

The court referred this branch of the case to the circuit court for this issue to be tried out there, but we are of the opinion that the chancery court erred in so doing. We have held uniformly that when chancery takes jurisdiction of a case for one purpose it will retain the case to administer the legal after the equitable relief. *McGaughey* v. *Brown,* 46 Ark. 25; *Hortsmann* v. *LaFargue,* 140 Ark. 558, 215 S. W. 729; *Rose City Bottling Works* v. *Godchaux Sugars, Inc.,* 151 Ark. 269, 236 S. W. 825; *Tallman* v. *McGahhey,* 164 Ark. 205, 261 S. W. 306; and *Short* v. *Thompson,* 170 Ark. 931, 282 S. W. 14.

In the instant case all of the parties in interest agreed to transfer the cases to the chancery court, and thereby agreed that all the issues raised by the pleadings might be decided in that court. Some of the issues raised were equitable in their nature; and, in order to avoid a multiplicity of suits, and to do justice to every one, the court had a right to decide and should have decided all the issues raised by the pleadings. The question as to the legality of the will of Gilbert Hays was so interwoven with the other issues raised by the pleadings that it was almost indispensable to decide that question along

with the other issues. The will itself purports to give the $9,000 policy to R. F. Masterson and the $5,000 policy to the Bank of Corning. It was executed at a time when Hays was in extremely bad health, and when he had been so for several years. He was bound to have known that he would live but a few days, and this proved to be the fact. The whole will was made in the interest of third parties, and his wife and child were cut off with a mere nominal provision. This shows that the execution of the will was procured by the interested parties in aid of the prior transactions, one of which we find to have been intended as an evasion of the law against issuing wagering policies of insurance. Without recounting in detail the testimony, when the ill health of the insured for a period of six or eight years is considered, coupled with the fact that he was not during that time able to make a living for his wife and child, and when read in the light of the other circumstances, we think the chancellor should have held that the will was procured by the undue influence of Dr. Blackwood, and that it was null and void.

It follows that the decision of the chancery court in holding that the bank was entitled to recover the sum of $1,648.86 and the accrued interest on the $5,000 was correct, and should be affirmed. The balance of the proceeds of that policy, however, should have been adjudged to have belonged to Annie Hays, as administratrix of the estate of Gilbert Hays, deceased, and as guardian of their minor child. For the error in not so holding the decree in this respect must be reversed.

The court also erred in allowing the statutory penalty and attorney's fee on the $9,000 policy. The statutory penalty, and a reasonable attorney's fee should have been allowed in the suit on the $5,000 policy.

The result of our views is that the decree must be reversed, and the consolidated cases will be remanded with directions to render a decree in accordance with the views of this opinion, and not inconsistent with the principles of equity. It is so ordered.

BARBER *v.* WHITAKER MANUFACTURING COMPANY.

Opinion delivered October 21, 1929.

June P. Wooten, for appellant.

Carmichael & Hendricks, for appellee.

SMITH, J. The Turner-Shannon Company, a corporation engaged in the mercantile business in Little Rock, made an assignment on January 12, 1928, for the benefit of its creditors. The Whitaker Manufacturing Company, of Chicago, was the largest commercial creditor, and, upon being advised of the assignment, sought to recover certain specific merchandise then on hand. The court sustained the creditor's intervention, but an order was made that all the goods be sold, and that the Whitaker Company be paid the sum of $1,000 out of the proceeds of the sale in satisfaction of this demand. The assignee resisted the creditor's demand for the return of its merchandise, and has appealed from the order of the court awarding it $1,000.

In the intervention filed by the Whitaker Company it was alleged that its debtor had on hand certain merchandise which it could and did identify, and it alleged that the sale of these goods had been induced by the false and fraudulent representation of the debtor that it was solvent when the goods were bought and shipped, when, in truth and in fact, it was hopelessly insolvent, and known so to be by the managing officers of the debtor.

The Turner-Shannon Company, hereinafter referred to as the assignor, had been for several years a customer of the Whitaker Company, hereinafter referred to as the creditor, and had bought goods from the creditor on the customary commercial credit. The assignor had been slow in its payments, but, after some delay, had always made them, except that, at the beginning of 1927, there was a small balance overdue and unpaid, which consisted principally of interest which had accrued on the delayed payments.

On January 28, 1927, the assignor placed an order for merchandise amounting to $6,103.55, which was a very much larger order than any of the previous orders had been. Upon investigation the creditor found that the assignor's rating in the commercial reporting agencies had been withdrawn, and the assignor was called upon for a financial statement as a condition precedent to filling the order. A lengthy correspondence ensued, during the course of which the creditor wrote letters dated as follows: February 12, February 23, March 19, April 19, and April 26, 1927. Early in the correspondence the creditor sent a commercial blank, which, if filled in with appropriate answers, would have conveyed specific and required information as to the assignor's financial condition and solvency. No response was made to this request, and in a subsequent letter a second blank was forwarded, with the request that it be filled in and returned.

Without setting out the correspondence, which is somewhat lengthy, it may be said that the point had been reached when it was apparent that the order would not be filled without the required showing being made. The correspondence had then covered a period of about four months, and on April 30, 1927, the assignor wrote a letter, which, as it is pivotal, is quoted from somewhat extensively:

"I have your communication of the 26th, and in reply wish to give you the following information: You

shipped us our requirements in repairs in 1925, also 1926, and our financial condition was no better in 1926 than 1925, and yet in 1927 you have refused to supply us because we cannot furnish you a financial statement of our present condition. We take inventory during the month of June, and our year is from July 1 to June 30. Our financial condition is a great deal better by about $45,000 now than it was July 1, 1926, yet our contract is being held up, because we cannot give you a financial statement of our affairs. We cannot close our house and go to taking inventory now. We will give you a statement between July 1 and 10, and see no reason in the world why you should not okeh our order for repairs and let them come forward."

After explaining that assignor's commercial rating had been withdrawn on account of some trouble which had arisen with the manager of a branch business in another city, in which the assignor was interested, the writer proceeded to say:

"I failed to find their reason for so doing (withdrawing the rating). Believe, however, if you will correspond with Mr. Howard Tune, city manager here for Bradstreet's, he will be glad to give you any satisfactory information about this concern you want. As to the small balance due you, we will be able to pay this in the next thirty days."

The writer then explained that an unprecedented flood had brought great damage in the assignor's trade territory, and had delayed expected collections. The letter concluded with the following statement:

"If you cannot okeh all the contract, will you okeh half of it? We are almost out of repairs. Or would you think it best to order as we need the merchandise, and pay for it as we get it? We perhaps could manage it this way. We are willing to do anything in the world that is fair, and see no reason why you should not be willing to do the same thing, and feel that you are."

The president of the creditor company testified that the previous dealings of his company with the assignor had been of such character as to induce the belief, which was, in fact, entertained, that the statements of the writer of the letter could be relied upon, and that, relying upon this letter as reflecting the financial condition of the assignor, he ordered the goods shipped, and they were forwarded in due course. Payments were made on this order and on the balance due when the order was filled, which reduced the account to $4,724.27.

When the assignment was made, the creditor sought to recover certain merchandise shipped in this last order, for the reasons heretofore stated, but the order was resisted by the assignee upon the ground that to permit the recovery of these goods would operate to give a preference over other creditors, and it was insisted that all the goods on hand should be sold for the benefit of all the creditors, and the proceeds of the sale divided pro rata.

The assignee insists that the assignor made no material or untrue representation upon the faith of which the sale was made, and that the testimony does not show any intention on the part of the assignor, existing at the time the order was given and filled, not to pay for the goods. In support of this contention it is argued that the creditor, in filling the order, was "taking a chance," and that knowledge that a chance was being taken will be imputed from the facts that the assignor's commercial rating had been withdrawn, and that a formal statement was refused and never furnished, although this requirement was the subject-matter of the correspondence which was conducted for about four months.

A representative of the creditor testified that after the assignment he called upon the managing officer of the assignor and discussed its affairs, and that in the course of the conversation it was admitted by the writer of the letter of April 30 that it was known when the letter was written that the assignor was then insolvent. This conversation was denied. But, whether it occurred

or not, we think it certain that the debtor was then insolvent, and this fact must have been known to any one cognizant of the assignor's affairs. It was hopelessly insolvent when the assignment was made less than a year later, and no great change occurred in its financial condition, although it became gradually worse.

The report of the assignee, when filed, showed an indebtedness of about $135,000, and assets of various kinds, including the accounts, were supposed to be worth about $35,000. At the first offering of these assets for sale by the assignee a bid of only $3,500 was received, and they were later sold for $5,000, although the assignee testified that they were worth $15,000, and could have been sold privately for that amount.

The president of the creditor company testified that, before filling the order, he examined the last commercial agency report on the assignor, which showed a surplus of $23,000, but, as no current report was available, he did not rely upon the report which he examined, and was only induced to fill the order by reason of the statement contained in the letter of April 30, and, as this letter contained the statement that the assignor's affairs had been improved to the extent of $45,000, he assumed that a surplus of $68,000 then existed or was claimed. We think this inference was fairly deducible from the letter, and we find nothing in the record which would warrant us in disregarding the testimony of the creditor's president that he let the order be filled in reliance thereon.

The statement contained in the letter in regard to the $45,000 was not a candid one, and its implication was false, and caused an erroneous impression, whether that result was intended or not. The facts in regard to the $45,000 are these: The president of the company, who had ceased to be a resident of Little Rock, and was not active in the assignor's affairs, was advised of its distress, and he advanced $10,000 in cash. He agreed to assume personally $15,000 of its obligations, but it was not shown that he had done so. Another stockholder,

who was not active in the management of the assignor's affairs, agreed to and did assume personally the payment of the interest account due a bank of $20,000. Had the president assumed the $15,000, these transactions combined would not have operated to reduce the assignor's liabilities as the letter implied had been done. The only effect of these transactions would have been to transfer that much of the assignor's indebtedness to more indulgent creditors.

The assignor's managing officer testified that there was no intention to defraud, and it is earnestly insisted that there was no testimony to the contrary, as it was sincerely believed that if indulgence were extended the debts could and would be finally paid.

We do not make the finding that any intent to defraud was shown, but it is not essential that such intent be shown to affirm the decree here appealed from. We do find the facts to be that the assignor was insolvent when the order was given and filled, and that an untrue statement as to the assignor's finances was made, which was relied upon and which induced the extension of the credit.

The law of the case stated is well settled by numerous decisions of this and other courts.

The case of *In re Epstein,* 109 Fed. 874, was one in which it was alleged that a bankrupt had knowingly made false statements of his assets and liabilities in his report to a commercial agency, upon the faith of which a wholesaler had extended credit. Suit was brought by the wholesaler to rescind the sale and to recover the goods, and, in declaring the law applicable to these conditions, Judge Trieber said:

"Had the intervener relied solely on the fact that these goods were obtained by the bankrupt with the fraudulent intent not to pay for them, perhaps this contention would be correct; but, as rescission is also asked upon the ground that the goods were obtained upon the misrepresentations of the bankrupt, who concealed the fact that at the time he was indebted to his father and

children in the sum of $5,500, the question to be determined is whether such misrepresentations, although not made in bad faith, nor with a fraudulent intent, are sufficient to entitle the vendor, who acted promptly upon the discovery of the true facts, to a rescission. There is no pretense that the bankrupt did not know of this indebtedness at the time, nor is it contended that the amount of these debts was not very material, in view of the real assets of the bankrupt. In such case the intent is immaterial. If a buyer knowingly makes false representations concerning material facts, and thus induces the seller to part with his goods, the seller may elect to avoid the sale, and this without regard to whether the buyer intended to pay for the goods or not. The fraud in such case consists in inducing the vendor to part with his goods by false statements to the buyer, known to be false when made, or made by him when he has no reasonable ground to believe that they are not true. When the bankrupt made his statements to the commercial agencies, he knew that they were intended to be furnished to the wholesale trade for the purpose of determining a basis of credit for him. Intervener, before filling the orders of the bankrupt, obtained copies of these statements, and, no doubt, in reliance upon the truth of these statements, the goods were sold and delivered. That a sale induced by such false representations may be rescinded, although the purchaser made them with no fraudulent intent, is well settled."

Among the Arkansas cases cited by the learned jurist, along with the cases from other jurisdictions, in support of the statement of the law there made, were those of *Bugg* v. *Shoe Co.*, 64 Ark. 12, 40 S. W. 134, and *Johnson Co.* v. *Triplett*, 66 Ark. 233, 50 S. W. 455. These cases fully sustain the rule announced.

In the Bugg case Mr. Justice Riddick said: "Nor can we sustain the contention of appellant that to entitle the vendor to avoid a sale after delivery it must in all cases be shown that the vendee did not intend to pay for

the goods. That is, as above stated, one ground on which the sale may be avoided, but not the only one. If the vendee knowingly makes false representations concerning material facts, and thus induces the seller to part with his goods, the seller may elect to avoid the sale, and this without regard to whether the buyer intended to pay for the goods or not. The fraud in such case consists in inducing the vendor to part with his goods by false statements of the buyer, known to be false when made, or made by him when he has no reasonable ground to believe that they are true."

Further citation of authorities is unnecessary, as the cases are both numerous and harmonious.

The decree is correct, and is affirmed.

[redacted]

SIMPSON *v.* SIMPSON.

Opinion delivered October 21, 1929.

[redacted]

W. B. Sorrels, for appellant.

Rowell & Alexander, for appellee.

SMITH, J. A decree of divorce was given Mrs. Bernice Simpson from her husband, Sherwood Simpson, who was therein directed to pay her $12.50 per week for the support of herself and their infant children. After making these payments for several weeks, default was made, which continued until $100 was due under the decree. A citation for contempt issued, and upon hearing thereof a bond was executed, and the proceeding dismissed. This bond reads as follows:

"Know all men by these presents, that we, Sherwood Simpson, principal, and Wm. H. Simpson, as sureties, are held and firmly bound unto the State of Arkansas for the use of the plaintiff, Bernice Simpson, in the penal sum of three hundred dollars, to the payment of which well and truly to be made we hereby bind ourselves, our heirs, executors and administrators, jointly and severally, firmly by these presents: The condition of the above obligation is such that the defendant, Sherwood Simpson, will promptly pay all sums due the plaintiff, Bernice Simpson, for the support of his children, as required by an order of the Jefferson Chancery Court, dated January 28, 1928, and now due from December 10, 1927, and all sums, to-wit, $12.50 each and every week, until said order is changed by said court. Now therefore, if the said Sherwood Simpson shall well and truly pay said sums as above set out, then this obligation to be null and void; otherwise to remain in full force and effect.

"This January 28, 1928.

(Signed) "Wm. H. Simpson,
(Signed) "Sherwood Simpson."

After the execution of this bond the $100 was paid, and subsequent installments of alimony were paid in the sum of $200, making a total of $300, which was the amount of the bond. But there was no showing that W. H. Simpson, as surety, had paid this money, or any part of it. Thereafter for two consecutive months default was made in the payment of the alimony, and a motion was filed in the original cause for judgment on bond for the amount of the default.

The surety filed a response, setting up the facts herein recited, and alleged that, inasmuch as $300 had been paid since the execution of the bond, the penalty thereof had been discharged. The binding obligation of the bond is not questioned. *Ex parte Coulter,* 160 Ark. 550, 255 S. W. 15. It is insisted only that the obligation thereof has been discharged by the payment of the sum of $300 since its execution. The court overruled this plea, and rendered judgment for the amount of the ali-

mony then in arrears, and this appeal has been duly prosecuted to reverse that decree.

For the reversal of the decree cases are cited in which it was held that the surety on a bond cannot generally be held liable for any sum greater than the penalty thereof, and that a surety who has bound himself under a fixed penalty for the payment of money or for the performance of some other act by a third party has marked the utmost limit of his liability. The principle announced has been recognized in numerous cases, but is not applicable here. The original decree directed that the weekly payments be continued until otherwise ordered, and the condition of the bond was "that the defendant, Sherwood Simpson, will promptly pay all sums due the plaintiff, Bernice Simpson, for the support of his children, as required by an order of the Jefferson Chancery Court, dated January 28, 1928, and now due from December 10, 1927, and all sums, to-wit, $12.50 each and every week, until said order is changed by said court."

The order for the payment of the money was not changed by the court, but remained in full force, and had continuing effect, and the court, in requiring the bond, no doubt contemplated future defaults in payment, and it was to insure against such defaults that the bond was required. It was not the purpose of the court's order, or that of the bond executed pursuant to it, merely to collect $300 for the benefit of the children; the purpose was to enforce continued payments of the weekly allowance until the court otherwise ordered, and it was only by the execution of the bond that the defendant purged himself of the contempt charge which resulted from his default. To prevent recurrence of the delinquency, the bond was required, and the surety became obligated to pay when his principal made default, and there was no obligation to pay until there was a default. Of course the bond imposed a maximum liability on the surety of $300, but a liability was assumed for the payment of each delinquent installment until this maximum was reached.

We conclude, therefore, that the court correctly construed the bond executed pursuant to its order, whereby the defendant was discharged in the contempt proceedings, and the decree is therefore affirmed.

COCA-COLA BOTTLING COMPANY *v.* MCBRIDE.

Opinion delivered October 21, 1929.

Edward B. Klewer, Sam Costen and *Wils Davis,* for appellant.

W. B. Scott, for appellee.

HUMPHREYS, J. This is an appeal from a judgment for $750, rendered in the circuit court of Crittenden County in favor of appellee against appellant, in an action based upon the alleged negligence of appellant in bottling and selling coca-cola which contained a poisonous substance.

Appellant contends for a reversal of the judgment upon the alleged ground that there is no substantial evidence in the record showing that appellant was negligent in bottling the coca-cola.

Appellee, who was clerking in a store owned by David Swartz, in the town of Earl, at the instance of her employer went to David Haddad's cold drink stand, about 150 feet from the Swartz store, to buy several bottles of coca-cola, which, by agreement of the parties to the suit, had been manufactured by appellant at its bottling plant at Wynne, Arkansas. She bought two or three bottles, which were opened by Haddad and handed to her, whereupon she immediately returned with them to the store. Appellee testified that, when she returned to the store, she drank a part of one bottle, and stopped, because she swallowed a hard substance; that, looking into the bottle, she saw an open safety pin, and something black; that she poured the balance of the coca-cola out into her hand, and found that it contained a black sediment; that what she drank poisoned and nauseated her in a few moments; that a physician was called, who took her home in his car; that, after being helped out of the automobile and assisted into the house and ordered to bed by the physician, she entered the bathroom, became dizzy, fell, and injured her back; that the following two or three days she suffered greatly from nausea, and more or less from the same cause for a week; that thereafter she was very nervous, and that since the fall she had suffered continuously with pains in her back.

She was corroborated in the testimony in all particulars by Mr. Swartz until the physician took her away from the store, and by the physician who took her home, in the remainder of her testimony, except as to the fall in the bathroom.

Appellant introduced testimony to the effect that the safety pin would not have poisoned the coca-cola, and that it and the black substance or sediment could not have been in the old bottle before being refilled under the

system employed by it in cleansing, sterilizing and inspecting its bottles before refilling them, nor could have entered the bottle during the process of refilling and inspection thereof, under the period and plan used by them.

If the theory of appellee and the testimony introduced by her in support thereof were true, the only opportunity for the safety pin and black substance to have entered the bottle was either before the bottle was refilled or during the process of refilling same before the bottle was capped.

If the theory of appellant and testimony introduced by it in support thereof were true, then the safety pin and black sediment either dropped in or was put in the bottle by some one after it was opened. This presented an issue of disputed fact for the jury to determine, and, according to the verdict, the jury necessarily found that the safety pin and black sediment were either in the bottle when refilled, on account of the negligence of appellant's employees to properly cleanse or inspect it, or else that both the safety pin and sediment found their way into the bottle during the process of refilling same, through the negligence of its employees engaged in the work, or their failure to properly inspect the bottle before putting it on the market.

The testimony introduced by appellee was sufficient to make a *prima facie* case, and shifted to appellant the burden of proving that there was no negligence in cleansing and refilling the bottle with coca-cola. The law imposed the duty upon appellant to clear itself of the charge of negligence by showing that ordinary care was observed in cleansing and refilling the bottle with coca-cola, and proof that the most modern machinery was used in the process of cleansing and refilling the bottles, and that its plan and system was to exercise every precaution in doing so, and to inspect every bottle, was not sufficient alone to meet the burden and overcome the *prima facie* case. If the plan for and system of cleansing and refilling bottles was perfect, as testified to by appellant's wit-

nesses, who were experts in the business, then the only way for the safety pin and the dark substance to have got into the bottle was on account of the negligence of its employees in cleansing or refilling same, provided that it did not get into the bottle after the cap was removed. The jury, as stated above, necessarily found by their verdict that the safety pin and dark substance did not drop in and were not put in after the cap was removed, and, having done this, they might have drawn the reasonable inference, and doubtless did, that the foreign substances found their way into the bottle before or during the time same was being refilled, through the neglect or oversight of some employee or employees of appellant.

Appellant also contends for a reversal of the judgment because the injury to appellant's back was not the immediate or direct result of drinking a part of a bottle of the coca-cola in question. According to the testimony of appellee, the coca-cola she drank poisoned her to such an extent that she became nauseated and very sick, resulting in a dizziness that caused her to fall and injure her back, immediately after reaching home, where she had been taken by the physician who attended her. No great length of time elapsed after appellee felt the effect of drinking the coca-cola, and before she fell. Only the necessary time intervened for her to be taken from the store to her home in an automobile. The record is silent as to any intervening cause that produced the dizziness which resulted in the fall and injury. The fall and consequent injury seem to have been the ordinary and natural result of drinking the coca-cola, and cannot be reasonably attributed to any other cause. We think the testimony in the case warranted the jury in finding that the proximate cause of the injury complained of was the result of drinking part of the bottle of coca-cola in question.

No error appearing, the judgment is affirmed.

MORTON *v.* STATE.

Opinion delivered October 21, 1929.

Hal L. Norwood, Attorney General, and *Robert F. Smith,* Assistant, for appellee.

HUMPHREYS, J. Appellant was indicted, tried and convicted in the circuit court of Miller County for the crime of assaulting John Morton, his brother, with intent to kill him, and, as a punishment for the crime, was adjudged to serve a term of five years in the State Penitentiary, from which judgment an appeal has been duly prosecuted to this court.

Appellant assigns as reversible error the insufficiency of the evidence to support the verdict. The record of the testimony introduced by the State reflects that on the 3d day of June, 1929, appellant, in company with his brother Joe, came to the house of Frank Morton, another brother, and accused him and his wife of saying they were going to turn him (appellant) in for selling whiskey, and, when Mrs. Frank Morton confirmed the report, he hit her twice, the second blow knocking her senseless; that, when Frank interposed to protect his wife, he (appellant) drew his pistol on him and chased him across the street into Frank Cornutt's home, and shot into the house several times; that about that time John Morton drove up in his car and inquired of Joe what was wrong, and, upon being informed that Allen (appellant) had been shooting into Cornutt's house, he turned on John, accused him of reporting him to the officers, threatened to kill him, and proceeded to strike him over the head with his pistol, and, when John knocked the second kick off, appellant shot John twice, once in the hand and once in the leg, and was attempting to shoot him again, when Joe interfered and prevented him from doing so; that John was unarmed at the time, and said and did nothing to cause appellant to shoot him.

The testimony thus detailed is of a substantial nature, and sufficient to support the verdict and judgment.

Appellant also assigns as reversible error certain remarks by the prosecuting attorney relative to what occurred in the home of Frank Morton, and across the road

at the home of Frank Cornutt, a few minutes before he struck and shot John Morton, and the subsequent introduction of testimony in support of the statement. The evidence was admissible to show appellant's abandoned disposition, his purpose in being there, and his motive for shooting John Morton. According to the State's testimony, appellant came to Frank Morton's house to administer punishment to him and his wife for threatening to report him to the officers for selling liquor, and, in carrying out his purpose, knocked Mrs. Frank Morton down, chased Frank across the road into Cornutt's home, and fired into the Cornutt house, after which he turned upon John Morton, and, for the same declared reason, struck him and shot him twice. The whole affair occurred in the space of about fifteen minutes, and was really one broil resulting from the same cause. As the testimony was admissible, it was proper for the prosecuting attorney to outline same in his opening statement.

Appellant also assigns as reversible error the exclusion of W. B. Thorpe's testimony, to the effect that appellant was an expert shot with rifle and pistol, and the testimony of other witnesses to the effect that Mrs. Cornutt cursed officers who made a liquor raid, some time prior to this occurrence, on their home, and concerning an accusation by Frank Cornutt, Frank Morton and their wives that appellant gave officers information that led to the raid.

Appellant's purpose in offering testimony relative to being an expert shot was to show that he could have killed instead of wounding John Morton, had his intent been to kill him. This does not follow as a necessary conclusion, for, in his excitement, he may have missed his mark. Appellant and his brother John were so close together that a nonexpert could have killed him as easily as an expert shot. We do not think the testimony was admissible as tending to show the intent with which appellant fired the shots.

The other pieces of testimony were collateral and immaterial, as they related to a liquor raid made on Frank Morton's home quite awhile before this occurrence.

Appellant also assigns as reversible error the action of the court in allowing the prosecuting attorney to ask certain witnesses whether they had not espoused his cause and sided with him. The questions were permissible to disclose the bias of the witnesses, and to test their credibility.

Appellant also assigns as reversible error the action of the court in allowing the prosecuting attorney to introduce Dr. Robison to show that the wounds inflicted upon John Morton were of such nature that one bullet could not have caused them both. The State introduced witnesses to show appellant fired two shots, one piercing the hand and one the leg of John Morton. Appellant testified that he only fired one shot at John Morton, which struck him in the hand, and that his purpose in firing it was to prevent him from drawing his pistol, which John was attempting to do. Dr. Robison's testimony was introduced to rebut this testimony of appellant, and was properly admitted as rebuttal testimony.

Appellant also assigns as reversible error the court's action in giving instructions numbers 1, 5 ,6, 7 and 8, and in refusing to give appellant's requested instructions numbers 12, 15 and 19.

It would extend this opinion to great length should these instructions be set out in full herein. Suffice it to say that we have carefully read the instructions, and determined that those given by the court were correct declarations of law applicable to the facts in the case, and that the instructions requested by appellant and refused by the court were fully covered by other instructions which the court gave.

No error appearing, the judgment is affirmed.

STOKES *v.* LANDREM.

Opinion delivered October 21, 1929.

Holifield & Upton and *Arthur Sneed,* for appellant.

Ward & Ward, for appellee.

KIRBY, J. This appeal is prosecuted from a decree in effect surcharging the account of appellant, F. M. Stokes, as guardian, and canceling a deed made to him by the commissioner under a decree of foreclosure against lands mortgaged by his former ward, Josie Landrem, to him, as guardian of her minor sister and brother, to secure a loan of money belonging to them in his hands as guardian.

It appears from the testimony that M. A. Palmer died intestate about the 6th day of December, 1908, leaving surviving him his widow and Josie Palmer Landrem, Rufus Palmer and Frank Palmer, his children by a former wife, and Elsie Palmer, his child by his surviving widow, who did not long survive her father, and no question is raised as to her interest here. Palmer owned and occupied a homestead consisting of about 63 acres, particularly described in the complaint, at the time of his death. Josie Palmer Landrem was born on the 10th day of September, 1893, and on the 25th day of May, 1908, F. M. Stokes was duly appointed guardian for her, Frank, Rufus and Elsie Palmer. Elsie Palmer died, and her guardian paid off her estate to her mother, Mollie Palmer. The widow lived upon the homestead until the 15th day of April, 1911, when she died, leaving surviving her Ardell Simpson, a son by a former marriage.

Josie Palmer married R. E. Landrem on the 10th day of December, 1909, and four children were born to them, and on the 18th day of July, 1911, appellant Stokes, as guardian for her, filed his final settlement, which was approved by the probate court on the 15th day of December, 1911, the amount found to be due the ward in the settlement being $195.03, which was paid to her by the guardian, who was discharged. She was 18 years old on the 10th day of September, 1911, and 21 years old on the 10th day of September, 1914, and was the owner of an undivided one-third interest in her deceased father's homestead. She, with her husband, R. E. Landrem, executed a mortgage on the 13th day of April, 1915, to F. M. Stokes, appellant, as guardian of Frank and Rufus Palmer, conveying her one-third interest in the homestead land to secure the payment of a $300 note given by her and R. E. Landrem to F. M. Stokes, as guardian, for money borrowed from the estate of said minors. She died on the 7th day of December, 1916, and on the 14th day of September, 1918, F. M. Stokes, as guardian of Frank and Rufus Palmer, brought suit to foreclose the mortgage given by her and her husband to secure the borrowed money. A decree of foreclosure was rendered, and on the 4th day of September, 1919, Stokes, guardian, filed suit in the chancery court against the heirs at law of Josie Landrem and R. E. Landrem, as guardian, to correct an error in the description of the land in the mortgage ordered foreclosed in the former suit. In the last suit constructive service was had, the two suits were consolidated, a guardian and attorney *ad litem* was appointed for the minor defendants, a decree was entered reforming the mortgage and ordering a sale of the property to pay the said indebtedness, and the lands were sold by the commissioner in chancery, and purchased by F. M. Stokes for $583.62, the sale being confirmed by the court and a deed executed to the lands. On the 20th day of August, 1924, R. E. Landrem, guardian for minor children of himself and Josie Landrem, de-

ceased, brought suit against F. M. Stokes and his son, Francis E. Stokes, to whom he had deeded the lands purchased at the foreclosure sale, for an accounting and for cancellation of the deed.

A master was appointed, an account stated, showing that, at the time of the execution of the mortgage by Josie Landrem and her husband to secure the sum of $300 borrowed from F. M. Stokes as guardian of her brothers, the said F. M. Stokes was in fact indebted to the said Josie Landrem in the sum of the amount of the money alleged to be loaned, and for security of which the mortgage was given. The court approved the master's findings, and, while he held there was no intentional fraud in any of the transactions on the part of the guardian, F. M. Stokes, it was also held that the relation had not been severed for a sufficiently long time to relieve his former ward against his influence, and that he stood to her in such a fiduciary relation, because of being in possession of the homestead lands of her father and her minor brothers, that he must account for her portion of the rent of the lands. A decree was rendered accordingly, and the deed executed to him under the mortgage foreclosure sale canceled, as was also his voluntary deed to his son, the other appellant, and from this decree the appeal comes.

Appellants insist that the decree is not supported by the testimony, and that the court erred in denying his plea of the statute of limitations against the claims of his former ward, Josie Landrem. It will suffice to say that the court, after a careful consideration of the entire record, is of opinion that the findings of the chancellor are not contrary to the preponderance of the testimony as to the principal facts, and as to the facts showing the trust relation, and warranting the denial of the plea of the statute of limitations under the doctrine announced in our cases of *Haynes* v. *Montgomery,* 96 Ark. 573, 132 S. W. 651; *Sconyers* v. *Sconyers,* 141 Ark. 256, 216 S. W. 1045; *Sorrells* v. *Childers,* 129 Ark. 149, 195 S. W. 1

L. R. A. 1917F, 430; *Oil Fields Corporation* v. *Dashko,* 173 Ark. 533, 294 S. W. 25, 17 R. C. L. 749.

Francis E. Stokes was not an innocent purchaser for value of the lands for which F. M. Stokes paid only $583.62 at the foreclosure sale, and which the testimony shows he had afterwards contracted to sell to his wards for something over three times the amount he paid therefor.

No error appearing in the record, the decree will be affirmed, and it is so ordered.

STATE, USE GARLAND COUNTY, *v.* BALESH.

Opinion delivered October 21, 1929.

William G. Bouic, for appellant.

Martin, Wootton & Martin, for appellee.

McHANEY, J. This action was instituted by the prosecuting attorney of the 18th Judicial District, under §§ 630 to 643, inclusive, of C. & M. Digest, relating to public auctioneers. The complaint charges that appellee operates a public auction in the city of Hot Springs, No. 350 Central Avenue, at which place various articles of merchandise are offered for sale daily, at public auction, to the highest bidder, and that appellee employs others to sell said goods at auction for him; that neither

he nor his employees have obtained a license as public auctioneers.

Appellee answered, admitting that he conducted the business alleged in the complaint, but denied that he did so in violation of law, and denied that he and his employees were required by law to take out a license.

The case was submitted to the court sitting as a jury, on an agreed statement of facts substantially as follows: Appellee is a resident and taxpayer of Hot Springs, and since 1918 has been selling merchandise in said city, consisting chiefly of Oriental goods, chinaware, linens, antiques and art goods generally, by auctioning same to his customers, instead of the ordinary method of selling over the counter; that he sells only his own goods, in his own storehouse, and not on consignment or for a commission for others; that he has never sold any goods on auction for any other person, and has never held himself out to the public as a public auctioneer to sell real estate or any other kind or class of goods; that he has paid no license as a public auctioneer, nor has he filed any bond with the county court, or rendered any account in writing to any county official of any property sold by him at auction; that he employs such help as he considers necessary, and that some of said employees auction goods for him; and that he pays the city $100 occupation tax, and $300 for the privilege of selling at auction annually.

Under the above facts the court found for appellee, and entered judgment accordingly.

The statute provides, § 630, C. & M. Digest, that: "No person shall exercise the trade or business of a public auctioneer, by selling any goods or other property subject to duty under this law, without a license, to be issued according to law." It will be noticed that the word "public" precedes the word "auctioneer" in this section, and nowhere else in the subsequent sections of the statute does this word "public" appear. It was put there by the Legislature for a purpose, and, in determining what this purpose was, as said in *Bullion* v. *Ætna In-*

surance Company, 151 Ark. 519, 525, 237 S. W. 716: "We conceive it to be our duty only to ascertain the legislative intent, and this must be done by interpreting the words which the Legislature itself has employed in expressing that intent. It is an accepted canon of construction that 'where a word which has a known legal meaning is used in a statute, it must be assumed that the term is used in its legal sense, in the absence of an indication of a contrary intent.' 26 A. & E. Enc. of Law (2d ed.) 607." And in *St. L. I. M. & S. R. Co.* v. *State,* 102 Ark. 205, 143 S. W. 913, this court said: "In determining what the meaning of these words ('division point') is, we must look to see what is the usual and ordinary interpretation given to them by those using them, and also to consider them in reference to the subject-matter in the mind of the Legislature, as shown by this statute." The word "public" is here used in its adjective sense. It is an adjective, and modifies and limits the word "auctioneer." It defines the kind of auctioneer who must obtain a license. It is descriptive of the person, and not his business. A number of definitions of "auctioneer" may be found in Words and Phrases, 1st ed., but the substance of all of them is that an auctioneer is a person who sells property at auction. But the word "public" in our statute, as applied to the word "auctioneer," means something more. It means just what it says, that is, a public auctioneer is a person who holds himself out to the public as being willing and ready to sell property at auction. It has the same meaning as the word "public" as applied to accountant, or stenographer—those who are willing to sell their services to the public in their particular line of business. A person might be an expert accountant, and yet do no business for the public, nor hold himself out to the public as being ready to serve it. Certainly such a person would not be a public accountant. The Legislature evidently intended to require all persons who engage in the business of selling property for others at auction, that is, for the public, to obtain a license.

All the cases cited by counsel for appellant construe statutes and city ordinances wholly different from ours. *Biddles* v. *Enright,* 239 N. Y. 354, 146 N. E. 625, deals with a city ordinance of the city of New York prohibiting sales at public auction except in the daytime. The ordinance was sustained. In *Fretwell* v. *City of Troy,* 18 Kan. 271, the court had under consideration an ordinance of the city of Troy providing that, "before any person shall proceed to sell at public auction * * * he shall obtain a license." The court sustained the ordinance. So, in the city of Hot Springs appellee is required to and does pay an annual license fee of $300. In *City of Goshen* v. *Kern,* 63 Ind. 468, 30 Am. Rep. 234, the court held an ordinance of the city valid which provided that "any person who shall exercise, within said city, the business of an auctioneer * * * without having first obtained a license, * * * shall be fined," etc. Also in *Chicago* v. *Ornstein,* 323 Ill. 258, 154 N. E. 100, 52 A. L. R. 489, an ordinance of the city of Chicago was held valid which required auctioneers to be licensed, and which defined an auctioneer as one "who sells goods at public auction for another or for himself." We do not consider these cases as being in point. Our statute deals with "public auctioneers," and not merely "auctioneers," or persons who sell goods, wares, and merchandise at public auction. Appellee sells his own goods, in his own place of business, at auction. He employs others to assist him. He does not sell for others, nor does he hold himself out to the public as ready and willing to do so. Applying the rules of construction above stated, we think the appellee is not a "public auctioneer" and is not required to comply with the statute referred to.

Affirmed.

MEHAFFY, J., (dissenting). I do not agree with the opinion of the majority in this case. The facts are sufficiently stated in the opinion of the majority, and it is unnecessary to restate them.

The majority opinion states: "It will be noticed that the word 'public' precedes the word 'auctioneer' in this section, and nowhere else in the subsequent sections of the statute does the word 'public' appear. It was put there by the Legislature for a purpose, and, in determining what this purpose was, as said in *Bullion* v. *Ætna Insurance Co.,* 151 Ark. 519-525, 237 S. W. 716, we conceive it to be our duty only to ascertain the legislative intent, and this must be done by interpreting the words which the Legislature itself has employed in expressing that intent. It is an accepted canon of construction that 'where a word which has a known legal meaning is used in a statute, it must be assumed that the term is used in its legal sense, in the absence of an indication of a contrary intent.' 26 A. & E. Enc. of Law, 2d Ed. 607."

The majority opinion then says: "The word 'public' is here used in its adjective sense. It is an adjective and modifies and limits the word 'auctioneer.' It defines the kind of auctioneer who must obtain a license. It is descriptive of the person and not his business."

We agree that the intent of the Legislature must be ascertained, but, in ascertaining the intent of the Legislature, we must consider the whole act and not merely a portion of it or one word, but all of it must be considered together, and we must also consider the purpose for which the act was passed; the object of the Legislature in passing it.

It is true that the first section of the statute says: "No person shall exercise the trade or business of a public auctioneer, by selling any goods or other property subject to duty under this law, without a license, to be issued according to law." Crawford & Moses' Digest, § 630.

The act provides that he shall not exercise the trade or business of a public auctioneer, by selling goods or other property, etc., and the section immediately following provides that every person who shall exercise the trade or business of an auctioneer, (this section does

not say public auctioneer), but every person who exercised the trade or business of an auctioneer. That is, every person who sells property at public sale to the highest bidder is exercising the trade of an auctioneer because, according to all the authorities, auctioneer means a person who sells goods at auction; that is, a person who sells goods at public sale to the highest bidder.

Again, § 637 of Crawford & Moses' Digest mentions the property that shall be free of duty and for the selling of which one does not have to have a license as an auctioneer. Among other things, one may sell property of a debtor who has made a general assignment for the benefit of creditors. Also property of deceased persons sold by authority of executors or administrators, and live stock, agricultural productions, etc., sold at the residence of the owner. Also land or leasehold interest sold on the premises.

There is no indication anywhere in the act that one might be permitted to sell his goods at auction, or that it was the intention to make an exception in case where one sold his own goods at auction other than the exceptions made in the statute. When the entire statute is considered, we think the word "public" meant nothing more than an auctioneer who sold goods at public sale.

We all agree that it was the intention of the Legislature in passing this act to protect the public. Can it be said that the public is more likely to be injured or deceived when one sells goods belonging to another at public sale than when he sells his own goods? If there is any difference at all, the public would be more likely to be deceived by the person who is selling his own goods than by a person who is selling the goods of another. The object is to protect the public.

I think, from the reading and consideration of the entire act, that it was the intention of the Legislature to protect the public, whether a person sold his own goods or the goods of another. If the construction placed upon the statute by the majority is correct, then three or four

merchants who desire to sell their goods at auction might very well contract with an auctioneer who would agree to sell at one place at one hour and at another at another, and also agree that he would not act as auctioneer for the public. But this would be a clear evasion of the law, and the object of the law is to prevent all persons from acting as auctioneer and selling goods at auction unless they comply with the law.

This court said recently: "Mr. Chief Justice Taft, in recognition of the duty of the court to consider the act whose validity was in question in the light of the environment in which Congress passed it, said: "It was for Congress to decide, from its general information and from such special evidence as was brought before it, the nature of the evils actually present or threatening, and to take such steps by legislation within its power as it deemed proper to remedy them. It is helpful for us, in interpreting its validity, to know the conditions under which Congress acted." *Hill* v. *American Book Co.,* 171 Ark. 427, 285 S. W. 20.

So, in the instant case, it is helpful for us, in interpreting the statute, to know the conditions, and especially the object of the Legislature in enacting the statute.

"Such a construction ought to be put upon a statute as may best answer the intention which the makers have in view, and this intention is sometimes to be collected from the cause or necessity of making the statute, and sometimes from other circumstances; and, whenever such intention can be discovered, it ought to be followed with reason and discretion in the construction of the statute, although such construction seems contrary to the letter of the statute. And such construction ought to be put upon it as will not suffer it to be eluded." *Turner* v. *Ederington,* 170 Ark. 1155, 282 S. W. 1000.

"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."

Cowan v. *Thompson,* 178 Ark. 44, 9 S. W. (2d) 790; *McGinnis* v. *Gailey,* 174 Ark. 174, 298 S. W. 335.

"This court has uniformly held that, in the construction and interpretation of statutes, the intention of the Legislature is to be ascertained and given effect from the language of the act, if that can be done. In doing this, each section is to be read in the light of every other section, and the object and purpose of the act to be considered." *Miller* v. *Yell and Pope Bridge Dist.,* 175 Ark. 314, 299 S. W. 15; *Ark. State Highway Com.* v. *Kirby,* 175 Ark. 652, 298 S. W. 335.

"The intention of the Legislature in framing a statute is to be collected from the words used, the context, the subject-matter, the effects and consequences, and the spirit and reason for the law." *Breashears* v. *Norman,* 176 Ark. 26, 2 S. W. (2d) 53.

"In deciding this question we have in mind the settled rules of construction that a statute must be read as a whole to ascertain its meaning, and courts must give effect to the meaning of the statute as thus ascertained, and in the discharge of this duty courts are frequently required to eliminate or to substitute words for those employed by the Legislature." *Indian Bayou Drainage Dist.* v. *Dickie,* 177 Ark. 728, 7 S. W. (2d) 794.

It appears to us that there could be no disagreement about the object and purpose of the Legislature in passing the statute, and, keeping that in view and considering the entire act, we are of opinion that the Legislature meant to require everyone, except those embraced in the exceptions of the statute, to get a license before he could sell goods at auction.

The majority opinion says that "public" means the same thing that it would to say public stenographer or accountant; that is, those who are willing to sell their services to the public in their particular line of business, and states: "A person might be an expert accountant and yet do no business for the public, nor hold himself

out to the public as being ready to serve it. Certainly such a person would not be a public accountant."

We do not agree with the majority in this. In the first place, the statute providing for an examination and registration of public accountants says that one may be a public accountant and serve the public as such without paying any fee or taking any examination. It, of course, prohibits him from claiming to be a certified public accountant when he is not.

The majority opinion says: "All the cases cited by counsel for appellant construe statutes and city ordinances wholly different from ours." We do not think so, but think that some of them are similar to our statute, if not exactly like it.

The first case to which the majority opinion calls attention is *Biddles* v. *Enright,* and that was under a New York statute and prohibited the selling of goods by auction at night. But the court said in that case: "It is a reasonable effort to insure fair public sales, to prevent fraud and deception, and to protect purchasers from the dangers lurking in the darkness of the night. * * * Then again, the business of an auctioneer, while perfectly legal, has always been affected with a public interest and subject to legislative restriction." *Biddles* v. *Enright,* 239 N. Y. 354, 39 A. L. R. 766, 146 N. E. 628.

In the New York case the auctioneer was selling his own goods, and not the goods of another.

In the case of *Fretwell* v. *Troy,* 18 Kansas 271, the court not only sustained the city ordinance, but that ordinance, like our statute, had two sections. One of them referred to the auction, and the other to the auctioneer. And the court said: "Do these two sections reach to the same matter, so that obtaining a license under one, is equivalent to a license under both, and a bar to any prosecution under either? We think not. There is a clear distinction between the two. The one applies to the party who has goods which he desires to dispose of by auction, and the other to the party who

makes the out-cry. The same party may occupy both positions. He may have goods to sell at auction, and he may be his own auctioneer."

The ordinance is not only similar to our statute in the two sections, but in that case the auctioneer was selling his own goods, just as the appellant in this case.

The majority opinion disposes of the case of *Goshen* v. *Kern,* 63 Ind. 468, 30 Am. Rep. 234, simply by stating that the court held the ordinance of the city making a person liable who exercised the business of an auctioneer without license valid. However that is another case which holds that an auctioneer must have license to sell his own goods. That case gives the definitions found in the dictionaries of auctioneer, and all of them define auctioneer as a person who sells by auction, or sells goods publicly to the highest bidder, and some of them state outright that an auctioneer is a person who sells at public auction his own goods or the goods of another. That court said also: "And the owner of the property to be sold will not and does not, in our opinion, affect, impair, or prevent the exercise of these powers in any respect. The power given is in the nature of police regulation, and it applies to all sales by auction, as well to those where the auctioneer sells his own property as to those where he sells the property of other persons."

The next case to which the majority opinion calls attention held as follows: "The object of the regulation is to promote the general welfare by protecting the public from fraudulent sales, and this protection is needed as much, if not more, where the auctioneer is selling his own goods as where he is selling the goods of another." *Chicago* v. *Arnstein,* 323 Ill. 328, 154 N. E. 100, 52 A. L. R. 489.

The Missouri court held valid an act which prohibited any person from exercising the trade or business of public auctioneer by selling any goods, or other property subject to duty under this law, without a license. There were exceptions to the statute there the same as

ours, but the defendant was selling tobacco and tobacco was not included in the exceptions. That is, the sale of tobacco was not free of duty. The defendant contended in that case that to be guilty he must be proved to have followed the business for a livelihood or for support. But the court held that this was not a defense. *State* v. *Rucker,* 24 Mo. 557.

I think, therefore, that the object and purpose of the Legislature in passing the act was to protect the public, and that therefore sales by the owner of goods cannot be lawfully made at public sale any more than the sale of the goods for others. It is immaterial whose goods they are if they are sold at auction, and not within the exceptions mentioned in the statute. The auctioneer who makes the sale must have a license.

I also think, when the entire act is considered and construed according to the rules adopted by this court, taking into consideration not only the entire act, but the purpose of it, that "public" before "auctioneer" means nothing more than selling at public sale, and that the case should be reversed.

Mr. Chief Justice HART and Mr. Justice HUMPHREYS agree with me in the conclusions herein reached.

FIDELITY MUTUAL LIFE INSURANCE COMPANY *v.* PRICE.

Opinion delivered October 21, 1929.

T. J. Moher, Rose, Hemingway, Cantrell & Loughborough and *Carmichael & Hendricks,* for appellant.

A. G. Meehan, Peyton D. Moncrief and *John W. Moncrief,* for appellee.

BUTLER, J. Appellee's intestate, James Arthur Price, in 1914 procured a policy of insurance from the appellant, Fidelity Mutual Life Insurance Company, in the sum of $5,000. He was at that time, or a short time thereafter, doing business with the appellant, American Southern Trust Company's predecessor, and, to secure it for any advances made, assigned the policy as collateral security. This assignment contained a stipulation giving full power to the assignee or its legal representatives to receive in any form the value thereof, in trust, without liability on the part of the company to see to the proper discharge of the trust or any part thereof. In April, 1926, this assignment was released in writing, and an

"assignment absolute" was executed, by the terms of which all the right, title and interest in and to the policy and all benefits accruing or arising therefrom were transferred without qualification. The assignee was constituted attorney with full power to do any act necessary for the enjoyment of the policy assigned, and the company was expressly authorized to make all payments under the policy to the assignee.

Price died May 31, 1927. Proof of death was made by the assignee, and on the 16th day of June, 1927, the appellant insurance company made its check for the face value of the policy, less a loan which the insured had negotiated in his lifetime, the net amount being $4,571.62. This check was duly paid, and the proceeds appropriated by the appellant bank. The appellee, R. C. Price, as administrator of the estate of James A. Price, his heirs joining with the said administrator, brought this suit against both the appellant insurance company and the appellant bank. The complaint sufficiently alleges a joint liability on the part of the appellants, on the theory that the assignment had been canceled by an oral agreement made between the appellant bank and the insured, and the policy constructively delivered to the insured, and the possession held by the bank thereafter was as agent of the insured, and that he was the owner of the policy, and his beneficiaries entitled to the proceeds at his death; that all of these facts were known to the insurance company, and that, with this knowledge, it colluded with the appellant bank to defraud the beneficiaries, and, in furtherance of the common design, accepted from the bank the policy, and made payment of the proceeds to it to enable its confederate to fraudulently convert the proceeds thereof to its own use.

This suit was filed in the circuit court of Arkansas County. Service was had upon the insurance company, and summons issued and served on the bank in Pulaski County by virtue of § 1176 of Crawford & Moses' Digest, which is as follows: "Every other action may be brought

in any county in which the defendant, or one of several defendants, resides, or is summoned." After service upon it, and before issue joined, the appellant bank challenged the jurisdiction of the court by its motion to quash service on it. Upon denial of its motion, proper exceptions were saved, and in its answer, after traversing the allegations of the complaint, it set up the fact that it was a banking corporation, domiciled in Pulaski County, with no branch in Arkansas County, and moved to transfer to chancery. The court sustained the motion to transfer, and the appellees (plaintiffs below) moved to dismiss as to both defendants, which motion was sustained. Thereafter the appellees filed their motion to reinstate. Appellants contested this motion, but the motion was sustained, and the cause reinstated, appellant bank appearing and contesting the motion to reinstate.

After the cause was reinstated, an amendment to the complaint and response to the motion to transfer to equity was filed, and, on a hearing of the response, the court set aside the order to transfer, and the cause then proceeded to trial, which trial resulted in a verdict and judgment for the plaintiff against both defendants in the amount sued for, to-wit, $2,997.50.

The insurance company raised no question as to the service upon it, but, before answer, moved to strike because there was a misjoinder of parties and no joint liability alleged. These motions were overruled. The insurance company answered, and, at the conclusion of the testimony, moved for a directed verdict, because the facts proved failed to establish any liability as to it. The appellant insurance company and the appellant bank filed their joint motion for a new trial, in which they preserved their objections and exceptions to the action of the court, and, their motion for a new trial being overruled, they have prosecuted this appeal.

They insist that there was no evidence tending to establish the allegations of fraudulent conspiracy of the appellants, The appellees, on their part, contend that

there is ample testimony to warrant the trial court in submitting this question to the jury. The facts relied upon to establish the allegations of fraudulent conspiracy may be thus summarized:

The insured died on or about May 31, 1927, and was buried June 2, following: On that day Mr. C. P. Ball addressed a letter to "R. C. Bright, manager of the Fidelity Mutual Life Insurance Company, Little Rock, Arkansas." Ball had been a friend of the insured, and was interested in the welfare of his family, and, moved by this, he wrote the letter, in which he informed Bright of the recitals of the decree of the chancery court entered May 28, 1928, showing that in 1922 the insured executed a mortgage on certain lands to secure an indebtedness due the appellant bank's predecessors, and had pledged two insurance policies issued by the appellant insurance company; that in the decree there was no personal judgment against the insured, and that the delivery of certain personal property, and the foreclosing of lands and sale of same to be made thereunder was in satisfaction and settlement of the indebtedness due. After making these statements, the letter concluded with the request for information relative to the status of the two policies.

On June 4, 1927, Mr. Bright answered the inquiry, stating that there had been one policy issued to the insured by his company for $5,000; that later the insured made application for another policy for $6,000, but that the last named policy was not acceptable to the insured, and was declined; that after this the $5,000 which had been pledged as collateral security was "assigned to the bank absolutely." He stated that, because of the assignment, the fact that no personal judgment was given in the decree mentioned would not serve to enable the family of the insured to receive the proceeds of the policy, but gave it as his opinion that, notwithstanding the assignment absolute, "as a matter of practice and good conscience, so far as I know, under the assignment absolute, if an equity exists it is turned over to the heirs of the

deceased." He further stated: "You know that the bank had paid the premiums for several years, and the collection of the policy will not prevent them from sustaining an actual loss."

It developed that Bright was mistaken, at least as to the payment of two past due premiums, which the assured paid through the appellant bank in April, 1926, and he also paid the premium due November, 1926, which was remitted by the appellant bank to the insurance company, with the request to mail receipt direct to the insured. Insured also paid the premium due November, 1927, by his personal check delivered to Mr. Bright. The insurance company mailed direct to assured notices of due dates of premiums. Mr. Bright, to whom the letter of Mr. Ball was written, and who received the premium check of November, 1927, was, and had been for some years, the State agent of the insurance company. He was also the owner of some three or four thousand dollars' worth of the capital stock of the appellant bank, and a director of said bank.

On the 8th day of June, 1928, proof of death was made by an officer of the appellant bank and transmitted to the insurance company, and on the 16th day of the same month the insurance company made and forwarded to the appellant bank its check for $4,571.62, net proceeds, after deducting a loan made by the insured in his lifetime on the policy. On the 13th day of July following, a son of the insured applied to Mr. Bright for forms on which to make proof of death, and was informed that proof had been already made by the appellant bank, and the proceeds of the policy paid to it. There was also evidence tending to show that there was a settlement between the bank and the insured prior to his death, and the assignment of the policy canceled.

There was no testimony showing that Bright had any part in the management of the affairs of the bank or any knowledge of the details of its business, or that he had any information regarding any settlement of the

affairs of the bank and the insured, except such as was disclosed in Ball's letter and his answer thereto, in which no knowledge was disclosed except such general knowledge as would likely be in the possession of any friend of the insured, and who had been acquainted with his business operations and the disasters attending it through several years.

Assuming that the transactions above narrated, and Bright's information was within the scope of his authority and the knowledge he gained as bank director, if any, is imputable to the insurance company (which is not necessary for us to decide, but see *Waters Pierce Co.* v. *Bridewell,* 103 Ark. 345, 147 S. W. 64, 64 Ann. Cas. 1914 B, 837, do the facts warrant the submission to the jury of the question of fraudulent conspiracy on the part of the insurance company in aid of fraudulent conduct, if any, on the part of the appellant bank? In order to establish a conspiracy to defraud, the evidence must do more than raise a suspicion; it must lead to belief. The circumstances are disconnected, and it seems only reasonable that any one or all of these circumstances are just as consistent with a lawful purpose as with an unlawful undertaking; they are "slight, equivocal, and unsatisfactory." The appellees, as we have said, insist, however, that this evidence is ample to establish the fraudulent conspiracy; that the fact that Bright was a director in the appellant bank and a personal friend of the insured, familiar with his business affairs, and that the insured's account with the bank was large—the knowledge that the insured had paid premiums after the date of the assignment, the letter of Ball and his reply—all warranted the submission of the issue to the jury and supported its finding. They say that the circumstances were sufficient to show that Bright knew that the assignment, although absolute in form, was only collateral security. If, indeed, the assignment was only collateral security, the insurance company could not be deemed to have agreed to any other conditions than those stated in the collateral

assignment which had theretofore been made, and which authorized the assignee to collect the proceeds, without liability on the part of the company to see to the proper discharge of any trust.

We see no fact from which a reasonable inference might be drawn that Bright or the insurance company had knowledge that the assignment was collateral or that the debt was paid, or knowledge of the alleged oral agreement of cancellation and redelivery of the policy to the insured. Bright testified that he had no knowledge of any such fact, and, while he was a director of the bank and had general knowledge that the insured was largely indebted to the bank, there is no testimony that he took any actual part in the management of the affairs of the bank or had any special knowledge of the extent of the insured's business, or any knowledge whatever of the alleged settlement or of the terms upon which it was made, or of the property taken or to be taken in satisfaction of the debt, or of any agreement, oral or otherwise, by which the absolute assignment was released. There is nothing in his letter to Ball to indicate any such knowledge. He merely gave Ball what information he had, namely, that there was an absolute assignment of the policy, and that the bank stood to lose a considerable sum after collecting the policy. It is true, he knew —as also did the home office of the insurance company— that the insured had paid the premiums of November, 1927, and the home office knew of the payment by the insured of the premium of November, 1926, and of past due premiums made in April preceding; but these circumstances would hardly call for any investigation of the respective rights of the bank and the insured, it not being shown that this was unusual or of any such particular significance as to call for any such investigation. Neither was the insurance company or its agent under any obligation to see that the bank properly discharged its duty to the insured. In the letter from Ball there was no intimation that the estate or heirs of the insured

would demand of the insurance company the proceeds of the policy, and nothing to warrant the belief that they intended to do so. The fact that the decree referred to provided for a judgment *in rem* only did not indicate anything further than that a personal judgment was not desired, and we fail to see how this could have indicated that the assignment had been, or ought to have been, released.

The appellees insist that Bright could have obtained all of this information on inquiry from Mr. Hicks, who appears to have been the officer in charge of the affairs of the bank, and knew whether the bank held the policy as collateral security, whether the assignment had been canceled, and whether the title to the policy reinvested in the insured. In the first place, there was no duty resting upon Bright to make any such inquiries, and, if he had, as shown by the testimony of Hicks, he would have discovered that the bank claimed the absolute ownership of the policy. The insured was indebted to the bank in excess of $50,000; the decree recited that the judgment was *in rem* only; that the mules and equipment had been delivered to the bank, and the land was to be sold in satisfaction of the debt. The policy was already assigned, the land and equipment and policy were all of doubtful value, and it might have been as reasonably concluded from a knowledge of these facts that the policy was taken into consideration, and absolutely acquired by the bank as to conclude otherwise.

In the case of *Bank of Little Rock* v. *Frank,* 63 Ark. 16, 37 S. W. 400, 58 Am. St. Rep. 65, where fraud was alleged and testimony introduced to establish it, the chancellor decreed that the facts proved were sufficient to sustain the allegation, and this court, on appeal, in reversing the cause and holding that the facts were not sufficient, among other things, said: "Fraud is never presumed, but must be proved, and the burden of proving it is upon the party alleging it. It need not be shown by direct or positive evidence, but may be proved by

circumstances. Slight circumstances, or circumstances of an equivocal tendency, or circumstances of mere suspicion, leading to no certain results, are not sufficient evidence. They must not be, when taken together and aggregated, when interlinked and put in proper relation to each other, consistent with an honest intent. If they are, the proof of fraud is wanting. They may be sufficient to excite suspicion, but suspicion is not the equivalent of proof. Circumstances necessary to prove fraud must be such as naturally, logically, and clearly indicate its existence." Applying this rule to the facts in this case, we think that the facts did not warrant the submission of the question to the jury, and that the appellant insurance company's request for a peremptory instruction should have been granted.

As we have seen, the appellant bank moved to quash service of summons upon it, and excepted to the action of the court in overruling same. Appellees say that, by asking for a continuance, or time to file its answer, and by appearing and contesting the motion to reinstate, and by presenting and arguing its motion to transfer to chancery without saving its rights, the question of service is waived. They rely upon the cases of *Epps* v. *Sasby,* 43 Ark. 545; *Tindall* v. *Layne,* 139 Ark. 590, 214 S. W. 1, and *Sager* v. *Jung & Son,* 143 Ark. 506, 220 S. W. 801, to support their contention. It is true that, as a general rule of practice, "any action on the part of the defendant, except to object to the jurisdiction which recognizes the case as in court, will amount to a general appearance," and these cases so hold. But, as the service on the bank was obtained by virtue of § 1176, C. & M. Digest, *supra,* the bank, under § 1178, C. & M. Digest, is not bound by the general rule, for it might at any time before judgment was rendered object to the jurisdiction of the court and thus preserve its rights, and if the case as to its codefendant should be dismissed or judgment rendered in favor of the codefendant, the bank would be entitled to dismissal as to it.

It follows therefore that the cause should be reversed as to the appellant bank; and the question arises, has the appeal of the bank to this court entered its appearance so that further service upon it will not be necessary, and the cause be remanded for a new trial in the circuit court of Arkansas County? The general rule is that, although the judgment was erroneously rendered in the trial court, where proper service was not had, yet an appeal to this court would render further service unnecessary, and the cause would be remanded for a new trial in the court below. This is the effect of the holding in the following cases: *Benjamin* v. *Birmingham,* 50 Ark. 433, 8 S. W. 183; *Waggoner* v. *Fogelman,* 53 Ark. 181, 13 S. W. 729; *Epps* v. *Sasby,* 43 Ark. *supra; St. L. I. M. & S. R. Co.* v. *Barnes,* 35 Ark. 95; *Adams Machine Co.* v. *Castleberry,* 84 Ark. 573, 106 S. W. 940; *Holloway* v. *Holloway,* 85 Ark. 431, 108 S. W. 837; *Beal-Doyle D. G. Co.* v. *Odd Fellows Bldg. Co.,* 109 Ark. 77, 158 S. W. 955; *Merimack Mfg. Co.* v. *Bibb,* 119 Ark. 443, 178 S. W. 403; *Tindall* v. *Layne,* 139 Ark. 590, 214 S. W. 1; *Duncan Lbr. Co.* v. *Blalock,* 171 Ark. 397, 284 S. W. 15; *Purnell* v. *Nichol,* 173 Ark. 496, 292 S. W. 686; *Federal Land Bank of St. Louis* v. *Gladish,* 176 Ark. 267, 2 S. W. (2d) 696.

An examination of all these cases will disclose, however, that in none of them was service had on the appellee by virtue of § 1176, C. & M. Digest, *supra,* but in each of the cases none of the defendants were residents of the county in which suit was brought, and that § 1178, C. & M. Digest, *supra,* had no application.

The only one of the above cases which might appear not of this class is that of *Beal-Doyle D. G. Co.* v. *Odd Fellows' Bldg. Co., supra,* but a careful examination of that case will disclose that there was but a single defendant, for the complaint showed that the defendant who was sued and served in Clay County was sued and served merely as the agent of the Beal-Doyle D. G. Co., so that the legal effect was but one defendant, Beal-Doyle Co., domiciled in Pulaski County, no cause of action being al-

leged against the resident defendant except in his representative capacity.

Seelbinder v. *Witherspoon,* 124 Ark. 331, 187 S. W. 325, was a suit like the instant case, and the court in that case held that under the statute the defendant, improperly served, and who made his objection before judgment, was entitled to have the case dismissed against him, where no judgment was rendered against his codefendant, and that an appeal from the judgment against him was not a waiver, and did not enter his appearance, and the case against him should be dismissed on appeal. In the recent case of *Federal Land Bank of St. Louis* v. *Gladish, supra,* the court reviewed the cases, and has clearly drawn the distinction, and shown that the case of *Seelbinder* v. *Witherspoon, supra,* is in no sense in conflict with the general rule announced in the cases above, but is governed by the express terms of the statute. The rule announced in the case of *Seelbinder* v. *Witherspoon, supra,* is applicable to the instant case, and controls it. As we have seen, there was no testimony to establish joint liability in the court below, and a verdict for the insurance company should have been directed. The judgment in this court dismissing the case as to the insurance company is therefore equivalent, and in legal effect the decision in the court below.

We have purposely refrained from discussing the question of the liability of the appellant bank to the administrator of the insured, for it is neither necessary nor proper, in our opinion, to discuss the facts relative to that issue.

It follows that the judgment of the trial court must be reversed, and the cause is dismissed as to both the appellants, without prejudice to the rights of the appellees to further proceedings against the appellant bank.

WILSON *v.* RAMBO.

Opinion delivered October 28, 1929.

Alley & Olney, for appellant.

Minor Pipkin and *Duke Frederick,* for appellee.

HART, C. J., (after stating the facts). It is sought to uphold the decree upon the authority of *Taylor* v. *Rogers,* 176 Ark. 156, 2 S. W. (2d) 56. In that case it was held that all contracts made by road improvement district commissioners for the construction of bridges on the main line of the road involved, and which formed a part of the State Highway system, made subsequent to the passage of act 11 of the Acts of 1927, were made without authority, and are void. It was further held that all contracts, made either prior or subsequent to the passage of the Acts of 1927 relating to improvements of roads not a part of the State Highway system, are valid and binding if made in compliance with the law authorizing the same.

The improved highway was organized under the provisions of the act of 1915 commonly called the Alexander Road Law, and under the terms of that act commissioners are authorized to make changes in the character and route of the road to be improved. This court, however, has uniformly held that such changes in the character of

the improvement and the route of the road must be confined to those which are consistent with the original plans, and that material changes in the plans or route of the road cannot be made. *Rayder* v. *Warrick,* 133 Ark. 491, 202 S. W. 831; *Hunt* v. *Harvey,* 135 Ark. 102, 204 S. W. 600; *Nunes* v. *Coyle,* 148 Ark. 365, 230 S. W. 11; *Matlock* v. *Jones,* 171 Ark. 45, 284 S. W. 30.

It is first earnestly insisted by counsel for appellee that the contract had been completed, in so far as the proposed change in the route is concerned, and that the commissioners had no authority to make a new contract for the proposed change after the passage of the acts relating to the subject by the Legislature of 1927. We do not agree with counsel in this contention. The original contract was made on a yardage basis, and was an entirety. It contemplated that the whole of the proposed improved road should be constructed before the contract was at an end. The contract was on a yardage basis, and did not contemplate that the construction of any part of the road should terminate the contract in so far as that part was concerned. As we have already seen, it was in the power of the commissioners to make changes in the route of the road under the Alexander act, under which the district was organized; and the contract for the construction of the road was executed in contemplation of this provision of the statute. The construction contract was made on a yardage basis, and applied to changes in the route of the improved highway as well as to that part of the highway which was already laid out and established. The fact that the change was made after the improvement had been made along that part of the road did not affect the power of the commissioners to make the change; and, inasmuch as the commissioners had the power to make the change, it was the duty of the contractors to construct the proposed change or changes in accordance with the plans of the commissioners. The contract was made before the Acts of 1927 were passed, and, under the case cited above, the commissioners had a right to enforce the original contract.

We are of the opinion that, under the terms of the original contract, the commissioners were bound to construct the improved road along the proposed change, provided they had the power to make the proposed change, under the authority of the county court. The record shows that the proposed change was sanctioned by the county court, and that it was ordered to be made a part of the proposed public highway. The city of Mena also passed an ordinance laying out the proposed route as a city street.

As we have already seen, the act under which the district was created gave the commissioners the power to alter the route, provided the change was not a material one. In other words, any change, in order to be made, must not be a material change in the route, but must be a minor change which tends to perfect the general plan of the proposed road. The proposed road runs from the north part of Polk County through the city of Mena to the south boundary of the county, where it touches Sevier County. When we consider the length of the road as running through the entire county from north to south, and the fact that the proposed change made shorter the road four or five hundred feet, and that it eliminated two right-angle curves in the city of Mena, we do not think that it can be classed as a material change in the route. On the other hand, we think that it is a minor change which tends to conform to the original plans of the road and make it more perfect, and safer for the public travel.

The result of our views is that the proposed change is a valid one, and the chancellor erred in not so holding. It follows that the decree must be reversed, and the cause will be remanded with directions to the chancery court to dissolve the injunction, and to dismiss the complaint for want of equity. It is so ordered.

WILLOUGHBY *v.* HOT SPRINGS ICE COMPANY.

Opinion delivered October 28, 1929.

W. D. Swain, for appellant.

Martin, Wootton & Martin, for appellee.

SMITH, J. This suit was brought by the administratrix of the estate of James M. Willoughby to recover damages to compensate the loss sustained by his death. It was alleged, and testimony was offered tending to show, that deceased went to the factory of the Standard Ice Company to purchase ice, and, while on the premises of the ice company for this purpose, a truck driven by C. E. Driscole was backed against the platform where deceased was standing, crushing his legs so severely that death resulted. The suit was prosecuted upon the theory that the ice company had negligently failed to provide deceased a reasonably safe place in which to stand and remain while he purchased ice, and the same was being delivered to him.

The complaint named Driscole and the Standard Ice Company as defendants, but, when it was developed that the plant was being operated at the time by the Hot Springs Ice Company, the latter was made a party defendant.

At the conclusion of the testimony a verdict was directed in favor of the ice companies, and from the judgment on this verdict is this appeal.

The ice plant was located about twenty-five feet from the street, and the space thus provided was used as a driveway or parkway for persons wishing to purchase ice. The front of the building in which the ice was stored extended about 140 feet parallel with the street. The building for its entire length was fronted with a platform approximately three feet high, with a concrete step in front also extending the length of the building. The platform and step were used in serving ice to pedestrians and trucks. Deliveries, both wholesale and retail, were made from points on this platform. Deceased lived near the plant, and bought ice daily, usually in small quantities, and delivery was made to him and all other pedestrians in the same manner at the platform, and the purchasers usually stood on the lower step of the platform while they were being served. There was a general invitation to the public to buy ice in this manner.

On the day of his injury deceased was standing on the step, or foundation, as it was interchangeably called, below the platform, which was about hip high to a man standing on the ground, but, if he were on the step, the platform reached his knees. The width of the step was not stated. Deceased was being served by Rufus Brown, a salesman of the ice company. While waiting to be served, deceased stood on the step with his back to the street and to approaching vehicles. Deceased gave his order for ice, and Brown went into the storage room to fill it, and he passed through two doors to do so. As Brown entered the first door he saw Driscole driving rapidly, who, "when he drove up, shot in like this (indicating)." The witness testified that the truck backed rapidly into the platform, and that "it jarred my feet" while he was in the storage room.

No separate part of the platform had been designated for the use of pedestrians, to the exclusion of vehicles.

Tom Neeley, testifying on behalf of the plaintiff, stated that he had worked at ice plants in Hot Springs and other cities in this State for twenty years, and that

the plant where deceased was killed was constructed in the usual way, and, while he would not say that this was a safe way he considered it as safe for pedestrians as a filling station, and that there was no danger if truck drivers were always careful, but they were not always careful. Witness had never known an ice factory having separate platforms or places assigned on the platforms for pedestrians, to the exclusion of those who came in cars.

There was no defect in the platform or the step attached to it, or in the premises approaching it, and it is not contended that there was anything dangerous about the premises. The only danger arose out of the probability that some of the drivers of the vehicles approaching the platform might not do so carefully. Deceased was in no danger, and would not have been injured, but for the recklessness of Driscole in backing the truck against him. There was no occasion for Driscole to back his truck against deceased, as there was an abundance of space for this purpose along the platform. Driscole was not employed by the defendant ice companies. They had no control over him in the operation of his truck, and the case was not tried upon the theory that Driscole or other truck drivers were accustomed to driving their trucks up to or against the platform in a careless or negligent manner. The argument is that a separate space for the exclusive use of pedestrians who bought ice pursuant to the invitation so to do, should have been provided, and that the failure to provide this exclusive space was negligence, which, in conjunction with the concurring negligence of a third party, was the proximate cause of the injury, and that the ice companies are liable as well as the driver of the truck.

The trial court held that no case had been made against the ice companies, and we concur in that view.

It may be conceded, as is contended on behalf of appellant, that, where one is invited on the premises of another, he has the right to assume that the premises are

reasonably safe for any use compatible with the invitation. But, as we have said, the premises were safe, and there was no danger in their use, and there would have been no injury, but for the negligence of a third party, over whose conduct the ice companies had no control. There was neither opportunity nor occasion for the ice companies to warn deceased, as there was nothing in the testimony tending to show that its employees, in the exercise of ordinary care, should have anticipated the danger. In order to warrant the finding that negligence is the proximate cause of an injury, it must appear that the injury was the natural and probable consequence of the negligence or wrongful act, and that it ought to have been foreseen in the light of the attending circumstances. *Ultima Thule, etc., R. Co.* v. *Benton,* 86 Ark. 289, 110 S. W. 1037.

It may be conceded that Driscole was grossly negligent in backing the truck against deceased, but Driscole was not an employee of the ice companies, and the doctrine of *respondeat superior* has no application to the ice companies, and there is nothing in the testimony to support the finding that the ice companies knew, or should have known, that the safety of any of its customers would be imperiled by an act so negligent as that committed by Driscole, which was the sole cause of the injury.

In the case of *Manning* v. *Sherman,* 110 Me. 32, 86 Atl. 245, 46 L. R. A. N. S. 126, Justice Cornish, for the Supreme Judicial Court of Maine, said:

" 'When the injury is the result solely of the negligent act of a third person, who does not stand in such a relation to the defendant as to render the doctrine of *respondeat superior* applicable, no liability attaches to defendant. The fact that the negligent act which caused the injury was done on a person's land or property will not render him liable, where he had no control over the persons committing such act, and the act was not committed on his account, nor where the third person, whose negligence caused the injury, assumes control of

the owner's property without authority. An owner or occupant of premises, not in a defective or dangerous condition, is not liable for injuries caused by acts of third persons, which were unauthorized, or which he had no reason to anticipate, and of which he had no knowledge.' '' Citing 29 Cyc. 477, 478.

This case is annotated in vol. 34 Ann. Cas. 1914D, 91, and the numerous cases there cited fully sustain the rule above quoted.

The judgment is affirmed.

KIRBY, J., dissents.

ZEDDY *v.* ZEDDY.

Opinion delivered October 28, 1929.

R. T. Boulware and *Edwin A. Upton,* for appellant.

Searcy & Searcy, for appellee.

HUMPHREYS, J. Appellant obtained a decree of absolute divorce from appellee upon the ground of abandonment, on the 30th day of November, 1928, in the chancery court of Lafayette County, the custody of their three minor children, and an allowance of $10 per month for their support, and a one-third interest for life in his homestead, consisting of 67.51 acres of bottom land in said county, which was ordered divided between them, quantity and quality considered, in accordance with the provisions of § 3511 of Crawford & Moses' Digest.

In addition to filing an answer in the suit denying that the abandonment was without cause, appellee filed a cross-complaint against appellant, seeking a divorce from her upon the alleged grounds of personal indignities and adultery.

In rendering the decree of divorce the trial court refused to allow appellant attorney's fee and suit money, to subrogate her to the rights of the mortgagee in the mortgage paid by her to remove an incumbrance from said homestead, and to require appellee to make bond to secure the payment of the monthly allowance for the support of the children, from which refusals, and the alleged inadequacy of the amount allowed her for the support and maintenance of the children, she has prosecuted an appeal to this court.

The trial court dismissed appellee's cross-complaint for want of equity, from which dismissal and the decree granting appellant a divorce on her complaint he has prosecuted a cross-appeal to this court.

The testimony is in sharp conflict as to whether appellant offered such indignities to the person of appellee as to render his condition in life intolerable, and as to whether she was guilty of adultery.

After a very careful reading of the record we are unable to say that the finding of the trial court upon these issues of fact is contrary to a clear preponderance of the

evidence. According to the undisputed testimony, appellant left his family in possession of the homestead, in the spring of 1926, and never returned to live with them, and never contributed anything out of his earnings to their support. His excuse for leaving was the alleged misconduct of appellant, and indignities offered him by her. It follows from the finding of the trial court against him on these issues that he deserted appellant without just cause. The trial court did not err therefore in granting appellant a divorce and dismissing appellee's cross-complaint.

The custody of the children was properly awarded to appellant. They are of tender years, the oldest being six years of age at the time the suit was instituted. Appellee is working for a small wage at such times as he can find employment, and has no separate home for them, and no one to take care of them while he works.

The allowance of $10 per month as support for the children is indeed small, but at present the earning capacity of appellee is not great. He only earns $2.50 a day at a sawmill at such times as he can get employment. The sawmill does not afford continuous employment. He has no property except the farm, out of which the life estate of appellant is to be carved. In the division of the homestead appellant will acquire a home for herself and children, upon which she will be able to earn a support. She has already demonstrated this fact by her ability to do so since appellee deserted her. The land is productive, and appellant, with the aid of her children as they grow older, can cultivate it without employing much, if any, labor. She has been cultivating a portion of the land by her own labor for several years.

Appellant's demand that appellee be required to give a bond to pay the monthly allowance of $10 was unreasonable, and not justified by the facts in the case. Bonds are not easily procured, and it will be time enough to request such a bond if appellee defaults in the payment of the monthly allowance. There is nothing in the record

reflecting that the trial court abused its discretion in denying appellant's request for a bond. It was within the trial court's sound discretion to grant or refuse the request.

The trial court did not err in refusing to decree appellant a reasonable sum for suit money and attorney's fees. In addition to cultivating a portion of the land herself, appellee has been collecting the rents on the land cultivated by a tenant upon the place, and, relatively speaking, was better able to pay her own cost and attorney's fee than appellee was to pay his.

The only remaining question raised by the appeal is whether the court erred in refusing to subrogate appellant to the rights of the mortgagee in the mortgage paid by her to remove an incumbrance from the homestead. The record reflects that at the time appellee abandoned his family there was a mortgage upon the homestead of $560. Although appellant paid this amount and took an assignment of the mortgage herself, the record reflects that it was paid out of the rents and profits of that portion of the homestead not actually occupied and cultivated by her. As the money with which she removed the incumbrance arose, not from the earnings of appellant or from her separate estate, but from the rents and profits of the homestead, she was and is not entitled to be subrogated to the lien of the mortgage on the land, under the doctrine announced in the case of *Kenady* v. *Gilkey,* 81 Ark. 147, 98 S. W. 969. The instant case is governed by the rule announced in that case.

No error appearing, the decree is affirmed throughout.

SNOW BROTHERS HARDWARE COMPANY *v.* ELLIS.

Opinion delivered October 28, 1929.

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

Gaughan, Sifford, Godwin & Gaughan, for appellee.

KIRBY, J. On this appeal the question for determination is whether the court erred in holding, upon the issue raised by the pleadings, that there was no title to the lands sought to be sold under execution remaining in Rogers, the judgment debtor, subject to execution on the judgment recovered against him by appellant.

The court sustained a general demurrer to appellant's answer, and, upon its declining to plead further, made the temporary injunction permanent, and from this decree the appeal is prosecuted.

From the complaint, answer and exhibits it appears that W. L. Rogers, the owner of the land, entered into a written contract with Mrs. Edna Umsted and her daughters, on January 15, 1927, under which she loaned him $5,000, taking his note therefor and a deed of trust on the land to secure same, and at the same time Rogers executed a deed conveying the lands in fee to Mrs. Umsted and her daughters. The contract provided that, if Rogers should not pay the $5,000 note when due, one year after date, Mrs. Umsted should deposit with the bank holding the contract and deed in escrow $2,650 and the $5,000 mortgage note, marked "Paid," and receive the deed from the bank. The $5,000 mortgage note was not paid by Rogers nor any one for him. She deposited the $2,650

and the note, marked "Paid," and received the Rogers deed from the bank, in accordance with the terms of the contract, recorded it on January 17, 1928, and she and her daughters conveyed the lands to S. J. Carnes on January 23, 1928, by deed recorded that day. Appellant recovered its judgment against Rogers on April 11, 1927, three months after the contract between him and Mrs. Umsted had been executed. The execution on the judgment was issued on November 26, 1928, and levied on the lands on December 24, 1928, about eleven months after Rogers' deed conveying the lands to Mrs. Umsted was delivered by the bank to her in accordance with the escrow agreement.

Appellant insists that its judgment constituted a lien on the lands, notwithstanding it was not rendered till three months after the written contract was made by the owner with the lender of the money, under the terms of which the money was loaned Rogers, the deed of trust executed by him for its security, and the warranty deed conveying the lands executed and put in escrow, to be delivered on condition to the grantee, since the judgment was rendered long before the condition was performed and the deed conveying the lands was delivered under the terms of the escrow agreement.

A judgment lien, however, does not attach to the land, but is a lien on the real estate owned by the defendant—the judgment debtor's interest in it—and, if that interest be subject to any infirmity or condition by reason of which it is eliminated or ceases to exist, the lien attached thereto ceases with it. *Howes* v. *King,* 127 Ark. 511, 192 S. W. 883; § 6299, C. & M. Digest; 15 R. C. L., § 255, p. 798.

A judgment lien only attaches to an estate in lands, not to a lien on lands, and a vendor's lien is not an estate or interest in land subject to execution, nor is the interest of a vendor of land who has given a bond for title thereto subject to execution. A judgment lien is subject to existing equities of third parties in the land. *Howes* v. *King,*

supra; Stephens v. *Shannon,* 43 Ark. 464; *Strauss* v. *White,* 66 Ark. 167, 51 S. W. 64; *McGuigan* v. *Rix,* 140 Ark. 418, 215 S. W. 611.

Before the rendition of the judgment, Rogers, the judgment debtor, had conveyed all his interest in the land on condition, and put the deed in escrow, to be delivered upon performance of the condition, which was done, and he did not therefore hold the land or any interest in it free from or not subject to the condition, by reason of which his entire interest was eliminated or ceased to exist.

If it be regarded that Rogers had a vendor's lien for the balance of $2,650 paid by the grantee to procure the delivery of the deed under the contract and escrow agreement, it does not improve appellant's position, since a vendor's lien is not an interest in land subject to execution. There was no attempt to levy the execution upon the balance of the purchase money paid into the bank upon delivery of the deed by it to the grantee.

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

HOWELL *v.* STATE.

Opinion delivered October 28, 1929.

Harney M. McGehee, for appellant.

Hal L. Norwood, Attorney General, and *Robert F. Smith,* Assistant, for appellee.

MEHAFFY, J. Appellant was convicted of murder in the first degree, and the death penalty was imposed. No motion for a new trial was filed, and we can therefore consider only the errors that appear on the face of the record. The attorney representing appellant here did not represent him in the lower court.

The evidence showed that Howell was an inmate of the county hospital in Crawford County; that, a few days before the killing with which he is charged, the superintendent, Deffenbaugh, asked Howell to fix a bed for a patient, and Howell told him he would not do that for him or anybody else. He became enraged, and packed his grip and left. He had on a pair of boots that the heels

were worn off, and they made a grating on the floor when he walked. The killing took place about 7:30 or 8 o'clock, and one of the witnesses saw a man run out and slam the screen door, and testified that he heard a scraping noise like tacks striking on the concrete. In the room where the shooting took place Nicholson was found dead, Deffenbaugh was dead, and Mrs. Deffenbaugh was lying on one side, still living, and asked for help, and said that W. H. Howell did it. The witness who testified to seeing the man run could not recognize him.

Deffenbaugh and Howell had not had any quarrel, but, after he had told Howell to help him with the bed, Judge Stockard discharged Howell. Howell, before the killing, left the county farm, and said he was going down and tell the county judge what they had been doing; that they had turned him out, and he was going to see the judge. He was mad.

Another witness testified that Howell said they turned him away without cause, and were keeping two young men there who had never paid a cent of taxes. This was about three days before the killing.

The county judge testified that he had sent Howell to the county house temporarily, and told him so at the time he sent him. On Wednesday before the killing Howell went to his office, and wanted to know whether he had been let out, and the judge told him he had. Howell remonstrated with the judge, and the judge ordered him out of his office. As Howell was leaving, he remarked: "I will get even with the last one of you that had anything to do with it." The judge then reached for a hammer, and told Howell to get out of his office, and Howell left.

Another witness testified that he saw Howell in a hardware store, the day before the killing, and he bought some 38-calibre Winchester shells. The empty shells that were found were identified by witness as the same kind that Howell had bought. Howell was seen on the same day of the killing with something in a gunnysack

that looked like a walking stick. He was going towards the county infirmary, and another witness testified that he saw Howell on the day of the killing. Howell rode with him a short distance, and this witness said Howell had something in his sack, and he asked him what it was, and Howell said it was a gun.

About noon on the day of the killing another witness said that a large man came to her house, wanting some dinner, and that he had something in a sack. She pointed out the man in the court room.

Another witness testified that Howell came to her house in the afternoon before the killing, and wanted something to eat, and that when he left he went in the direction of the county farm.

When Howell was arrested, the Monday morning before the killing, he had his Winchester, and the shells in the gun were the same kind as the empty shells picked up in the hall where the parties were killed. They were 38-calibre.

Other witnesses testified that they picked up empty shells around the infirmary, and identified them as 38-calibre shells.

I. N. Alexander said that some time last December Howell was at his house and ate supper. He was there 25 or 30 minutes. He was carrying a Winchester. That he was mad, and said he had just had a fight.

Another witness testified that a man came to his house, and said his name was Thompson. He had a Winchester, and said he was lost. Witness then pointed out the man at the end of the table as the same person.

There was some testimony that Howell was not entirely normal.

Appellant was being tried for the murder of J. D. Nicholson, and the prosecution proved by witnesses that Mrs. Deffenbaugh, who was evidently killed at the same time, had made a dying declaration in which she stated that Howell did it.

It is contended by the appellant that he did not have a fair and impartial trial, and that the dying declarations of Mrs. Deffenbaugh were improperly admitted in evidence.

There is some conflict in authority about the admissibility of the dying declarations of a person other than the one defendant is being tried for killing, some courts holding that, where two or more persons are killed at the same time by the same person in the trial for killing one, the dying declaration of one of the others that was killed at the same time is admissible. Most courts, however, hold that only the declarations of the person whose death is the subject of the charge against the accused are admissible. Under the common law, dying declarations are admissible in criminal prosecutions for homicide only, and the declaration is then admissible only when the declarations are those of the person whose death is the subject of the charge against the accused, and the circumstances of such death are the subject of the declarations. Such declarations are not admitted to prove the killing of any other than the declarant.

"According to the weight of authority, this rule is adhered to where the accused has killed two or more persons by the same felonious act, and is on trial for the murder of one of them; but there are cases holding that, upon the trial of the accused for the murder of one of his victims, the dying declarations of another are admissible, inasmuch as he might have been charged in one indictment for the murder of all of them, when such evidence would have been clearly admissible." 21 Cyc. 982.

This court, however, has held that the dying declaration of the person for whose death the defendant is being tried only can be introduced; that the dying declaration of any other person, although killed at the same time and by the same person, is not admissible.

"Dying declarations are admissible only in case of homicide where the death of the person killed is the subject of the charge, and the circumstances of the death are

the subject of such declarations." *Rhea* v. *State,* 104 Ark. 162, 147 S. W. 463; *Moore* v. *State,* 125 Ark. 177, 188 S. W. 3.

Therefore the dying declaration of Mrs. Deffenbaugh should not have been admitted; but no objections were made in the trial court, and it cannot be considered here. The evidence, without the declaration of Mrs. Deffenbaugh, was sufficient to justify the jury in finding that the appellant killed the three persons. No objection having been made to the introduction of this testimony, it cannot be considered here.

Harding v. *State,* 94 Ark. 65, 126 S. W. 90, was a case where the defendant was convicted of murder in the first degree. He saved no exceptions to the evidence adduced or to the instructions, but relied on the statute (Acts 1909, p. 959) which provides that, when one has been convicted in the lower court of a capital offense, all errors of the lower court prejudicial to the rights of the appellant shall be heard and considered by the court, whether exceptions were saved in the lower court or not. And, if the Supreme Court finds that any prejudicial error was committed by the trial court in the trial of any case in which a conviction of a capital offense resulted, such cause shall be reversed, and remanded for a new trial, etc. The court said in construing this statute:

"The Supreme Court of this State has appellate jurisdiction only, except it may issue writs of *quo warranto* to the circuit judges and chancellors, and to officers of political corporations when the question involved is the legal existence of such corporation. * * * As to the admission of evidence in a trial, a question as to its admissibility or competency must be presented to the circuit court by objection or otherwise for decision before it can err as to its admission, and the same is true as to the law of the case. No exception to such decision is necessary, under the act of 1909, to present it to this court for review, neither is a motion for new trial in cases in which the defendants have been convicted of

capital offenses. But it must appear that the decision was made before we can find that the court erred. It is only for errors of the lower court that the act of 1909 authorizes this court to reverse or modify judgments of conviction of capital offenses. Such errors must appear in the manner indicated before such authority can be exercised." *Harding* v. *State,* 94 Ark. 65, 126 S. W. 90.

This court also has said: "Appellant now contends that the testimony of Homer Bearden was incompetent, and that the court erred in not sustaining his motion to strike it out. In *Warren* v. *State,* 103 Ark. 165-171, 146 S. W. 477, we said: 'Where incompetent evidence is offered, it is the duty of the party to object immediately, or at least within a reasonable time. If he fails to object at the time, and afterwards asks for the exclusion of the incompetent evidence, he cannot demand its exclusion as a matter of right, but the request addresses itself to the discretion of the court. A party cannot speculate upon what the testimony of a witness will be, and then at the end of the trial demand as a matter of right that the incompetent testimony be excluded." *Bell* v. *State,* 120 Ark. 531, 180 S. W. 186.

In the Bell case it was also said that the appellant did not object to the testimony at the time it was given.

"Here, as above stated, the record does not show that any objection was made to the manner of selecting the jury. This court has held repeatedly in capital cases that there are certain constitutional and statutory rights guaranteed to the defendant as a personal privilege, which he may waive at the trial, and which he does waive by not objecting to the method of procedure during the trial. Most of the cases on this point, as well as a review of them, will be found in the majority opinion, or in the dissenting opinion, in *Shinn* v. *State,* 150 Ark. 215, 234 S. W. 636. * * * Both the majority and the dissenting opinion recognized that rights which do not affect the State and are in the nature of a personal privilege may be waived by the defendant, and are waived by him where

he does not object during the trial." *Sullivan* v. *State,* 161 Ark. 19, 257 S. W. 58; *Bullen* v. *State,* 156 Ark. 148, 245 S. W. 493.

The court, in the case of *Sullivan* v. *State* also said, in speaking of the statute with reference to procedure in capital cases: "In construing this act, however, this court has held that, while formal exceptions need not be saved at the trial, objections must be made to the proceeding in the trial court in order to obtain a review of the alleged errors in this court." And it cites *Harding* v. *State,* 94 Ark. 65, 126 S. W. 90; *Caughron* v. *State,* 99 Ark. 462, 139 S. W. 315; *Morris* v. *State,* 142 Ark. 297, 219 S. W. 10; *Snead* v. *State,* 159 Ark. 65, 255 S. W. 895.

It therefore appears to be the settled rule of this court that, although in capital cases exceptions would not have to be saved, objection must be made at the time before this court will be authorized to review it, and, as to the admissibility of the testimony complained of, no objection was made at the time. As to the admissibility of the dying declaration, it is sufficient to say that no objection was made.

As this court has repeatedly held, the Supreme Court of the State has only appellate jurisdiction in cases of this kind. It reviews errors of the circuit court, but, before it can consider an error of the circuit court as to the admission or rejection of evidence, objection must be made in the trial court, and this is true in capital cases as well as others.

Appellant next contends that the court erred in refusing to allow him to show by witnesses the fact that he was not mentally normal at the time of the alleged shooting. The question asked, after reciting a number of facts, was: "Do you consider that an act of a normal man?" The State objected to it, first, on the ground that it was not based upon facts in proof. In other words, before the evidence would have been admissible, the State contended that it should state the facts in proof, and that it did not do this. It is also stated that it included things

that had not been proved. And the prosecuting attorney said: "It is not a question of whether or not he is normal, but whether he is insane." The defendant then modified the questions by asking: "Is it the actions of an insane man?" And the court permitted the witness to answer this question.

A sufficient answer to the objection here is that the question contained matters not in proof, and then that the defendant himself, when he changed the question without objection, necessarily waived his right to ask it in the form first presented. The same thing may be said about this as said about the last question, that no objection was made after the form of the question was changed. Moreover, the court properly instructed the jury with reference to the defendant's mental capacity to commit crime.

The appellant, however, argues that no exception was saved to the court's action, but that it is not necessary that exceptions be saved, because this is a capital case, and relies on § 3414 of Crawford & Moses' Digest, the act already referred to.

It is true that in a capital case no exceptions have to be saved, but we have repeatedly held that objections must be made, and there was no objection made to this question as appellant finally asked it himself, and it was permitted to be answered. When appellant changed the form of the question and substituted the word "insane" for the word "normal" he waived any objection he might have had to the question as originally asked, and he made no objection to it in the way it was finally asked, and, in fact, it was answered. But the court stated clearly that the question reiterated matters not in proof, and that would have been a sufficient reason for rejecting it.

The instructions given to the jury on the question of insanity are instructions that have been approved by this court time and again, and the record does not show any objections to any of the instructions, and they were as favorable to appellant as he had any right to ask.

The appellant also contends that the hypothetical questions and answers in response thereto, over his objection, were prejudicial. That hypothetical question recited the facts already testified to, and then asked the doctor if there was anything in that testimony, or the conduct of the defendant, as shown by this evidence, that indicated that he was insane, and he answered that there was not. We do not think the question was objectionable, and the court did not err in permitting it to be answered.

Appellant discusses at some length also the testimony of appellant's former wife, but that testimony was withdrawn from the jury, and the court instructed them that they should not give it any consideration whatever, and the court committed no error in this respect.

The statute relied on by appellant, as construed by this court, requires this court to consider all objections made by the appellant, whether excepted to or not. If objection is made, this court must consider it, whether exceptions were saved or not. We have construed the statute to mean this, but, where no objections are made, there is no error for the court to review. Witness might be asked about a dying declaration that would be wholly improper, as in this case, and not object, for the reason that he thought the answer might be helpful to him. If he were permitted to pursue this course, and then, when it turned out to be against him, could object, he would be in the position of taking advantage of it if it were favorable to him, and objecting if it were unfavorable. This he cannot do, but he must object, and, if he does, then this court will review the errors whether there were any exceptions or not.

There were three persons killed at the same time. The evidence is sufficient to show that the appellant did the killing, and we find no error in the record justifying a reversal of the case, and the judgment is therefore affirmed.

ALEXANDER *v.* AMERICAN BUILDING & LOAN ASSOCIATION.

Opinion delivered October 28, 1929.

Starbird & Starbird, for appellant.

Robinson, House & Moses, Harry E. Meek and *W. R. Roddy,* for appellee.

McHANEY, J. Appellee foreclosed a mortgage on certain real property in Mulberry, given it by G. L. Wisdom and wife as security for a note for $1,650, and interest. The Bank of Mulberry was made a defendant, it holding a second mortgage. Appellant is an officer of the bank. Neither the Wisdoms nor the bank filed an answer or made any defense to the action, and a default decree was taken. Counsel for appellee wrote the commissioner appointed by the court to make the sale, who was the clerk of the court, to advertise the property for sale, after the lapse of the ten days given the judgment debtor in the decree to pay the judgment, and to notify them of the day of sale. The property was advertised by the commissioner according to directions, but he failed to notify counsel for appellee of the date of sale, as requested by them. At the sale appellant became the purchaser on a bid of $305. Before confirmation, appellee filed a motion to set the sale aside on the ground that it had no notice of the day of sale; that it relied upon the commissioner to notify its counsel thereof; and that the property was sold for a grossly inadequate price, it being willing to bid the amount of the judgment, interest and costs—a sum in excess of $1,800. It attached to its motion the original application for loan signed by Wis-

dom and the appraisal made by others, showing a value of $4,500 at the time the loan was made.

The court refused to confirm the sale, set it aside, reopened the sale, and sold the property in open court to appellee for $1,838.04, the amount of its judgment, interest and costs. Appellant was present in person and by attorney, but declined to bid.

We think the court correctly set aside the sale and resold the property, under the circumstances. The sale was not complete until confirmed. *Moore* v. *McJudkins,* 136 Ark. 292, 206 S. W. 445. We have many times held that mere inadequacy of price is not sufficient to justify the court in refusing to confirm. *Marten* v. *Jirkivosky,* 174 Ark. 417, 295 S. W. 365, and cases cited. We have also held that, where the sale is made not only for a grossly inadequate consideration, but is attended by circumstances which work a hardship against the owners of the property or against a party to the suit, such as appellee, the court does not err in refusing to confirm the sale. In *Hawkins* v. *Wood,* 179 Ark. 845, 18 S. W. (2d) 371, we said:

"The sale was not only for a grossly inadequate price, but appellee was misled and prevented from attending it by the failure of the other party in interest, or the commissioner, to notify him of the time and place of the sale, as was agreed to be done, thus permitting appellants to attend the sale and bid without competition for the property, working a hardship against the owners of the property, and the court did not err in refusing to confirm the sale."

In *Moore* v. *McJudkins, supra,* this court held that it was error to confirm a sale where the property sold did not bring a fair price "because of circumstances which created a condition in the nature of an unavoidable casualty which prevented appellants or their attorney from attending." While the same set of circumstances do not exist in this case as in that, yet the fact remains that the property was sold to appellant at the first sale for a

grossly inadequate price, at a time when appellee and its counsel had no actual notice thereof, were not present, for the reason the commissioner neglected to notify them of the date as requested, and, but for this failure of the commissioner, would have been present and bid enough to satisfy its judgment with costs.

Under these circumstances we are of the opinion that no error has been committed, and the decree is accordingly affirmed.

ICE SERVICE COMPANY *v.* FORBESS.

Opinion delivered October 28, 1929.

[redacted]

Mike Danaher and *Palmer Danaher,* for appellant.

Rowell & Alexander, for appellee.

BUTLER, J. Robert Douglas, a negro man, assisted by his son, Willie Douglas, whose age is not disclosed by the testimony, was engaged in delivering ice in the city of Pine Bluff, and, while so engaged, a large block of ice fell from the rear of the delivery wagon, striking and injuring a boy about ten years of age, the son of the appellee. The appellee brought suit in his own right and for the benefit of his minor son for damages for the injury, alleging that the same was occasioned by the negligence of the two negroes while in the employ of the appellant, Ice Service Company. There was a trial, and a verdict for the plaintiffs in the sum of $4,000.

Error is assigned because of the admission of incompetent testimony and in the court's declarations of law, to all of which timely objections were made and exceptions duly saved. A careful examination of the testimony and instructions given discloses no reversible error.

We think appellant has correctly stated the vital issue: "The only question in this case is whether Willie Douglas, who was driving the wagon, was an employee of the defendant, Ice Service Company."

It is admitted that the evidence, while conflicting, is sufficient to establish negligence on the part of those in charge of the delivery wagon, and the sole issue in the case is whether these persons were the servants of the appellant Ice Service Company. The latter insists that there is no liability attached to it, because neither Robert Douglas nor Willie Douglas were in its employ, but were independent peddlers of ice on the streets of Pine Bluff, and the only connection appellant had with them was to sell them ice which they, in turn, independently sold and delivered, without any control or supervision on the part of the appellant.

It appears there were two corporations in Pine Bluff engaged in the manufacture, sale, and delivery of ice, the Southern Utilities & Ice Company and the City Ice Company, prior to the 29th day of June, 1927, on which date the appellant ice company was organized and took over the retail business of the ice companies and the delivery to the customers in the city of Pine Bluff. One of these companies was known as the City Ice Company. Miller testified that Robert Douglas, before the organization of the appellant company, had a contract with the said City Ice Company, which defined and specified his relationship with respect thereto, and that, when the appellant company was formed, he (Miller), who was also the manager of the City Ice Company, and became the manager of the appellant company, told Robert Douglas that he could continue to work under the same contract for the appellant company. This contract was introduced in evidence, on the theory that it might be taken into consideration in determining what contract Robert Douglas had with the appellant company. The contract specified that Douglas should purchase all of his ice from the appellant company, pay for it at the close of the business day, and sell it to the citizens of Pine Bluff at a price to be fixed by him (Douglas); that he would pay the appellant company the sum of $1 per week for the wagon he used in the prosecution of his business. Mr. Miller, the manager of the appellant, and Willie Douglas were the only ones testifying as to any direct knowledge of the relationship existing between the appellant and Robert and Willie Douglas. Both testified positively that the Douglases were not in the employ of the ice company; that Robert Douglas was an ice peddler; that the appellant had no connection with him except to sell ice to him and deliver it to him on his wagon at the storage house of the appellant, and that Willie Douglas worked for Robert Douglas, his father, and was paid for his services by him.

Appellant insists that there was no testimony contradicting this evidence. There were, however, other

conditions in the contract and other facts and circumstances proved in the case which we think have been overlooked by the appellant. The Ice Service Company, as shown by its articles of incorporation, was organized for the purpose of retailing and delivering ice in the city of Pine Bluff. There was a license tax required by the city for those engaged in that kind of business, which was paid by the appellant company. It took over from the City Ice Company and the Southern Ice & Utilities Company the equipment owned and used by them in the delivery of ice. The appellant company owned the wagon that was used by Douglas, and paid the tax on it. The appellant company required Douglas to store the wagon at all times, when not in use in the prosecution of the delivery of ice, in the storehouse of appellant, and prohibited its use for any purpose except the delivery of ice. It prescribed the territory in which Douglas was to operate, and required that all complaints, orders or inquiries received from patrons in that territory should be referred to the company. Mr. Miller, appellant's manager, controlled the loading of the ice upon the wagon, and would not allow more than a certain amount to be loaded thereon, the average load being about 2,400 pounds. The city also required a license tax for all peddlers, and it was shown that no peddler's license was ever issued to Robert or Willie Douglas, or that they had paid any peddler's license fee, either during the time they were working for the City Ice Company or continued for the appellant company, and that they had been working for the City Ice Company for about two years before they began working for the appellant company. The ice which was unsold at the end of the day's business was returned to the appellant company and stored in its warehouse, and on the following morning that ice, or "its equivalent," was again delivered to Douglas.

As before stated, Mr. Miller was manager of the City Ice Company, and also of the appellant company. During the two years that Robert Douglas had been engaged

in the delivery of ice, Willie Douglas, his son, helped him. Mr. Miller stated that he knew this—that he had seen Willie on a number of occasions around the ice plant with Robert Douglas, and had seen Robert's wagon out on delivery work a number of times and Willie with it; one would drive the wagon and the other deliver the ice; that he kept Robert Douglas' wagon in repair and controlling the manner of its loading.

There was testimony to the effect that, a short time before the trial, Willie Douglas had stated that he was working for the appellant company, and was going to testify to that fact.

Counsel for the appellant argue most earnestly and plausibly that the evidence is wholly insufficient to establish the relationship of master and servant; that it does show that the negro, Robert Douglas, was an independent peddler or contractor, and that, even though Robert Douglas might have been the servant of the appellant, Willie Douglas is shown to have had no connection with such company, but worked solely for his father.

Terry Dairy Co. v. *Parker,* 144 Ark. 409, 223 S. W. 6, is similar, and, under the rule *stare decisis,* controls the instant case. The facts in that case were as follows: "The appellant is engaged in selling milk and manufacturing and selling ice-cream. It buys milk from dairy farmers and distributes it to its customers in Little Rock. During the summer months it contracts with drivers to sell what the stores want. Appellant starts running its wagons about the first of March. It gets good men, who take it on commission, and it gives 10 per cent. a gallon for the first thirty gallons and five per cent. a gallon over that. It had three men running like that. Bob Ellison was one of them. He was using appellant's truck at the time of the injury. Appellant paid the license on the truck. The truck had painted on it in big letters, 'Terry Dairy Company.' Appellant did not have any control over Ellison as to the quantity of cream he should sell or dispose of or to whom he should sell. He would

come in in the morning and write out his order for what he wanted, and then he would sell to whomsoever he pleased, and turn in what he sold. He got whatever he wanted, and it was loaded on the wagons, and the company had no more control of it. Appellant had a verbal contract with Ellison by which he would take out his cream and sell it, and account to appellant for the price of the cream. He turned back the cream he did not sell, and got credit for that. He was charged with the amount he got in the morning, and had to account for that amount of cream, either by turning in charge tickets or turning in cash for what he sold. He had been working for the company four or five years. Appellant paid Ellison's commissions once a week. Did not pay him anything except the commission. Appellant did not furnish Ellison any help; if he hired any help, appellant did not have anything to do with it. John Freeman, the negro driver who was driving the truck at the time of the injury, was not working for the appellant, although he had previously worked for appellant in the capacity of truck driver, and anything else that came up. At the time of the injury his name was not on appellant's payroll, but when he worked for appellant his name was on the payroll."

The court held that, under the above testimony, it was an issue for the jury as to whether or not Ellison was an independent contractor at the time of the injury to the appellee, and as to whether or not John Freeman was in his employ or in the employ of the appellant. This is our conclusion in the case at bar.

Counsel for the appellee urge that the decision in the above case should be overruled, and to support this contention cite an array of authority which they fortify by cogent reasoning and illuminating illustration. We are much impressed by the able argument, but are not convinced that we should depart from the rules announced in *Terry Dairy Company* v. *Parker, supra.*

On the question where, in a given case, the relation of master and servant obtains, this court has held that

the method by which the compensation for work to be done is not conclusive as to the relationship of the parties, nor the name by which the compensation is called. The conclusion as to the relationship must be drawn from all the circumstances in proof, and, where there is any substantial evidence tending to show that the right of control over the manner of doing the work was reserved, it became a question for the jury whether or not the relation was that of master and servant. *Magnolia Petroleum Co.* v. *Johnson,* 149 Ark. 553, 233 S. W. 680; *Harkins* v. *National Handle Co.,* 159 Ark. 15, 250 S. W. 900. This was the rule applied in *Terry Dairy Co.* v. *Parker, supra,* and is in accord with the weight of authority. 39 C. J., § 1518. Although Willie Douglas might not have been employed by appellant, but only by his father Robert, the testimony is undisputed that appellant knew for two years that Willie was engaged in helping his father deliver ice; knew in what way this help was given; and it became a question for the jury whether Robert's act in procuring Willie's services was acquiesced in and ratified by appellant. If it did ratify or acquiesce in the boy's employment, he then occupied the same relation to appellant as Robert, and therefore the appellant was liable for his negligence. It might be said that he was an instrumentality used in the furtherance of appellant's business, and, when the appellant knowingly permitted this, it may be said to have adopted such instrument, and become liable for his negligent acts. *Osteen* v. *S. C. Cot. Oil Co.,* 102 S. C. 146, 86 S. E. 202, L. R. A. 1916B, 629; *Lakin* v. *Ore. Pac. R. Co.,* 15 Ore. 220, 15 Pac. 641; *Althorf* v. *Wolfe,* 22 N. Y. 355; *Demmit* v. *Hannibal,* 40 Mo. App. 654.

It is not infrequent that liability attaches to the master for the negligence of one employed by the servant or substituted for him, where that one, in the prosecution of the master's business, negligently causes an injury. *Tchula Co-Op. Store* v. *Quattlebaum,* 176 Ark. 780, 4 S. W. (2d) 919. In those cases the liability seems to attach

upon the broad ground that the master is responsible for the negligence of the servant, whether the same be his immediate act or his mediate act only; but in the case at bar it is unnecessary to fix liability on that ground (and we do not in this case so hold), for the evidence was sufficient to submit the question to the jury on the theory that Robert Douglas' employment of Willie was acquiesced in and ratified by appellant.

The issues raised by the pleadings and evidence were fully and fairly submitted to the jury under proper instructions, and we think its verdict was not excessive. The boy injured was ten years of age, and the son of a printer. A block of ice weighing 300 pounds fell, striking him and crushing his hand. Both forefinger and second finger were so injured that it appeared at first necessary to amputate both. However, the bones of the second finger were set, and that finger saved. The forefinger and about one-half of the bone extending from the base of the finger to the wrist were amputated; the skin of the index finger was torn off, and the palm of the hand was used to cover up the torn-out flesh. The doctor said: "The boy has a very good hand, minus one finger, with a pad that looks rather bunglesome in the palm of his hand." The boy suffered great pain for a considerable time. As before stated, we think, under all the circumstances, the verdict was not excessive. See *Moline Timber Co.* v. *Taylor,* 114 Ark. 317, 222 S. W. 371; *Terry Dairy Co.* v. *Parker, supra.*

Judgment affirmed.

ALPHIN *v.* BLACKMON.

Opinion delivered October 28, 1929.

Powell, Smead & Knox and *C. E. Wright,* for appellant.

Earle W. Moorhead, for appellee.

BUTLER, J. S. E. Revels, an old negro preacher, died October 10, 1915, the owner of eighty acres of land, his homestead, in Union County, Arkansas. He left his widow, Ester Revels, four children and two grandchildren, surviving him, one of whom, Willie Eddie Blackmon, a grandchild, was the plaintiff in the court below.

Shortly after the death of Revels, his widow and a number of the children executed a mortgage on a part of the lands left by Revels to secure a debt, and afterwards John Moore, who had married one of the daughters of Revels, made arrangements to pay off the mortgage, and Ester Revels, the widow, and the other children of Revels, deceased, except the wife of John Moore, conveyed to him the land in controversy by quitclaim deed. This deed was executed December 5, 1919, at which time Ester Revels, the widow, John Moore and his wife, and one or two of the other children, were living on the land. There were several houses, one occupied by the widow, and the others occupied by other members of the family. After the execution of this deed, Moore lived in the house with Ester Revels for a time, and, some disagreement arising, he moved from that house into another on the same tract, and continued to reside there until some time in the latter part of 1921, when he was

sentenced to the penitentiary for one year. He was paroled along in March, 1922, and never lived on the lands in controversy again, but went to live with a Mr. Smith, who had been instrumental in securing his release from the penitentiary.

During the time Moore was in the penitentiary his wife and Ester Revels continued to reside on the lands, and until the release of Moore, when his wife joined him, and, some months after—perhaps in September, 1922—the widow, Ester Revels, also left the lands and moved to Moore's, on the Smith place. No one occupied any of the houses for a time after Ester Revels left, until Bertha Macey moved into the house vacated by the widow, and resided there for about a year, leaving it the latter part of the year 1923. The place was unoccupied from the time the Macey woman moved out until one Oliver moved in. Oliver is now dead, and the time he took possession is not definitely fixed, but it was some time in 1925 or 1926. There was a dispute as to who gave Oliver permission to occupy the premises, Moore claiming that he was occupying as his tenant, while the widow stated that Oliver went into possession by her permission and held under her. Oliver remained on the property and occupied the house for perhaps a year or eighteen months, cultivating only a small potato patch near his residence. Just when he moved away is not shown. After he vacated, Charlie Rogers moved in, about November 1, 1927, and was in possession at the time this suit was instituted, holding as a tenant of John Moore.

Beginning with the year 1919, Moore paid the taxes for each year down to and including the year 1925. J. S. Alphin paid the taxes for the year 1926, and Moore paid them for the year 1927. J. S. Alphin, one of the appellants, purchased the land under a sale made by the commissioner of the chancery court on April 8, 1926. This sale was made under a decree of the court foreclosing the mortgage given by Moore and others to Alphin to secure the payment of a debt. Previous to that time Moore

made Alphin a deed to the lands, and in June, 1927, Alphin deeded the lands back to Moore, reserving to himself a 63/64 undivided interest in all of the minerals under and upon said land, Alphin having previously executed a number of oil leases and mineral deeds to the other appellants in this case.

The mother of the appellee, Willie Eddie Blackmon, died before the death of S. E. Revels, leaving two children surviving, Willie Eddie Blackmon and a sister. This sister joined with Willie Eddie Blackmon in this suit, but seems to have parted with her interest in the lands before the suit was brought, and since has passed out of the case. The appellee was about two weeks old when his mother died, and about twenty-seven years of age when this suit was instituted. Immediately after his mother's death he was taken to another settlement in Union County, where he lived with his father's mother for some time. Later he afterwards moved with his paternal grandmother to Parkdale, Arkansas, and from there to Bastrop, Louisiana.

At the time of the purchase of the lands by John Moore, he testified that he knew nothing of the existence of the appellee, Willie Eddie Blackmon, and Blackmon himself did not know that he had an interest in any lands in Union County until he was informed of that fact some time before the bringing of this suit. This suit was instituted by the appellee as one of the heirs of S. E. Revels, deceased, to recover a one-tenth interest in and to the lands of which his ancestor died seized and possessed. The chancellor found the issues of law and fact in favor of the appellee, and decreed to him a one-tenth interest in the eighty acres of land involved in this suit.

A number of questions are raised by counsel in this case:

(1) Was the homestead abandoned by the widow? (2) Was Moore acting as a trustee for his wife and the other heirs of Revels and the widow in paying off the mortgages and acquiring a deed to the property? (3)

Was Moore's possession hostile to that of Willie Eddie Blackmon, or was his possession that of a cotenant? (4) Did Moore have actual, visible, exclusive, continuous and adverse possession for seven years?

We think a decision of the last question will be decisive of the issues of this case, and that it will not be necessary to determine the other questions raised.

The evidence regarding this possession is meager, and makes it difficult to determine. It is clear, however, that Moore's possession must rest solely on his actual occupancy, either in person or by those holding under him. He made no improvements on the property, built no houses, cleared no land, nor did anything save to farm it during the years 1920 and 1921, and during all the time that he occupied it Ester Revels, the widow, continued to reside upon it also. John Moore testified that he went to the penitentiary in the fall of 1921, and Mr. Smith got him out early in March, 1922; that he then went to work for Mr. Smith, and that he had not lived on the land in controversy since that time. He further stated that Ester Revels moved from the place about September, 1922, when she moved to his house at Mr. Smith's place; that after she left the place a man named Oliver moved on the place in 1925 or 1926, and rented it from him.

Charlie Rogers testified, and the abstract does not show when his deposition was given. He stated that he lived at that time on the land, which he rented from John Moore, and had been there, at the date of his deposition, a year and a month; that he was living at the only house on the place; that there was no floor in the house at the time he went there, and he didn't farm the land.

Bertha Macey stated that, not long after Ester Revels moved off the land, she rented the house from Ester, and stayed on the land and in the house about one year. Moore does not dispute this statement.

At the time John Moore got his deed there were three houses on the land and about forty acres in cultivation. When the depositions in this case were taken,

there was only one house left, and the land had grown up in pine bushes. There was at least an interval of one year from the time the Macey woman lived on the place that the land was wholly unoccupied, namely, the year 1924, and an interval of about the same time elapsed between the occupation of Oliver, and that of Rogers. If Bertha Macey's possession was not that of Moore, then there was an interval of three or four years when no one was in possession claiming under Moore. We think that the testimony shows that the continuity of Moore's possession was broken, and for a material length of time. The physical facts—the destruction of two houses and the condition of the land with respect to growth of bushes thereon—shows there had been a virtual abandonment of the lands after the middle of the year 1922.

The appellants seek to fortify their claim of adverse possession by proof of payment of taxes, and insist that actual pedal possession of lands may be tacked to constructive possession of them when wild and unimproved by payment of taxes upon them under color of title. It is true that where one, having color of title, pays taxes on wild and unimproved land, and thereafter takes possession of the same, continuing to pay the taxes, the benefit of the tax payments will not be forfeited by reason of the possession taken (*Gaither* v. *Gage,* 82 Ark. 51, 100 S. W. 80), but we cannot see how an application of that rule would be of any benefit to the appellants under the facts of this case. Where reliance is placed on the seven-year payment of taxes, under act March 18, 1899, the burden is upon the one making the payments to bring himself within its terms. *Bradley Lumber Co.* v. *Miller,* 94 Ark. 118, 126 S. W. 98.

This suit was filed on November 26, 1927, and if the theory of the plaintiffs is that the lands were wild and unimproved, and that title vested by reason of the payment of taxes, then it could not avail, because seven years have not elapsed since the lands became vacant in 1922,

nor have seven payments of taxes been made since that date. Ester Revels remained on the lands until the middle of 1922, and, while her possession might have been permissive, yet the fact that she was the widow of Revels, deceased, and continued in possession of the homestead, was sufficient to divest the possession of Moore of that exclusive character that would be necessary to give constructive notice of his adverse holding to one interested in the lands, and whose right to the possession was in abeyance during the possession of the owner of the homestead. Moore's possession also and the payment of taxes by him were not constructive notice to the appellee of his adversary claim, for the further reason that his wife was the owner of an undivided interest in the lands and a cotenant of the appellee, and Moore's possession might have been referable to hers, and his possession was not therefore exclusive, notorious and adverse as against all persons.

The burden is upon the party claiming by adverse possession to show that his possession was actual, open, hostile and exclusive and continued without a break for the full statutory period. *Nicklace* v. *Dickinson,* 65 Ark. 422, 46 S. W. 945; *Norwood* v. *Mayo,* 153 Ark. 620, 214 S. W. 7; *Tallman* v. *McGahhey,* 164 Ark. 205, 261 S. W. 306; *Meadow* v. *Weathers,* 167 Ark. 264, 267 S. W. 787.

We think the decree of the chancellor on the whole case is not against the preponderance of the evidence, and is supported by the principles of law hereinbefore stated. It is therefore affirmed.

BINGANAN *v.* STATE.

Opinion delivered October 28, 1929.

John E. Tatum, for appellant.

Hal L. Norwood, Attorney General, and *Pat Mehaffy,* Assistant, for appellee.

PER CURIAM. The Attorney General has properly confessed error on an appeal by the defendant from a judgment of conviction for forgery, and uttering a forged instrument. The facts bring the case squarely within the principles decided in *Harrison* v. *State,* 72 Ark. 117, 78 S. W. 763, and *State* v. *Adcox,* 171 Ark. 510, 286 S. W. 880. The instrument was not forged, but was simply a check drawn by the defendant on a bank by a name by which he was commonly known. Under the common law and under the statutes defining forgery, as at common law, the genuine making of an instrument for the purpose of defrauding does not constitute forgery.

BEGLEY *v.* STATE.

Opinion delivered November 4, 1929.

John G. Rye and *Robert Bailey,* for appellant.

Hal L. Norwood, Attorney General, and *Robert F. Smith,* Assistant, for appellee.

HART, C. J. Cecil Begley prosecutes this appeal to reverse a judgment of conviction against him for assault with intent to rape.

It is first earnestly insisted that the evidence is not legally sufficient to support the verdict. While the defendant took the stand in his own behalf and expressly denied that he had attempted to have intercourse with the prosecuting witness against her consent, and while he was corroborated in this respect by a male companion who was with him, yet, in testing the legal sufficiency of the evidence to support the verdict, we must view the evidence for the State in the light most favorable to it; and,

if that evidence is legally sufficient to support the verdict, we cannot disturb it on appeal. The reason is that the jury are the judges of the credibility of the witnesses, and have decided that question in favor of the State by returning a verdict of guilty. Hence we need only to refer to the evidence adduced in favor of the State.

Before doing this we will briefly state the principles of law governing cases of this sort, which have been repeatedly announced by this court. In order to warrant a conviction of assault with intent to rape, it must appear not only that defendant intended to have carnal knowledge of the girl alleged to have been assaulted, forcibly and against her will, but that he did some overt act towards the accomplishment of his purpose, which amounted in law to an assault upon her. An assault usually implies force by the assailant and resistance by the assailed. It is not necessary in such cases that the attempt by the assailant be persisted in to the utmost, but it is sufficient that it was actually begun, without reference to the reason which causes the assailant to desist. *Anderson* v. *State,* 77 Ark. 37, 90 S. W. 846; *Tyra* v. *State,* 120 Ark. 179, 179 S. W. 167; *Lockett* v. *State,* 136 Ark. 473, 207 S. W. 55; and *Snetzer* v. *State,* 170 Ark. 175, 279 S. W. 9. In *Paxton* v. *State,* 108 Ark. 316, 157 S. W. 396, the court again said that subsequent yielding and consent does not mitigate or justify an assault with intent to commit rape.

Tested by this well-settled rule of law, we are of the opinion that the evidence is legally sufficient to support the verdict. According to the testimony of the prosecuting witness, she was sixteen years of age, and lived in Russellville, Arkansas, at the time of the alleged assault. She had only lived in Russellville for about three months, and prior to that time had lived in the country, in the northern part of the county. She first met the defendant, Cecil Begley, at her home, and had gone with him five or six times before the time of the alleged assault. She

went to a show with him one night, and he made improper proposals to her, which she rejected. She had never met Jewell Lewis before, and did not know whether he was married or single. Appellant, in a car belonging to Jewell Lewis, came to her house late one evening in May, 1929, and made a date to take her riding. They claimed that they were going to get another girl to go with them, but failed to do so. They drove south from Russellville on the public highway. Lewis drove the car, and the defendant and prosecuting witness sat on the back seat. After they got out into the country, Lewis stopped the car, and asked the defendant if he wanted to get out while he went on and turned the car around. Defendant then took hold of the prosecuting witness, and pulled her out of the car. He carried her to some bushes near the road, and attempted to forcibly have intercourse with her. She struggled, and finally got up. The defendant then struck her on the breast and knocked her down. He told her that he intended to have intercourse with her. He pulled her underclothes down, and got on top of her and attempted to have intercourse with her. She screamed, and pulled his hair, and he finally let her up. It is true that her testimony was considerably weakened on cross-examination, and that there were some inconsistencies in her testimony. She however adhered to the main fact under investigation, and that was that the defendant had actually attempted to have intercourse with her, forcibly and against her will, and that she had resisted him as much as she was able to. The jury may have thought that the inconsistencies in her testimony resulted from her youth, inexperience and ignorance, and they had a right to take into consideration all the attendant facts, and give her testimony such credence as they believed it entitled to. *Lockett* v. *State,* 136 Ark. 473, 207 S. W. 55; *Brock* v. *State,* 168 Ark. 302, 270 S. W. 98; *Lewis* v. *State,* 168 Ark. 509, 271 S. W. 708; *Franks* v. *State,* 168 Ark. 932, 272 S. W. 648; and *Snetzer* v. *State,* 170 Ark. 175, 279 S. W. 9.

It is next insisted that the court erred in allowing the prosecuting attorney to ask leading questions to the prosecuting witness. In cases of this sort a wide discretion is allowed the trial court in the conduct of the examination of the prosecuting witness, where she is a young girl, inexperienced in the ways of the world, and appears to be embarrassed. *Wallace* v. *State,* 177 Ark. 892, 9 S. W. (2d) 21.

Other assignments of error are made on the ground of the giving of instructions by the court at the request of the State, and the refusal of others asked by the defendant. We do not deem it necessary to set out the instructions given and those refused. We have examined and considered them, and find that the instructions given conform to the rules of law settled by this court in the cases above cited, and many others that might be cited. The instructions requested by the defendant and refused, were covered by other instructions given at the request of the State, and of the defendant himself.

The defendant elected to cross-examine the prosecuting witness concerning prior acts to show immorality, and now complains that he was not allowed to introduce evidence in contradiction of his cross-examination of the prosecuting witness relative to these acts. While it was competent to impeach the credibility of the prosecuting witness on cross-examination by questioning her concerning particular instances of immorality on her part, the defendant was bound by her answers, and could not introduce witnesses to contradict her. *Lockett* v. *State,* 136 Ark. 473, 207 S. W. 55; and *Jordan* v. *State,* 165 Ark. 502, 265 S. W. 71.

It is also contended that the court committed reversible error in permitting the prosecuting attorney, in his opening statement, to say that there was an assault upon the prosecuting witness on the same night by Lewis, when he did not attempt to show that there was a conspiracy between Lewis and the defendant to assault the prosecuting witness. The court did not permit any tes-

timony to go to the jury on this point, except that of a witness who testified that her husband and herself picked up the girl on the highway, when they saw her fall out of the car. Blood was streaming out of her jaw, and she had blood all over her. The undisputed evidence shows that Lewis went out riding with the prosecuting witness after the defendant got out of the car, and, while riding with her, she either fell or was knocked out of the car by Lewis, and was picked up by the witnesses and carried home. This testimony was admissible as part of the transaction. The prosecuting witness, a young girl sixteen years of age, had gone riding with the defendant and Lewis, and was picked up by other parties after she had fallen or been knocked out of the car in which she was riding with Lewis, before she returned home. This testimony could not, in any event, result in prejudice to the defendant, because marks of violence were on the body of the prosecuting witness, and it was not claimed by the State that they were caused by blows inflicted by the defendant. On the other hand, it was shown by the State that they were inflicted by Lewis after he had left the defendant. Under these circumstances no prejudicial error was committed by the court in the respect now complained of.

We have carefully examined the record, and find no prejudicial error in it. Therefore the judgment will be affirmed.

SMITH AND BUECHLEY *v.* HEMPSTEAD COUNTY.

Opinion delivered November 4, 1929.

O. A. Graves, for appellant.

L. F. Monroe and *W. S. Atkins,* for appellee.

HART, C. J., (after stating the facts). The quorum court, at its regular session in November, 1928, made the necessary appropriation to pay the salaries of appellants for the positions then filled by them for the ensuing year, and passed a resolution recommending their retention in their positions for the ensuing fiscal year. Appellants were reappointed to their respective positions by the State Extension Service cooperating with the United States Department of Agriculture to aid said departments in carrying on extension work in agriculture and home demonstration work in Hempstead County, Arkansas. The appointment of appellants as such agents was neither consented to nor ratified by the county judge or the county court. The agents

continued in their work, and presented their claims for salary to the county court, and their claims were disallowed.

Under the provisions of the original act on the subject, which is set forth in § 1983 of Crawford & Moses' Digest, quorum courts were authorized to annually appropriate such an amount as might be deemed necessary, to be used at the direction of the county judge, in cooperation with the United States Department of Agriculture, to aid in carrying on farm demonstration work. In *Searcy County* v. *Jordan,* 136 Ark. 138, 206 S. W. 129, the court construed this act to mean that it was the intention of the Legislature to require the money appropriated by the quorum court to be expended under the direction of the county judge. The court said that the Legislature did not vest in the quorum court the power to make contracts for the expenditure of money appropriated by it.

The correctness of this decision is not challenged by appellants, but they contend that the law has been changed by act 347 of the Acts of 1927, so that it is no longer necessary to obtain the approval of the county court to such a contract. Acts of 1927, p. 1104. Section 1 of the act reads as follows:

"Section 1. That § 1983 of Crawford & Moses' Digest of the Statutes of Arkansas be and the same is hereby amended to read as follows: 'Section 1983. The quorum courts of the respective counties of this State are hereby authorized and empowered to appropriate annually such amount as may be deemed necessary to be used in cooperation with the extension service of the College of Agriculture of the University of Arkansas and the United States Department of Agriculture, cooperating, to aid said departments in carrying on cooperative extension work in agriculture and home economics in such county. The county judge shall approve authorized claims against the county for such purposes, and such approved claims shall be paid by the county treasurer. However,

no claims shall be allowed in excess of the sum appropriated."

It will be noted that the act does not give the quorum court any more power than the original act. By the terms of the statute, the quorum court has only the power to appropriate the money deemed necessary by it to aid in carrying on the work provided for in the statute, and in the case cited the court expressly said that the Legislature did not give the quorum court the power to make contracts for the expenditure of the money appropriated by it. Neither does the act give the State Extension Service or the United States Department of Agriculture, separately or together, the power to make a contract for the services provided for in the act or the power to appoint agents to carry out its provisions.

This is apparent from the language of the statute itself, and it necessarily results from the language used in the opinion above cited. The court said that the only authority for the appropriation and use of the money was in the statute. Under the original act the money was to be used at the direction of the county judge in cooperation with the United States Department of Agriculture. The court said that the Legislature had designated the county judge as the officer who had the power to make the contracts for the expenditure of the money, and this necessarily carried with it the power of appointment. This amounted to holding that our statute did not give the United States Department of Agriculture the power to contract for the expenditure of the money appropriated by the quorum court, and the resulting power of appointment.

Such holding is not changed by the fact that the present statute provides that the money appropriated shall be used in cooperation with the State Extension Service and the United States Department of Agriculture. The first sentence of the act under construction provides only for the appropriation of the money by the quorum court, to be used in cooperation with the State

Extension Service and the United States Department of Agriculture. It does not give any authority to these departments to contract for the expenditure of the money. That is done by the concluding sentence of the section, which provides that the county judge shall approve authorized claims against the county for such purposes. Here lies the source of power to make contracts for the expenditure of the money appropriated by the quorum court, and the authority must be vested in the county judge or county court, or it does not exist at all, and the statute would have to fail because its terms were not capable of enforcement. We are of the opinion, however, that the language used by the Legislature, when read in connection with the opinion of the court heretofore stated, clearly evinces an intention to continue the power to make contracts, and to expend the money in the county judge or county court in the same respect as the authority was given under the original act.

The county court, in the case at bar, refused to enter into a contract with appellants or to appoint them to carry on the work provided for in the statute, and they had no right to continue the work and bind the county for the payment of their salaries. The circuit court correctly held that the county court was not liable for the salaries of appellants as such agents, and the judgment of the circuit court will therefore be affirmed.

CROSBY *v.* LUCAS.

Opinion delivered October 21, 1929.

Jones & Wharton, for appellant.

Caraway, Baker & Gautney, for appellee.

McHaney, J. This appeal is an aftermath of *Crosby* v. *State,* 169 Ark. 1058, where the same Crosby was indicted, convicted and sentenced to five years in the penitentiary on a charge of grand larceny for stealing 65 suits of clothes, the property of appellee. While we there held the evidence sufficient to sustain the conviction, the case was reversed for error in an instruction given over appellant's objection.

In this case appellee sued appellant for the value of the clothes stolen after crediting him with the market value of 35 suits recovered from him in their then condition, a total of $1,502.53. There was a verdict and judgment for appellee for $500.

The only question raised that we can consider is the sufficiency of the evidence to support the verdict. It is said there is no proof as to the measure of damages at the time and place of conversion. But we have examined the evidence, and find it sufficient to sustain a much larger verdict. We do not set it out, as it would serve no useful purpose.

Complaint is also made of certain instructions. But appellant has not set out in his abstract all the instructions given by the court, and this court will not explore the record to determine whether error has been committed in giving or refusing to give instructions. Moreover, the instructions complained of appear to be correct declarations of law as applied to the facts in this case.

Affirmed.

Conley *v.* State.

Opinion delivered November 4, 1929.

Hal L. Norwood, Attorney General, and *Robert F. Smith,* Assistant, for appellee.

SMITH, J. Appellant was convicted under an indictment charging him with the crime of grand larceny, which was alleged to have been committed by stealing a suitcase and its contents, the property of Mrs. Maggie McKinzie.

For the reversal of the judgment sentencing appellant to a term of one year in the penitentiary, it is first insisted that the verdict was arrived at by a consideration of extraneous matters having no relation to the question of appellant's guilt; but this assignment of error may be disposed of by saying that there is nothing in the record to support it or to require its consideration.

It is assigned as error that, after the jury had reported that an agreement could not be reached, the court inquired how the jury stood as to numbers, without indicating how they stood as to parties. A juror answered that the jury was divided eight to four, and the court then directed that the jury further consider the case. The practical administration of the law in jury trials, both civil and criminal, has made this practice by the trial courts both common and necessary. There was nothing in the question of the court to indicate that the court was attempting to coerce a verdict contrary to the deliberate and final conclusion of any juror, and there was, therefore, no error in asking the question. *Eady* v. *State,* 168 Ark. 731, 271 S. W. 338.

The only other assignment of error in the motion for a new trial is that the testimony is insufficient to support the verdict. The testimony tending so to do was to the following effect. Mrs. McKinzie kept a small hotel, and appellant was one of her guests. She had money and other valuables in a suitcase which she kept in her room. She left her room unlocked on one occasion, and as she went out of the room saw appellant standing in the hall into which the room opened. When she returned to her room appellant and the suitcase were gone. Search was made, and it was learned that appellant had gone to another hotel, where he had registered under an assumed name, and the suitcase was found in his room.

Judgment affirmed.

WILKERSON *v.* STATE.

Opinion delivered November 4, 1929.

Partain & Agee, for appellant.

Hal L. Norwood, Attorney General, and *Pat Mehaffy,* Assistant, for appellee.

HUMPHREYS, J. Appellant was indicted in the circuit court of Crawford County on separate counts charging the crimes of forgery, uttering a forged instrument, and false pretense. A demurrer in short to the indictment was made, entered on the record, and, over the objection and exception of appellant, overruled by the court. Appellant then moved the trial court to require the State to elect upon which count of the indictment it would stand. The court ordered the trial to proceed, and reserved its ruling on this motion until the testimony was concluded, and then sustained it, whereupon the State elected to stand on the count charging false pretense. Appellant objected, and saved his exception to the refusal of the court to require the State to elect upon which count it would stand at the beginning of the trial.

During the introduction of the State's evidence T. Guy Reed was allowed to testify, over the objection and exception of appellant, that, when appellant presented the check of Smith & Mallory he was induced to cash the same upon the representation of appellant that Smith & Mallory had an agreement by which the checks of the firm would be signed "Smith" by Smith and "Mallory" by Mallory, without the initials of either. The court also

allowed the State to prove by R. E. Covey, over the objection and exception of appellant, that Bob Smith and Ralph Mallory had an understanding with the Crawford County Bank, of which Covey was cashier, that checks drawn on the partnership account should be signed in the firm name with the name "Smith" signed by Bob Smith and the name "Mallory" signed by Ralph Mallory, which understanding and agreement took place in the absence of appellant. At the conclusion of the testimony the court, among other instructions, over the objection and exception of appellant, instructed the jury as follows:

"If you find that Bob Smith and Ralph Mallory were partners at the time this offense is alleged to have been committed, and that these partners were restricted and limited in their powers such that neither was to have the authority to sign the name of the other partner to checks, and that this limitation of authority was known to the defendant, Jim Wilkerson, and that the said Jim Wilkerson knowingly entered into a conspiracy to defraud with Ralph Mallory, and that the defendant, Wilkerson, cashed the check in question at the store of T. Guy Reed and obtained from the said T. Guy Reed any money or thing of value in the excess of ten dollars, and that he represented to the said T. Guy Reed that the check was signed by the proper persons, both Smith and Mallory, and that the check was for work, and that the said T. Guy Reed believed in and relied on the representations made, and parted with his money or his goods in excess of the value of ten dollars by reason of said representations, and that such representations were known to be false by the defendant, Jim Wilkerson, and were made with the intent to cheat and defraud the said T. Guy Reed out of his money and goods in excess of ten dollars, then you will convict the defendant, and fix his punishment at not less than one nor more than five years in the penitentiary."

The trial resulted in a conviction of appellant on the count charging false pretense, and as a punishment therefor he was adjudged to serve a term of one year in the

State Penitentiary, from which he has duly prosecuted an appeal to this court.

The first assignment of error urged by appellant for a reversal of the judgment is the trial court's action in overruling his demurrer in short to the indictment. It is argued that the description of the property claimed to have been obtained through false pretense was insufficient. It was not. The count charged appellant with obtaining from T. Guy Reed "certain goods, merchandise and money, current money of the United States of America, of the value of $12, the personal property of said Reed," by fraudulently representing an unauthorized check to have been properly signed and genuine. The description of the property in cases of this character is sufficient if it apprises the accused of the property he is alleged to have received. This indictment, in effect, charged appellant with exchanging the check to Reed for goods, merchandise and current money of the United States of America of the value of $12. This necessarily apprised him, that he was charged with receiving both merchandise and money in exchange for the check. It is true that the count did not particularize the exact amount of each that he received, but did specify the total amount of both, and that he received both kinds of property in exchange for the check.

Appellant also argues that, even though the description of the property in the indictment was sufficient, the proof failed to show the value of the property received. A single value of the total amount of the property received was alleged to be $12. The reasonable inference deducible from the testimony of Reed and appellant is that appellant received the full value of the check in goods and money. This proof was sufficient to sustain the verdict and judgment.

The next assignment of error urged by appellant was the action of the trial court in permitting T. Guy Reed to testify that appellant represented to him that the check was signed by both Smith and Mallory, and that he cashed the check on account of the representation. The objection

made to Reed's testimony in this regard was that the count contained no such charge. It is true that the count did not charge that Reed relied upon the representation that the check was signed in any particular manner, but the count did charge that the check was issued without authority, and that, by reason of the false and fraudulent representation that it was genuine, Reed was induced to part with his property. As the State alleged that the check was false, testimony was admissible to show appellant's representation to the effect that it was valid.

Appellant's next assignment of error for a reversal of the judgment was the action of the trial court in permitting Covey to testify to the agreement between Smith, Mallory and the bank relative to the manner in which the checks must be signed to validate them. The objection made to the testimony is that appellant had no knowledge of the understanding or agreement. The testimony tended to show that he did have such knowledge. Smith testified that appellant had worked for them quite awhile, and was frequently compelled to wait for his check until he came and signed his own name thereto.

The last assignment of error urged by appellant for a reversal of the judgment is that the court erred in giving instruction number 12, heretofore set out at length in this opinion. The first argument made is that the instruction told the jury that they might find the defendant guilty if he entered into a conspiracy to defraud with Ralph Mallory, without saying that the conspiracy entered into was for the purpose of defrauding Reed out of his property. The instruction, in effect, does say that the purpose of the conspiracy was to defraud Reed out of his property, because it told the jury that before they could convict appellant they must find that he cashed the check in question at the store of Reed, and obtained from him money or things of more than $10 in value. According to our interpretation of the instruction, this was clearly its meaning, and we do not find any ambiguity therein. If, however, appellant thought it susceptible of any other construction, the alleged error should have been

reached by specific objection. None was made. *Stotts* v. *State,* 170 Ark. 188, 279 S. W 364.

The next argument made is that the instruction submitted to the jury the question as to whether Reed relied upon the representations of appellant that the check was properly signed, and was received by him for work. The suggestion is made that Reed did not testify that he relied upon these representations in cashing the check. Appellant is mistaken in saying that Reed did not testify that he cashed the check in reliance upon these representations. Reed in his testimony stated that he relied upon these representations. The following interrogatory and answer thereto appear in Reed's evidence:

"Q. Did you rely on what he said about the check being for work, and about it being signed by Smith and Mallory, both, in cashing the check? A. Yes sir."

No error appearing, the judgment is affirmed.

HART, C. J., dissents.

CLARK AND TUTTLE *v.* STATE.

Opinion delivered November 4, 1929.

Hal L. Norwood, Attorney General, and *Robert F. Smith,* Assistant, for appellee.

KIRBY, J. This appeal is prosecuted from a judgment of conviction for the manufacture of intoxicating liquors, with a sentence of one year's imprisonment in the Boys' Industrial School.

The sheriff of Nevada County and some deputy sheriffs from Lafayette County, and a prohibition enforcement officer made a raid on a still in the south end of Nevada County. The sheriff had information about a still being in the vicinity, and went out the afternoon before and located it on Artie Clark's place. There being no one found at the still, and the mash appearing about ready to be run, the officers decided to leave, and return the next morning. Upon their arrival next morning the still was in operation, and the two boys, appellants, were caught there, with Bo Smith, a negro. "It was a one-barrel outfit, and full of mash, and cooking at the time." A small amount of whiskey had been made, and some whiskey was dripping out from the worm. Eleven barrels of mash were found, and one of the boys was carrying a bucket when first seen, and the two boys were only 10 or 12 feet from the still, which was of such capacity that one man might have been able to operate it.

The appellant Clark was the son of Artie Clark, and lived with him, about 250 yards from the still. The Tuttle boy was Artie Clark's brother-in-law, and lived with him, and had the bucket, and was within four or five feet of the still when discovered by the officers. The still was in the open, and could be seen for 50 yards in any direction. The officers went on to the house of Artie Clark, and found three sacks of sugar, two sacks of shorts, a roll of copper sheeting and a ten-gallon keg that had six or seven gallons of liquor in it. Whiskey can be made with shorts and sugar, the sheriff testified. One of the boys, who had started back up the trail upon the appearance of the officers, had a soldering iron in his hand, and the other had a bottle of acid. The still was made of copper sheeting, and it held about 60 gallons.

The negro, Bo Smith, lived on Artie Clark's place, attempted to assume the entire responsibility for manu-

facturing the whiskey, which he said he was doing by himself, without any assistance from the boys, upon a still that belonged to him, and that he had pleaded guilty for making the whiskey.

The boys stated that they had been sent for the cows that morning, and, when they were returning, Smith whistled and motioned to them to come down, and borrowed a knife from one of them. They were not there over fifteen minutes. Neither of them had a bucket in his hand, and they denied having a soldering iron or acid, and that they had anything to do with the still or any knowledge of the materials, the shorts, sugar and whiskey found at the house. The Tuttle boy was 16 years old and the other boy 14.

The boys were corroborated by the other members of the family about having been sent for the cows, but the officers stated that the cows were being milked when they took the boys back to the house after their arrest. From the appearance of the still and the location, the officers thought it had been operated there for some time.

No brief was filed for appellants. It is only complained that the verdict is contrary to the evidence, and that the court erred in admitting the testimony of the witnesses to the finding of the materials out of which whiskey could be made, the sugar, shorts, sheet copper and the whiskey, at the home of Artie Clark, where the boys lived.

No error was committed in admitting the testimony of the officers showing the discovery of the materials for making the whiskey, the copper sheeting and the keg of whiskey in the house where appellants were living. It was a question of fact for the jury to determine whether appellants were merely innocent bystanders at the still or helping to operate it in the manufacture of the whiskey, and they have determined it against appellants upon testimony sufficient to support the conviction. *Roach* v. *State,* 179 Ark. 1155, 19 S. W. (2d) 1009.

The judgment is affirmed.

MILLAR-JEFFERIES CHEVROLET COMPANY, INC., *v.* WAKENIGHT.

Opinion delivered November 4, 1929.

Culbert L. Pearce, for appellant.

John E. Miller and *C. E. Yingling,* for appellee.

KIRBY, J. This suit was brought in the justice court by the assignee of the written contract or $300 credit slip issued by appellant's selling agency for Chevrolet automobiles, for the purpose of taking in the owner's old car to be applied on the purchase of a new motor-car agreed to be delivered, and from a judgment against it an appeal was taken to the circuit court.

It was agreed on the trial before the court without a jury that the appellee was the holder of the credit slip, which reads as follows:

"Searcy, Arkansas, October 22, 1928.

"It is hereby agreed between Guy Ellis and the Millar-Jefferies Chevrolet Company, that Chevrolet coupe motor No.....be delivered to Millar-Jefferies Chevrolet Company to apply as a credit of $300 on a new model Chevrolet car to be delivered during 1929, or at such time as I may elect. It is further understood that, if I should elect to transfer this credit, it may be transferred for the full amount of $300, or further, should I be unable to take this car or see fit to cancel my obligation with the Millar-Jefferies Chevrolet Company, my money will be refunded, less twelve per cent. for handling and other expenses incidental to sale of this car.

"Accepted. Guy J. Ellis.

"Millar-Jefferies Chevrolet Co.,

"By W. H. Jefferies, November 15, 1928.

"The writing cert. of credit is hereby transferred to Wakenight Motors.

"Guy J. Ellis."

Appellant offered to prove that it was the contract and understanding in the issuance of the credit slip that it should have all the costs and expenses incident to the reconditioning and sale, showing the amount thereof, of the old car taken in for which the credit slip was issued, in addition to the 12 per cent. provided in the contract. The court refused to allow the introduction of this testimony, and rendered judgment against appellant company for the amount of the credit slip, less the 12 per cent. provided therein for handling and other expenses incidental to the sale of the car, from which this appeal is prosecuted.

Appellant insists that the court erred in holding this testimony incompetent, and in rendering judgment for the amount of the credit slip, less the 12 per cent. only.

The credit slip or contract appears to be plain, and its meaning clear and free from any ambiguities, and, such being the case, it was not competent to vary or contradict its written terms with parol testimony, as the court correctly held. The writing appears to be complete, and to embody the terms of the contract made, which it is presumed to do, and cannot be qualified by the introduction of any parol contemporaneous terms not included therein. *Smith* v. *Bank of Marianna,* 176 Ark. 1146, 5 S. W. (2d) 335; *Lane* v. *Smith,* 179 Ark. 533, 17 S. W. (2d) 319; 3 Jones on Evidence, § 440, p. 182; 10 R. C. L. 1070, § 265; *Oliver Const. Co.* v. *Union Trust Co.,* 171 Ark. 485, 284 S. W. 779; *Threlkeld* v. *Baptist Hospital,* 176 Ark. 1073, 5 S. W. (2d) 305.

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

BETHEL AND WALLACE *v.* STATE.

Opinion delivered November 4, 1929.

O. H. Hurst, W. A. Jackson and *E. E. Alexander,* for appellant.

Hal L. Norwood, Attorney General, and *Pat Mehaffy,* Assistant, for appellee.

McHANEY, J. Appellants were indicted on a charge of rape. On a former trial they were convicted, and sentenced to death by electrocution. An appeal to this court resulted in a reversal for a new trial. The facts are stated in the opinion on the former appeal, *Bethel and Wallace* v. *State,* 178 Ark. 277, 10 S. W. (2d) 370, and we will not repeat them here, as they are substantially the same, and no question of fact is involved in this appeal. The trial in this case resulted in a verdict of guilty of assault with intent to rape, with a sentence of 18 years in the penitentiary.

Appellants urge two assignments of error, numbers 6 and 7, in the motion for a new trial, as grounds for a reversal. First, that "the court erred in refusing to rebuke the deputy prosecuting attorney, after his abuse of the defendants in his opening statement in the presence of the jury, after the court told the jury that the prosecuting attorney had no right to make such statements and that they were improper." Second, "that the court erred in refusing to rebuke the prosecuting attorney for his abuse of the defendants during his closing remarks, which remarks were: 'That the defendants were fortunate in that one of the prosecuting witnesses for the State had circulated a petition prior to the former trial of this cause, and, had it not been for the fact of the circulation of the petition and the fact that the court was then in session and that they were given an immediate trial, they would not have been brought to the bar of justice for a trial.' To which statement the court sustained an objection, and told the jury that the remark was improper, but refused to rebuke the prosecuting attorney after having been requested to do so by the defendants."

Relative to the first ground of error specified, it would be a sufficient answer to say that it is too general to point out to the trial court the particular language constituting the abuse complained of, and too general to present a question for review by this court. Neither in the assignment nor in the brief have counsel set out the language objected to which would call for a rebuke from the court. An examination of the record and the assignment discloses the fact that the court sustained counsel's objections to certain remarks of the deputy prosecuting attorney in his opening statement, and instructed the jury not to consider them because they were improper. Nor does the record disclose any request from counsel that the State's attorney be rebuked. On objections being made, they were promptly sustained, and, in the absence of a request for a reprimand, no error has been committed. *Skaggs* v. *State*, 88 Ark. 72, 113 S. W. 346, 16 Ann. Cas.

622. It is well settled that trial courts have a wide discretion in the supervision of trials before them, including matters pertaining to opening statements, and this court will not reverse unless a manifest abuse of discretion is shown. *Nelson* v. *State,* 139 Ark. 15, 212 S. W. 93; *Stanley* v. *State,* 174 Ark. 743, 297 S. W. 826; *Adams* v. *State,* 176 Ark. 916, 5 S. W. (2d) 946; *Bowlin* v. *State,* 175 Ark. 1115, 1 S. W. (2d) 553. We conclude therefore that there is no merit in this assignment.

Relative to the second ground of error specified, most of what has heretofore been said in disposing of the first error relied on applies with equal force here. Moreover, it appears that the facts regarding the circulation of the petition referred to were brought out by appellants, and were commented on in argument by their counsel. Hence if error was committed it was invited. Furthermore, the statement set out in this assignment does not appear in the bill of exceptions, but only in the motion for a new trial. In *Adkisson* v. *State,* 142 Ark. 19, 218 S. W. 165, in overruling a similar contention, we said: "Objection is made to certain statements of the prosecuting attorney in the course of his argument before the jury; but there appears to be nothing in the bill of exceptions showing what these statements were, the only reference thereto being found in the motion for a new trial. These objections are not therefore properly before us for review. *Cravens* v. *State,* 95 Ark. 321, 128 S. W. 1037." The conclusion necessarily follows that this assignment cannot be sustained.

Having examined all the errors relied on for a reversal of the case, and having found that they are untenable, the case must be affirmed. It is so ordered.

BAILEY *v.* FLORSHEIM BROTHERS DRY GOODS COMPANY, LTD.

Opinion delivered November 4, 1929.

R. T. Boulware and *Edwin A. Upton,* for appellant.

Pat Robinson, for appellee.

McHANEY, J. Appellee sued appellant on a promissory note dated February 24, 1923, due November 1, 1923, for the principal sum of $311, with interest from maturity at 8 per cent. Appellant admitted the execution of the note sued on, and alleged that this note was given in renewal of a former note for $535 and interest, which should be reduced by $250 for a pair of mules delivered to appellee at that agreed price, and the further sum of $175 paid in cash by appellant's wife; that after deducting said payments there was due $117.23; that the note in suit was signed by appellant in blank, and that he trusted appellee to fill it in for the proper amount, with the correct dates, but that it had been filled in for a larger amount than due, and without proper dates of payments.

The case was tried to a jury, which resulted in a verdict and judgment for appellee for the full amount sued for.

Appellant first says the court erred in permitting the note sued on to be offered in evidence, for the reason he filed an affidavit under § 4114, C. & M. Digest, denying its genuineness before trial. While this is true, he admitted signing the note, and the above statute is not applicable.

The only question was the amount due on the note, not whether it was the genuine note of appellant, and the court did not err in this regard.

It is next said that the court erred in refusing to give certain requested instructions, and in giving certain instructions over his objections and exceptions. As to the requested instructions not given, we cannot tell, without exploring the record, whether they were covered by other instructions or not, since appellant has not abstracted or set out all the instructions given by the court. The instructions given, about which complaint is made, are not inherently erroneous, and this court will not explore the record to discover whether error has been committed in the giving or refusing to give instructions under such circumstances. *Crosby* v. *Lucas, ante* p. 277.

We find no error, and the judgment is affirmed.

NEWKIRK *v.* SHIRLEY.

Opinion delivered November 4, 1929.

Jones & Jones, for appellant.
John N. Cook, for appellee.

BUTLER, J. J. G. Newkirk was engaged in the construction of a portion of a highway in Miller County, Arkansas, under contract with the Arkansas Highway Commission, and sublet a portion of this work to T. S. Shirley under an oral agreement. There is no dispute as to the price Shirley was to receive for the work, which was twenty-five cents per cubic yard for excavation work, $80 per acre for grubbing, and $40 per acre for clearing. The dispute arose on the settlement, Shirley claiming and testifying that the contract was that the amount of work he should be paid for was to be based upon the preliminary estimate made by Mr. H. E. Powell, resident engineer, while Newkirk contended and testified that the work should be paid for on the basis of the final estimate made by the chief engineer of the Highway Commission from data furnished by the engineers in actual charge of the work.

Shirley began work about October 22, 1927, and on January 10, 1928, asked for and received an estimate of his work from Mr. Powell. That part of the highway on which he worked lay north and south of Kelly Bayou. He was to be paid at so much per cubic yard, so much for grubbing, and so much for clearing on that part of the road lying north of Kelly Bayou, and for work done south of the bayou he was to be paid by the day. The amount of work done on the road north of Kelly Bayou, at the stipulated price, was to be divided by the number of days he worked, and whatever that amounted to per day he should receive for the work done south of the bayou. The total amount due for the work, estimated by Powell, on January 10, 1928, was $1,657.40. Shirley was engaged in doing this work 156 days, earning $9.50 for each day. Shirley claimed that he had put in 99½ days on the work south of the bayou, and under his contract was entitled to receive $9.50 per day for each of these days, making $945.25.

It was admitted by Shirley that Newkirk had furnished supplies to him in the sum of $1,997 and brought suit for the difference. The engineer, Powell, testified

that the estimate given to Shirley on or about January 10, 1928, was a preliminary estimate, and that when he made the final estimate it was discovered that the preliminary estimate was incorrect, and that the amount of dirt moved and acreage cleared and grubbed was considerably less.

The defendant offered to introduce his contract with the Arkansas Highway Commission for the purpose of showing how the estimates of the work were to be made, and when he was to be paid for the work done. He also offered to testify that he was paid for his work on the road on the final estimate made by the engineers, and offered to introduce the final estimate of the highway engineers showing the quantity of earth moved on that part of the road that was made by Shirley. He also offered to introduce that part of his contract with the Highway Commission which provided that "all prior partial estimates and payments shall be subject to correction in the final estimate and payment."

The court refused to permit the defendant to introduce any of this testimony, to which action of the court proper objections were made and exceptions saved, and have been assigned as error in the motion for a new trial.

After the evidence was in, the court was requested by the defendant to give instruction No. 5, as follows:

"If the jury find from the evidence that plaintiff was to be paid for the work done by him north of the bridge according to the estimate to be made by the engineer of the Arkansas Highway Commission, and that correct data was furnished by H. E. Powell, the resident engineer, to the district engineer at Hope, and that said district engineer, or his assistant, George Fry, made an estimate of such work, which was sent to C. S. Christian, chief engineer of the Arkansas Highway Commission, then you are instructed that the estimate so made shall govern in this case."

The court refused to so instruct the jury, and the defendant duly excepted to this ruling.

There was a verdict for the plaintiff in the sum of $500. Motion for a new trial was made and overruled, and this case is here on appeal.

The theory of the defendant (appellant) was that the work was to be paid for according to the final estimate made by the engineer of the Arkansas Highway Commission. He testified that such was the agreement, and he was entitled to have the testimony in support of that theory presented to the jury, and we think that the testimony offered and refused by the court should have been admitted, and that the court's refusal to permit the testimony hereinbefore mentioned to be introduced was error.

Appellant also contended that the evidence offered, showing the amount of work done and the number of days required to do it north of Kelly's Bayou, would show that the number of days of work south of said bayou was less than the number claimed by appellee, and that the value of the work per day, based on the earnings per day for the work north of said bayou, would be less than appellee claimed.

The defendant was also entitled to have his theory presented to the jury under correct instructions. Instruction No. 5 correctly presented this theory, and should have been given. *Taylor* v. *McClintock,* 87 Ark. 281, 112 S. W. 405, and cases cited.

Other assignments of error are made which we find unnecessary to discuss, as the principles of law herein announced will be a sufficient guide for the trial court, both as to the admission or exclusion of evidence, and as to its declarations of law.

For the errors indicated the judgment is reversed, and the cause remanded for a new trial.

MARTIN *v.* STREET IMPROVEMENT DISTRICT No. 349.

Opinion delivered November 11, 1929.

[redacted]

June P. Wooten, for appellant.

Lewis Rhoton, for appellee.

HART, C. J., (after stating the facts). Counsel for appellant, Martin, contends that the court erred in not setting aside the verdict in favor of the defendant on the Marshall Street Annex on the ground that, under the undisputed evidence, he was entitled to recover certain court costs advanced by him in the formation of the annex, and for fees based on a *quantum meruit* basis. Under the evidence introduced the jury had a right to find that the contract made by the commissioners for a fee of $7,000 on the Marshall Street Annex was so improvident as to demonstrate its unreasonableness. While the evidence for Martin tends to establish the reasonableness of the fee, still there was sufficient evidence to warrant a finding against him on his contract for a fee of $7,000. Evidence was adduced by the defendant tending to show the amount of the bond issue, and Martin himself testified as to the various services performed by him and the costs advanced by him in these suits. When the amount of the bond issue is considered with reference to the various suits relating to the formation of the district, the jury might have found that a fee of $7,000 was

so improvident as to demonstrate its unreasonableness. Hence there was no error in the finding of the jury on this branch of the case.

When this finding was made the contract would be treated as being void, but in such a case the attorney would be entitled to recover on a *quantum meruit* basis. It is sought to uphold the verdict, however, on the ground that the amount of fee which Martin might claim on a *quantum meruit* basis was only established by his own testimony, and that thus the case falls within the principles of law announced in *Skillern* v. *Baker,* 82 Ark. 86, 100 S. W. 764, 118 Am. St. Rep. 52, 12 Ann. Cas. 243, and later decisions of this court, to the effect that, where the witness is interested in the result of the suit, his testimony cannot be considered as uncontradicted, and the case must go to the jury. Martin's right to recover upon a *quantum meruit* basis does not depend alone upon his testimony. The extent of his services was stated in detail to the jury, and, according to all the lawyers who testified in the case, he was entitled to recover some substantial amount. They only differed as to the amount of his recovery. In this connection it may be stated that Martin was entitled to recover whatever costs were legally advanced by him in the suits brought seeking to establish the district. He would have a right to defend the districts or the commissioners from any suit seeking to invalidate it or to overthrow the assessment of benefits made by the assessors, and to advance costs in such suits. He would not have a right, however, to advance costs for suits brought by the district against him, and to recover them as costs expended for the benefit of the district.

Upon the appeals of the defendant district, on their cross-complaint against Martin to recover illegal fees advanced him in the original district and in the Summit Street Annex, but little need be said. Upon the former appeal it was held that a suit for the recovery of excessive fees paid to an attorney is barred by the three-year

statute of limitation. On this branch of the case the testimony is in irreconcilable conflict, and the jury by its verdict has found the disputed question of fact in favor of Martin, and against the district in the suit against the original district, and in the suit against the Summit Street Annex. No useful purpose could be served by setting out this testimony in detail, for the jury was the judge of the credibility of the witnesses. We deem it sufficient to say that the issues raised by the cross-complaint of the original district and of the Summit Street Annex were submitted to the jury upon competent evidence, and under proper instructions. Therefore the verdict of the jury is binding upon us on appeal, and the judgment in each of these cases will be affirmed.

In the suit against the Marshall Street Annex the judgment must be reversed because, under the undisputed evidence, Martin was entitled to recover some substantial amount upon a *quantum meruit* basis. We cannot, however, remand the case to be submitted to the jury upon this issue alone. The practice in this State has been that, when a verdict is set aside as being inadequate, the court must grant a new trial in the whole case. The reason is that a verdict, as the foundation of a judgment at law, is an entity, and cannot be divided by the trial court. Hence under our rules of practice we cannot remand the case for a new trial of the issues as to the amount to be recovered by Martin for his attorney's fee and for costs advanced by him in the Marshall Street Annex case, but the case must be remanded for a new trial. *Krummen Motor Bus & Taxi Co.* v. *Mechanics' Lumber Co.*, 175 Ark. 750, 300 S. W. 389.

Therefore the judgment as to the Marshall Street Annex will be reversed, and the case remanded for a new trial.

SANDERS *v.* FLENNIKEN.

Opinion delivered November 11, 1929.

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A. D. Murphy, M. L. Allday and *R. M. Hutchins,* for appellant.

Marsh, McKay & Marlin, for appellee.

HART, C. J., (after stating the facts). Appellants brought this suit in equity, and asked that certain conveyances by appellees be canceled as clouds upon their title. Such a suit is of purely equitable cognizance, although appellants ask that the title to the land be also declared in themselves, and that they have possession under their claim of title.

Appellees pleaded in bar of the recovery of the land by appellants that they were guilty of laches. The doctrine of laches is entirely a defense in equity, and, if the facts justified it, constituted a bar to the right of appellants to the relief asked by them.

Mere lapse of time before bringing suit, without change of circumstances or in the relation of the parties, will not constitute laches. Not only must there have been unnecessary delay, but it must appear that, by reason of the delay, some change has occurred in the condition or relation of the parties to the property which would make it inequitable to enforce the claim. So long as the parties are in the same condition, a claim for land may be asserted within the time allowed by law. But when, knowing his rights, a party takes no steps to enforce them until the condition of the other party has, in good faith, become so changed that he cannot be restored to

his former state if the rights should be enforced, delay becomes inequitable, and operates as a species of estoppel against the assertion of the right. The disadvantage may come from loss of evidence, change of title, intervention of equities, and other causes; but, when the court sees negligence on one side and injury therefrom on the other, it is a ground for denial of relief. This doctrine has been recognized and applied according to the facts of the particular case in a great many cases by this court. It would serve no useful purpose, and would make this opinion too long to cite all of them. We deem it only necessary to cite a few of them in which the doctrine has been applied in cases of this sort: *Avera* v. *Banks,* 168 Ark. 718, 271 S. W. 970; *Walker-Lucas-Hudson Oil Co.* v. *Hudson,* 168 Ark. 1098, 272 S. W. 836; *Horn* v. *Hull,* 169 Ark. 463, 275 S. W. 905; *Langston* v. *Hughes,* 170 Ark. 272, 280 S. W. 374; *Clark* v. *Friend,* 174 Ark. 26, 295 S. W. 392; and *Clark* v. *Wilson,* 174 Ark. 669, 297 S. W. 1008.

The doctrine of laches has also been recognized and applied by the Supreme Court of the United States in cases involving oil and mining lands. The case of *Taylor* v. *Salt Creek Consolidated Oil Co.,* 285 Fed. 532, contains a review of the decisions of the Supreme Court of the United States in cases of this sort, and an instructive discussion of the reason for the application of the doctrine in oil and mining cases. In this connection, we quote from the opinion in *Patterson* v. *Hewitt,* 195 U. S. 309, 25 S. Ct. 35, the following:

"There is no class of property more subject to sudden and violent fluctuations of value than mining lands. A location which today may have no salable value may in a month become worth its millions. Years may be spent in working such property, apparently to no purpose, when suddenly a mass of rich ore may be discovered from which an unusual fortune is realized. Under such circumstances, persons having claims to such property are bound to the utmost diligence in enforcing them, and there is no class of cases in which the doctrine of laches has been more relentlessly enforced."

In *Twin-Lick Oil Co.* v. *Marburg,* 91 U. S. 587, the court said:

"Property worth thousands today is worth nothing tomorrow; and that which today would sell for a thousand dollars at its fair value may, by the natural changes of a week or the energy and courage of desperate enterprise, in the same time be made to yield that much every day. The injustice therefore is obvious of permitting one holding the right to assert an ownership in such property to voluntarily await the event, and then decide, when the danger which is over has been at the risk of another, to come in and share the profit. While a much longer time might be allowed to assert the right in regard to real estate whose value is fixed, on which no outlay is made for improvement, and but little change in value, the class of property here considered, subject to the most rapid, pregnant, and violent fluctuations in value of anything known as property, requires prompt action in all to hold an option whether they will share its risks or stand clear of them."

From these citations it will be seen that this court, as well as the Supreme Court of the United States, has uniformly recognized that, on account of the fluctuating and uncertain values of oil and gas lands, parties asserting title thereto must act more promptly than in ordinary cases in which the values remain practically the same.

Of course, it is equally well settled that, when the question of laches is in issue, the plaintiff is chargeable with such knowledge as he might have obtained upon inquiry, provided the facts already known to him were such as to put the duty of inquiry upon a man of ordinary intelligence. *Walker-Lucas-Hudson Oil Co.* v. *Hudson,* 168 Ark. 1098, 272 S. W. 836; and *Johnson* v. *Standard Mining Co.,* 148 U. S. 360, 13 S. Ct. 585. In the latter case the court said:

"While there is no direct or positive testimony that plaintiff had knowledge of what was taking place with

respect to the title or development of the property, the circumstances were such as to put him upon inquiry; and the law is well settled that, where the question of laches is in issue, the plaintiff is chargeable with such knowledge as he might have obtained upon inquiry, provided the facts already known by him were such as to put upon a man of ordinary intelligence the duty of inquiry."

Tested by this well-settled rule, we think the court properly held that appellants were guilty of laches. Some of them resided in the same vicinity in which the lands were located at the time of their father's death, and have continued to reside there ever since. The rest of the appellants either have resided in the same community ever since their father's death or have lived in the same locality. Although some of them stated that they had paid taxes during some of the years, the record shows that the purchasers at the foreclosure sale under the power contained in the deed of trust and their grantees have paid taxes on the land ever since 1907. Two of the appellants who executed the deed of trust lived on the land at the time of its sale under the power contained therein. They moved off of the land after the foreclosure, and, although they continued to live in the same vicinity, never exercised any other acts of ownership over the land, or attempted to do so. In 1922 appellants went to one of their attorneys in the present suit, who was then an abstracter of titles, but who had not yet been admitted to practice law, and stated facts under which they claimed the land to him. He advised them that he thought that they might recover the land. This shows at least that they had knowledge of the facts upon which they based their claim at that time. Notwithstanding this, they delayed bringing their suit until some time in 1925. During this time Mrs. Flenniken, who claimed title to the land under deed from the purchasers at the foreclosure sale, executed an oil lease as sole owner of the land. She thus bound herself to the lessees for the performance of the covenants in her lease, and upon faith of her owner-

ship they commenced extensive drilling on the land for oil and gas. They paid Mrs. Flenniken the sum of $20,000 under the lease, and also over $32,000 in royalties. Before the suit was commenced, in 1925, the original mortgagees and the trustees under the mortgage had died. Alymer Flenniken had also died. After the purchase of the land by the firm of Marsh & Flenniken, Flenniken alone looked after it, because he had been reared in that part of the county where the lands were situated. These persons might have shed light upon the question of appellants' claim of title. Alymer Flenniken died after 1922, and thus appellants waited until appellees could not prove any facts known by him with regard to the claim of title of appellants. It will be remembered that appellants admitted themselves that they knew in 1922 of the facts under which they claim title. The widow of Seaborn Sanders, from whom appellants claim to inherit the land, died in 1919.

Under these circumstances, appellants' claim should not in equity be enforced. After the changes of situation during all of these years, after the changes in title, after the execution of the oil lease and the subsequent discovery of oil, and after evidence of the facts upon which they base their title has been lost by the death of disinterested witnesses who best knew them, equity will not now enforce a claim which it seems would not likely have been asserted if oil had not been discovered on the land. The undisputed evidence shows that the land was comparatively worthless except for the mineral rights. They could not rest on their rights and see appellee expend great sums of money in exploring for oil and gas, and, after the land had suddenly and unexpectedly made a great increase in value on account of this, come into a court of equity, and demand the enforcement of their rights.

Therefore the chancellor properly held that they were barred of relief under the doctrine of laches, and the decree will be affirmed.

GRABLE *v.* BLACKWOOD.

FINTON *v.* BLACKWOOD.

Opinion delivered November 11, 1929.

Robinson, House & Moses, Harry E. Meek, W. H. Cooper and *Horace Sloan,* for appellants.

Hal L. Norwood, Attorney General, *Claude Duty,* Assistant and *Harry P. Daily,* for appellees; *Rice & Dickson, Amici Curiae,* for appellants.

HART, C. J., (after stating the facts). The correctness of the decisions of the trial courts depends upon the construction to be given to act 153, passed by the Legislature of 1929, which was in aid of road districts in the State of Arkansas. Acts of 1929, vol. 1, p. 785. Section 1 provides for the payment of outstanding indebtedness other than bonds incurred prior to January 1, 1927, and reads as follows:

"That the Highway Commission shall, as soon as possible, ascertain the amount of any valid outstanding indebtedness incurred prior to January 1, 1927, against any road district in the State of Arkansas organized prior to the passage of act No. 11 of the Acts of the General Assembly of the State of Arkansas for the year 1927, which was approved February 4, 1927, and shall draw vouchers to be paid out of the appropriation already provided for in act No. 18 of the Forty-seventh General Assembly for the payment of road district bonds and interest obligations; such voucher shall be delivered to the person authorized to receive the same, on proper satisfaction of such indebtedness; provided that such payments so made shall be charged against the allotment to the respective counties (in which the road was located) as made by the Highway Commission, and, if in two or more counties, it shall be prorated in accordance with the mileage of the road in each county."

The act under consideration was passed by a two-thirds majority of those voting thereon, both in the Senate and in the House of Representatives, but it did not receive a two-thirds majority of the members elected to each branch of the General Assembly.

Counsel for appellants seek to reverse the decree in the chancery court, and the judgment in the circuit court

under the authority of *Belote* v. *Coffman,* 117 Ark. 352, 175 S. W. 37, where it was held that the legislative appropriation for the exhibit of the resources of the State at the Panama-Pacific Exposition was not a necessary expense of government, and required a two-thirds majority vote on the act by each house of the Legislature in its favor to render it valid. They claim that, while the act under consideration was not an appropriation to defray the necessary expenses of government, it was in the nature of a donation in aid of the road improvement districts of the State which were duly organized under acts of the Legislature, and that the appropriation made was for a public purpose.

On the other hand, it is contended by counsel for appellees, that the act under consideration is governed by the provisions of § 27, article 5, of the Constitution, which was construed in the case of *Oliver* v. *Southern Trust Company,* 138 Ark. 381, 212 S. W. 77. In that case it was held that the Legislature could not appropriate money to pay a claim against the State not authorized by pre-existing law, except by a bill passed by two-thirds of the members elected to each branch of the General Assembly. They contend that the outstanding indebtedness referred to in the act under consideration are not claims under preexisting laws, under the section of the Constitution construed in the Oliver case, and that the bill is unconstitutional because it was not passed by two-thirds of the members elected to each branch of the General Assembly.

As we have already seen, counsel for appellants contend that the case does not fall under the provisions of the section of the Constitution construed in the Oliver case, but that, if it does, the indebtedness provided for is a claim under preexisting law, and requires only a majority of the votes cast on the bill to pass it.

In the Belote case the court had under consideration article 5, § 31, of the Constitution, which reads as follows:

"No State tax shall be allowed, or appropriation of money made, except to raise means for the payment of

the just debts of the State, for defraying the necessary expenses of government, to sustain common schools, to repel invasion and suppress insurrection, except by a majority of two-thirds of both houses of the General Assembly.''

The Legislature had appropriated money for the purpose of exhibiting the resources of the State at the Panama-Pacific Exposition. The act appropriated $40,000 for that purpose, but it did not receive a two-thirds majority of those voting thereon in the House of Representatives. The court held that, under our system of government, the Senate and the House are separate and independent bodies, and each votes separately on every bill presented to it. Therefore it was held that the bill did not legally pass, because it was not a necessary expense of government, and did not receive a two-thirds majority of those voting on it in each branch of the General Assembly. Citizens of the State advanced the necessary money to pay for the exhibit of the natural resources of the State at the exposition, and, at a subsequent session of the Legislature, asked for an appropriation to reimburse them for the amounts expended. The act did not receive a two-thirds majority of the members elected to each branch of the General Assembly. In a test case, which was appealed to this court, *Oliver* v. *Southern Trust Co.,* 138 Ark. 381, 212 S. W. 77, it was contended that citizens who advanced the money had claims under a preexisting law, and that the appropriation to reimburse them need only pass by a majority vote of those cast on the bill. They insisted that the original appropriation bill which came up for construction in the Belote case made their claim for reimbursement one under a preexisting law. The court held that the first act was essentially an appropriation act, and did not have the effect to make the subsequent claims for reimbursement claims under preexisting laws within the meaning of article 5, § 27, of the Constitution.

We are of the opinion that the outstanding indebtedness incurred prior to January 1, 1927, mentioned in the

act under consideration, does not fall within any of the provisions of § 27, article 5, of the Constitution. It is certainly not extra compensation made to any officer, agent, employee, after the service shall have been rendered or the contract made. On the other hand, the indebtedness claimed to be due was reduced to judgment, and was for an amount due under contracts made with improvement districts. It is not money appropriated or paid on a claim either provided for by preexisting law or the subject-matter of which shall not have been provided for by preexisting law. In other words, it is not a claim at all. It is a bill passed in aid of road improvement districts which had been legally formed under laws passed by the Legislature. That this view is correct will be seen by the reasoning of the court in the following cases: *Cone* v. *Hope-Fulton-Emmett Road Improvement District,* 169 Ark. 1032, 277 S. W. 544; *Bush* v. *Martineau,* 174 Ark. 214, 295 S. W. 9; and *Arkansas State Highway Commission* v. *Kerby,* 175 Ark. 652, 300 S. W. 377.

In the Cone case the court said that the statute, which was in aid of the taxpayers of road districts and the bondholders thereof, had set apart a portion of the revenue to be applied on the payment of said bonds, and that such act on the part of the sovereignty was a gratuity rather than a contract. The court pointed out that the State, unless inhibited by some constitutional provision, had, by its Legislature, full power over all matters of taxation, and the collection and disbursements of taxes, and might exercise absolute control over all revenue collected by subordinate branches of the State Government. Therefore it was held that the act in aid of the payment of the bonds of this road district was in the nature of a donation to them. This being true, the amount donated could in no sense be considered as claims against the State.

We can illustrate our meaning by an application of the principles of law decided in *Compton* v. *State,* 38 Ark. 601. In that case Compton had been employed by the

Governor to assist the Attorney General in the foreclosure of a mortgage against a railroad, and was to receive $5,000, to be paid out of the sum recovered. Upon appeal to this court it was held that the State's attorney had no lien on the judgment recovered, and that Compton must look to the Legislature for his compensation. The court recommended that the Legislature should make an appropriation for the compensation, because the State had profited by his labors, his learning, and his experience, and it was only bare justice to recompense him. Now, we think it results from the reasoning of the court in that case that the Governor had the inherent power to employ Compton, but that he had no power to employ him so as to give him a lien on the judgment recovered. If Compton had presented his claim to the Legislature, it would have been only necessary to pass a bill appropriating the money to pay it by a majority of those voting on the question, because, if the Governor had the inherent power to employ him, he had a claim against the State under a preexisting law, just as much as if the Legislature had passed a statute authorizing the Governor to employ him before he did so. On the other hand, if Compton had been employed by the Attorney General without any statute authorizing him to do so, his employment would have been outside of the jurisdiction of the Attorney General, and would have been illegal. Under these circumstances, a bill to appropriate money to pay his claim must have been passed by two-thirds of all the members elected to each branch of the Legislature, because it was not a claim which had been provided for by a preexisting law.

In this view of the matter, appellants in the case at bar did not have any kind of a claim against the State. As already pointed out, the act of the State in appropriating money to pay the indebtedness of the various road districts was in the nature of a donation, and was not the result of any obligation which had been incurred or attempted to be incurred by the State itself. It is only

in cases where the State has incurred an obligation, or attempted to do so, that a party can be said to have a claim against the State, within the meaning of article 5, § 27, of the Constitution.

The court has held valid the acts of the Legislature appropriating money for the payment of the bonds of the various improvement districts which had begun or completed the construction of the improved roads authorized by the laws creating them. No useful purpose could be served by again giving the reasons for so holding. It is obvious that, if the Legislature had the power to appropriate money to pay the outstanding bonds of these road improvement districts, it would also have the authority to appropriate money to pay any other valid indebtedness incurred by said districts in the accomplishment of the purposes for which they were organized.

It is next insisted that the act under consideration is unconstitutional because it violates the provisions of article 5, § 23, of the Constitution, which provides that no law shall be revived, amended, or the provisions thereof extended or conferred, by reference to its title only.

Section one of the act provides that the Highway Commission shall ascertain the amount of any valid outstanding indebtedness incurred prior to January 1, 1927, against any road improvement district in the State organized prior to the passage of act 11 of the Acts of 1927, and shall draw vouchers to be paid out of the appropriation already provided for in act 18 which had been previously passed by the Legislature of 1929, appropriating money for the payment of road district bonds and interest obligations.

The framers of the Constitution meant only to lay a restraint upon the Legislature where the bill was presented in such form that the members could not determine what its provisions were from an inspection of it. Here, no confusion would result to the Legislature in the premises. Both statutes were passed at the same session of

the Legislature, but it is apparent from reading them that act 18 and act 153 are original statutes in form, and complete in themselves. The two statutes are separate and distinct legislative enactments, and each had its appointed sphere of action. No alteration, change or repeal of the one would affect the other. We are of the opinion that an act complete in itself, and which would not mislead the members of the Legislature is not within the evils to be remedied by this provision of the Constitution, and cannot be held to be prohibited by it without violating its plain intent. *Watkins* v. *Eureka Springs,* 49 Ark. 131, 4 S. W. 384; *Common School District* v. *Oak Grove Special School District,* 102 Ark. 411, 144 S. W. 224; *State* v. *McKinley,* 120 Ark. 165, 179 S. W. 181; and *Farris* v. *Wright,* 158 Ark. 519, 250 S. W. 889.

It is next contended that the act under consideration is not an appropriation act, or that, if it should be construed to be an appropriation act, it is also an appropriation by reference, which is prohibited by the section of the Constitution just referred to. An appropriation need not be made by any set words. It is the setting apart from the public revenues of a certain sum of money for a specific object in such manner that the executive officers of the government are authorized to use that money, and no more, for that object, and no other. *Clayton* v. *Berry,* 27 Ark. 129; *Jobe* v. *Caldwell,* 93 Ark. 503, 93 S. W. 503; *Dickinson* v. *Clibourn,* 125 Ark. 101, 187 S. W. 909; and *Conner* v. *Blackwood,* 176 Ark. 139, 2 S. W. (2d) 44.

Act 18 was approved February 13, 1929, Acts of 1929, vol. 1, p. 26. Section 7 makes the biennial appropriation to retire road district bonds and interest assumed by the State. Section 8 makes it the duty of the Highway Department auditor to certify amounts necessary to go to road districts each year, and for certificates of indebtedness.

Act 153 is an act for the payment of outstanding debts other than bonds from road district bond allot-

ment by counties, and was approved March 20, 1929. It expressly provides for vouchers to be paid out of the appropriation already provided for in Act No. 18 of the same Legislature. It contains proper direction to the proper officers to pay money out of the treasury for a given object, and constitutes an appropriation to pay the debts of the road districts which had been incurred prior to January 1, 1927, out of the appropriation which had already been made for the payment of the bond indebtedness of said road districts. This view of the matter has been adopted by the court in the following cases: *Jobe* v. *Caldwell,* 93 Ark. 503, 125 S. W. 423; *Hudson* v. *Higgins,* 175 Ark. 585, 299 S. W. 1000; and *Conner* v. *Blackwood,* 176 Ark. 139, 2 S. W. (2d) 44.

In the Jobe case the court sustained an appropriation to pay an award in favor of Caldwell & Drake by the Capitol Commission out of money appropriated out of the Capitol Fund. So, too, in the other cases just cited, the same principle of law was applied.

It cannot be said that act 153 violates article 5, § 29, of the Constitution, which provides that no money shall be drawn from the treasury except in pursuance of specific appropriation made by law, the purpose of which shall be distinctly stated in the bill, and the maximum amount which may be drawn shall be specified in dollars and cents. Both act 18 and act 153 are specific appropriation acts. Each act is complete in itself. Act 153 expressly grants the power to the Highway Commission to ascertain the amount of any valid outstanding indebtedness incurred prior to January 1, 1927, against any road district in the State of Arkansas, and to pass on its merits, and refers to act 18 for the purpose of pointing out the procedure to be exercised in executing the power conferred, and that was, after ascertaining the amount due, to pay the same out of the amount appropriated by act 18. That act expressly states the maximum amount which is appropriated for the purposes specified in the act, and this maximum amount determines the total

amount which may be expended under the provisions of act 18 or act 153.

The latter act sets apart or assigns to a particular use of a kindred kind a sum of money out of a specific appropriation made by the first act, the maximum of which is stated in that bill. That is to say, it is for the payment of certain indebtedness of various road districts which had not been included in act 18. The appropriation is specific as to the purpose for which it is to be used. It is specific as to the time of payment, and as to the fund out of which it shall be paid. This was sufficient to constitute a valid appropriation.

The result of our views is that the decree of the chancery court and the judgment of the circuit court were wrong. The chancery court should have overruled the demurrer to the complaint of appellant and the interveners in that case, instead of sustaining it. It was decreed that the complaint of each one should be dismissed for want of equity; and for the error in so holding the decree must be reversed, and the cause will be remanded with directions to the chancery court to compel appellees to carry out the provisions of act 153, and for further proceedings in accordance with the principles of equity, and not inconsistent with this opinion. In consolidated case No. 1373 the judgment will be reversed, and the cause will be remanded with directions for further proceedings in accordance with the principles of law decided in this opinion.

It is so ordered.

MARTIN *v.* DALE.

Opinion delivered November 11, 1929.

Jones & Jones, for appellant.

Henry Moore, Jr., for appellee.

SMITH, J. In 1925 Lenz, as agent for Martin, trustee, obtained from Mrs. May B. Dale an oil lease, which expired November 18, 1928. As a consideration for this lease, a substantial sum of money was paid, and an interest in any oil which might be produced was reserved. Lenz began his search for oil and gas, and put down half-a-dozen or more wells, all of which proved to be dry holes. Notwithstanding all these failures, Lenz's faith continued, and in June, 1928, he commenced negotiations for a six months' extension of the lease. These negotiations were had with Miss Lois Dale, the daughter and agent of the owner of the land.

Lenz used fuel oil in connection with his drilling operations, which he transported in barrels in a truck from Texarkana. In doing so he used a State highway known locally as the East Ninth Street Road, as the highway penetrated the city of Texarkana through Ninth Street. Mrs. Dale's plantation was about eighteen miles east of Texarkana, and was adjacent to and north of this highway.

A drainage district had been organized a number of years ago, which dug a ditch on the property line of the Dale plantation, and parallel to the ditch was a public

road known as the Ditch Line Road. This road started at the East Ninth Street Road, and ran north and south, and furnished means of ingress into the Dale plantation. The ditch makes a Y, along the right prong of which the road extended to a point near an elevation known as the "Mounds," which was from three to twelve feet higher than the surrounding land, and about six hundred acres in area. A portion of this elevated land was on the Dale plantation, and it was here that Lenz carried on his exploration for oil and gas. The Mounds was about half a mile north of the East Ninth Street Road.

During the years 1925, 1926 and 1927, and until November, 1928, ingress to the wells being drilled on the Mounds was had over the spoil bank on the west side of the main line ditch for a half a mile to a bridge which spanned the ditch, and it is a half a mile from the bridge to the Mounds, and for this distance Lenz used, first, an old public road built by the county, which ran inside of the Dale field, and later, a new public road built on the line between the Dale and the adjoining plantations.

In 1926 a private road was constructed from the East Ninth Street Road to a place on the plantation called the Dale headquarters, which was later graveled, and was thereafter known as the gravel road, and this litigation arose over the use of this road by Lenz in his drilling operations.

Lenz asserted that the use of the gravel road was necessary to reach his wells after the Ditch Line Road became impassable; and he also contends that, after the controversy over its use arose, he made a contract giving him the right to use it, and, when the exercise of this right was denied him, he brought this suit to enjoin Mrs. Dale and her agents from interfering. A temporary restraining order was granted, which was dissolved on the final hearing, and damages were awarded on the dissolution of the injunction covering the use of and the damage to the gravel road.

The law of the case has been settled by prior decisions of this court, and is succinctly restated in the case

of *Vassar* v. *Mitchell,* 169 Ark. 792, 276 S. W. 705. It was there said: "If one sells to another a tract of land surrounded by other land of the grantor, a right of way across such other land is a necessity to the enjoyment of the land granted, and is implied from the grant made. *Belser* v. *Moore,* 73 Ark. 296, 81 S. W. 219. The principle, from which the doctrine of implied grants of easements over other lands of the grantor springs, is said to be found in the maxim that 'one shall not derogate from his grant,' and the kindred one, that the purchaser takes the land bought, and whatever right in the hands of the grantor as is necessary to its enjoyment."

It is not questioned that Lenz, as agent for the trustee to whom the lease was given, had the right of access to the lands covered by the lease; but this is a right which arose out of necessity, and not as a matter of convenience. In other words, while the right of entry was implied, this right did not authorize Lenz to enter as he pleased; it was his duty to do so in the manner least injurious to his grantor, and if a means of ingress existed when the lease was taken, and which continued to be available, this entry, and no other, should have been used, although it was not the most convenient.

It is undisputed that the gravel road was a private way, and there was therefore no right to use it if another was available, although not so convenient.

Prior to 1927, while Lenz was drilling under the original lease, there was a road along the ditch bank on the east side and parallel with the Ditch Line Road, but the evidence shows that this road was plowed into and made a part of the field, and a portion of it actually cultivated as such. There was a road leading from the East Ninth Street Road to the Mounds, which has been referred to as the Ditch Line Road, which was a public road; but this road was plowed up on December 18 by the county judge, and, while this was not done at Mrs. Dale's request, it was not done over her protest. There is some conflict in the testimony as to the condition of

the road after it had been plowed up, but we think it fairly appears that the road was thereafter impassable, and that it could not have been made passable without undoing what the county judge had ordered done, and this at a considerable expense. The reason for plowing up the road appears to have been that it was not located on the property line of the adjacent plantation, but, when it was so located, it became impassable, at least for the remainder of that winter. The testimony is to the effect that an unloaded wagon might have been driven over it, but not a loaded one.

The only other road was the gravel road, and Lenz used this for some time before he was forbidden to do so, but Miss Dale testified that she was not aware of that fact. No objection was made to the use of the gravel road by Lenz and others in their automobiles, but objection was made to the use of the road by the truck in which the oil was carried. This was a one ton Ford truck, and six barrels of oil was its load limit over a road of any kind.

An understanding of some kind was arrived at between Lenz and Miss Dale for the use of this road, but the testimony is in hopeless conflict as to the terms of this agreement. It is certain that Lenz paid $100 for the use of this road, but whether the payment was for past or future use is not certain. The chancellor found there had been no agreement for the future use of the road, and we will not reverse that finding of fact, as we are unable to say that it was clearly against the preponderance of the evidence. But, even so, we are of the opinion that the gravel road had become a "way of necessity," and that only by using it could the right to explore for oil granted by the lease be exercised before the lease had expired.

The court assessed the damages at $100 on dissolving the injunction, but we think this finding is against the preponderance of the evidence. In addition to paying the hundred dollars, Lenz maintained the road by

dragging it after every rain, and by regraveling it when this became necessary, and we think the testimony shows the road was in as good condition when the injunction was dissolved as it was when Lenz began to use it. Of course, the use of the road itself was a valuable right, but this use, as we have shown, became an incident to the lease, and was presumably compensated by the consideration inducing the lease. The restraining order should not therefore have been dissolved before the expiration of the renewed lease.

It will be unnecessary to remand the cause to order the dissolution of the temporary restraining order, as the lease has now expired, and no present rights are claimed under it, but the decree for the hundred dollars will be reversed, and that cause of action dismissed.

WADE *v.* DENISTON.

Opinion delivered November 11, 1929.

Saxon, Wade & Warren and *R. K. Mason,* for appellant.

Arthur D. Chavis, for appellee.

SMITH, J. Drucilla Newton successfully prosecuted a suit to cancel a deed which she had executed to Robert Deniston. The deed canceled conveyed an interest in oil royalties, and, as an incident to this relief, judgment was rendered against Deniston for $686.98, covering the amount of royalties collected prior to the cancellation of the deed. *Deniston* v. *Newton,* 175 Ark. 1169, 300 S. W. 929.

An execution issued upon this judgment, directed to the sheriff of Ouachita County, but a return *nulla bona* was made. Later a second execution was also directed to the sheriff of Ouachita County, which was levied upon a one sixty-fourth interest owned by Deniston in the royalty derived from a two-acre oil lease, and at the sale under this execution Mrs. M. L. Wade became the purchaser of the interest sold for $50. The costs incident to the sale, amounting to $26.50, were first deducted, and the balance of $23.50 was paid to the plaintiff by the husband of the purchaser, who was the plaintiff's attorney, and the amount thereof was credited on the judgment. The property sold under this execution was in Ouachita County, and Deniston resided in Jefferson County, and had no notice of the sale until after it had been made.

A third execution issued, which was directed to the sheriff of Jefferson County, and a stay bond was given in satisfaction of it, and, when this bond was not paid at its maturity, a fourth execution issued, which was directed against the sureties on the stay bond, and this execution was satisfied by paying the amount of the third execution, and all costs and interest.

Upon selling the royalty interest in the two-acre lease the sheriff executed, on the date of the sale, a certificate of purchase, but, having concluded that a deed was necessary to convey the interest sold, he declined to acknowledge the instrument until the year allowed by law for redemption from execution sales of real estate

had expired, and, a year and two days later, he acknowledged the instrument as a deed, after changing the date thereof.

Deniston brought this suit to cancel the execution deed, and to recover royalties from certain oil companies. The court found the fact to be that Deniston's interest in the two-acre lease was worth as much as $500, and we think this finding is not contrary to the preponderance of the evidence, as Deniston's interest in the royalties amounted to about $20 per month. The court also found that there were "other circumstances" which rendered it inequitable for the sheriff's sale to stand, and the execution deed was canceled. The court ordered Mrs. Wade to pay "all costs accruing in and about the issuing of the execution and the sale of the royalty under the same," but adjudged all other costs against Deniston, who does not complain of the assessment of these costs against him, as the relief which he prayed against other defendants (but which need not be here recited) was denied.

As we have said, the interest of Deniston in the two-acre lease sold for a grossly inadequate consideration, and there was, as the court found, "other circumstances" which made it inequitable for the sale to stand. The statute contemplates that the judgment debtor shall have notice of the levy upon his property, and he is given the right to select the property upon which the levy shall be made, "and, if he give to the officer a list of the property so selected, sufficient to satisfy such execution, the officer shall levy upon such property, and no other, if it be sufficient, in his opinion, to satisfy such execution, and, if not, then upon such additional property as shall be sufficient." Section 4277, C. & M. Digest. This opportunity was not afforded Deniston, and the property was sold, without notice to him, to the wife of the attorney for the plaintiff.

In the case of *Huffman* v. *Gaines,* 47 Ark. 226, 1 S. W. 100, it was held (to quote a syllabus) that: "An attorney of the plaintiff, who purchases property sold under

the plaintiff's execution, is charged with notice of the vices and infirmities of the judgment and process, and stands in no better attitude than a stranger who buys with actual knowledge of the same facts." It is an application of familiar principles of equity to apply the same rule to the wife of the plaintiff's attorney. See also *Woods* v. *Hayes,* 85 Ark. 163, 107 S. W. 387; 23 C. J. 765, and 10 R. C. L. 1309, and the cases cited in the notes to those texts; vol. 3, Freeman on Executions (3 ed.), § 340, p. 1958.

Of course, as was said in the Huffman case, *supra,* the judgment debtor may waive an improper sale of his property; but we think Deniston has not done so under the facts of this case, as he has never received any benefit under its sale. It does appear, however, that the net proceeds of the sale of the two-acre tract were credited upon the original judgment, but the amount of Mrs. Wade's bid will be repaid her out of the royalties due from an oil company made a defendant in the suit, which were impounded, and held subject to the final decree in this case, and the decree of the court will be modified to this extent.

As thus modified, the decree will be affirmed, but no change will be made in the order of the court affecting costs.

CENTRAL BANK *v.* JACOBSON.

Opinion delivered November 11, 1929.

Rose, Hemingway, Cantrell & Loughborough, for appellant.

Frank Bird, for appellee.

SMITH, J. On June 21, 1921, Charles Jacobson indorsed the note of C. E. Becker, payable to the order of the Central Bank, Little Rock, in the sum of $5,421.80, due and payable ninety days after date. The note was not paid, although frequent demand was made, and on September 29, 1922, the president of the bank wrote Jacobson that an auditing committee of the directors had ordered the note to be collected, and that it would be placed in the hands of an attorney for collection.

On November 8, 1922, Jacobson conveyed the undivided interest which he had inherited from his father in certain lands to his sister, Laura. This deed recited that it was executed in consideration of the sum of $1,000 cash in hand paid by Miss Jacobson, and in satisfaction of an existing indebtedness of $9,500 due her by the grantor.

Suit was not brought immediately, as the letter of September 29 advised would be done, but such delay as occurred appears to have been occasioned by an effort to make the debt out of Becker; and, while it does not appear just when the suit was commenced, judgment on the note was rendered January 25, 1924. After recovering this judgment, further correspondence was had and negotiations conducted in an effort to make as much of the debt out of Becker's collaterals as possible, but, when only a portion of the judgment had been collected, this

suit was begun July 16, 1927, to cancel the deed from Jacobson to his sister as a fraud upon the rights of his creditors. Separate answers were filed by both the Jacobsons, which alleged the *bona fides* of the conveyance.

The apparent consideration for the deed was $10,500, of which $9,500 was preexisting debts. The chancellor found, after hearing the case on oral testimony, that the deed was in fact a mortgage, and it was so construed, and reformed accordingly. The court also found that the actual indebtedness due Miss Jacobson from her brother amounted to only $4,500, and that the reformed instrument secured only that amount. In arriving at these figures the court disallowed the $1,000 recited as having been paid upon the delivery of the deed, and the $5,000 item which will be further discussed. From this decree the bank has appealed, and the Jacobsons have prosecuted a cross-appeal.

The deed from Jacobson to his sister conveyed all the unencumbered property owned by him at the time of its execution, and his equity in the encumbered property appears to have been of but little value, and it is certain that this deed rendered Jacobson insolvent, and, if it is allowed to stand, the bank will be unable to collect its judgment.

The law of this case is clearly stated in the case of *Wilks* v. *Vaughan,* 73 Ark. 174, 83 S. W. 913, where it was said: "It is thoroughly settled in equity jurisprudence that conveyances made to members of the household and near relatives of an embarrassed debtor are looked upon with suspicion and scrutinized with care; and when they are voluntary, they are *prima facie* fraudulent; and when the embarrassment of the debtor proceeds to financial wreck, they are presumed conclusively to be fraudulent as to existing creditors." This exact language has been quoted with approval in a number of subsequent cases.

There remains therefore only a question of fact for our consideration, and that is, was the conveyance voluntary? And, if not entirely so, what valid indebtedness subsisted between the parties?

Jacobson admitted that the deed was intended as a security for debt, and no one denied that fact, and it was therefore a mortgage, notwithstanding it was in form a deed, and the chancellor properly construed it so to be.

Jacobson undertook to state the transactions between himself and his sister which eventuated in this indebtedness, but, as has been said, the chancellor disallowed items of $1,000 and $5,000, and it is earnestly insisted on behalf of the appellant bank that Jacobson's testimony was insufficient to support the finding that there was, in fact, any indebtedness to be secured. It may be said that there was no note, or check, or other writing, evidencing any indebtedness, but Jacobson testified that his sister earned and saved money which she permitted him to use; and we are unable to say that the chancellor's finding that these transactions amounted to $4,500 is clearly against the preponderance of the evidence. We are also of the opinion that the finding that the loans did not exceed this amount is not clearly against the preponderance of the evidence. Jacobson testified that the loan of $5,000 was made to pay a mortgage on his home; but it appears that this mortgage was not paid until thirteen months after the alleged loan was made; and the evidence as to the $1,000 loan is not more certain.

Miss Jacobson did not testify, but the explanation was offered that her failure to do so was due to the fact that she was ill at her home in Texas; but no continuance was asked upon this account, nor was her deposition taken.

Upon a consideration of the case in its entirety we are unable to say that the chancellor's finding, that the indebtedness due Miss Jacobson equaled, but did not exceed, $4,500 is contrary to the preponderance of the evidence, and the decree must therefore be affirmed, both on the appeal and the cross-appeal, and it is so ordered.

NEAL *v.* STATE EX REL. ATTORNEY GENERAL.

Opinion delivered November 11, 1929.

Fred A. Isgrig and *Owens & Ehrman,* for appellant.

Hal L. Norwood, Attorney General, and *Walter L. Pope,* Assistant, for appellee.

HUMPHREYS, J. Frank Neal, road foreman of Pulaski County, refused to deliver thirty-five State prisoners in his custody to the sheriff and keeper of the penitentiary on demand, whereupon this petition for a writ of mandamus was filed in the circuit court of Pulaski County, Third Division, on relation of the Attorney General, against him to compel the delivery of said prisoners, naming each and the crime for which he had been sentenced, to the sheriff of Pulaski County, for delivery to the keeper of the penitentiary, basing the proceeding

upon a violation of act No. 281 of 1929, approved March 29, 1929, in words as follows:

"Be it enacted by the General Assembly of the State of Arkansas:

"Section 1. That § 5394 of Crawford & Moses' Digest be and the same is hereby repealed.

"Section 2. Within thirty (30) days after the approval of this act, all persons who have been convicted and sentenced to the penitentiary, but have been delivered to the foreman as provided in said section, shall be delivered by said foreman to the sheriff of the county in which such conviction was had, who shall immediately deliver said prisoner to the keeper of the penitentiary in the same manner as other prisoners are now required to be delivered.

"Section 3. It is hereby ascertained and declared that the present manner in some counties of handling prisoners convicted of a felony has brought about many abuses, is hindering law enforcement, and is a blot upon our statutes, and the change contemplated by this act is necessary for the correction of such abuses, so that the immediate operation thereof is essential for the preservation of the public peace, health and safety; an emergency is therefore declared to exist, and this act shall take effect, and be in force from and after its passage."

The defendant, Frank Neal, one of the appellants herein, filed an answer and an amendment thereto, in substance, to the effect that act No. 281 of 1929 was void: (1) Because it increased and changed the method of punishment prescribed by § 5394 of Crawford & Moses' Digest in force at the time said prisoners were convicted, sentenced and delivered to him to serve out their respective terms, and that in its retroactive feature *ex post facto,* because in violation of the provisions of article 1, § 10, of the Constitution of the State of Arkansas, and article 2, § 16, of the Constitution of the United States; and (2) because it changed the several judgments of the circuit courts ordering said prisoners to be delivered to

him to serve their respective terms, under § 5394 of Crawford & Moses' Digest, which section is in words as follows: 'The said board shall have the power, if it shall vote to do so, to work all persons convicted of felonies and sentenced to the penitentiary for not more than five years in any of the counties entering into said agreement as herein provided; and if said board shall so vote, all such convicts as the road foreman thinks he can control shall be delivered to him, instead of being delivered to the warden of the penitentiary, as now provided; provided that, if any such convicts so delivered to him shall become unruly, or it shall be thought by such road foreman that he is likely to escape, he shall be carried to the penitentiary by the sheriff, and delivered to the warden thereof, upon the request of such road foreman.''

Pulaski County, also an appellant herein, filed an intervention, attacking the validity of act No. 281 of 1929, upon the ground that it deprived the county of its property without due process, in contravention of both the Constitution of the State and United States, for the reason that it spent large sums of money for road machinery and equipment, and in building stockades for the use of said prisoners delivered to its foreman under the provisions of § 5394 of Crawford & Moses' Digest set out above.

J. S. Hill, also an appellant herein, filed an intervention and amendment thereto for himself and the other prisoners similarly situated, in substance to the effect that he was convicted in Pulaski Circuit Court upon a plea of guilty, on September 29, 1927, and was sentenced to three years' imprisonment on the road district, which plea of guilty was induced under the promise of the prosecuting attorney and court that he would be adjudged to serve his term on the road district, instead of in the State Penitentiary, and that since that day he has been confined in the stockade built and maintained by Pulaski County for the sole purpose of caring for and keeping prisoners convicted of felonies and sentenced to

labor in said district for less than five years, where he would not have to wear stripes, where health conditions were better than they were at the penitentiary, where he could see his friends and relatives often, where the hours of service were not as long, and where he would not be compelled to serve with criminals convicted of graver offenses and sentenced to longer terms than five years; that he had served approximately two years of the sentence, and would within a few months be entitled to discharge; that at the time he entered his plea of guilty he was given a sentence of less than five years and sentenced to labor in the district, and that he relied upon the court and the officers of the court to carry out the same in the steps designated; that the sentence was given to him by the court, and could not be altered or changed by the Legislature; that act No. 281 of 1929 is unconstitutional and void, so far as it attempts to change the terms and provisions of sentences, judgments and decrees theretofore made and entered by a court of competent jurisdiction; that said act was in violation of article 4, §§ 1 and 2, of the Constitution of the State of Arkansas; that the judgment entered in his case was entered by the judicial department of the government, and that the passage of act No. 281, so far as its retroactive aspect was concerned, was an attempt by the legislative department of the government to invade the powers of the judiciary; that act No. 281 of 1929 is unconstitutional and void as an *ex post facto* law because in violation of article 2, § 16, of the Constitution of the State of Arkansas, and article 1, § 10, of the Constitution of the United States.

Demurrers were filed by appellee to the answer and interventions and amendments thereto, upon the grounds that the facts set out therein did not constitute any defense to the cause of action set out in its petitions.

The cause was submitted upon the pleadings, with the result that the demurrers to the answer and intervention were sustained, and, upon the election of appellants to stand upon their respective pleadings as amended

theretofore, the court dismissed the answer and interventions, and directed that a writ of mandamus issue requiring the delivery of said prisoners to the warden or keeper of the penitentiary, over the objection and exception of appellants, from which is this appeal.

On motion of appellant, the court superseded the judgment during the pendency of the appeal to this court, over the objection and exception of appellee, from which order appellee also appealed.

Appellants contend for a reversal of the judgment upon the grounds: (1) That act No. 281 of 1929, in its retroactive aspect, is void as contravening article 1, § 10, of the Constitution of the United States, and article 2, § 16, of the Constitution of the State of Arkansas, both of which forbids the passage of *ex post facto* laws; and (2) that the effect of the act was to change the judgment of courts under the passage of such act.

It is argued first that the facts set out in the answer and intervention and admitted by the demurrers bring the instant case within the definition of *ex post facto* laws, inhibited by both constitutions, in the case of *Kring* v. *Missouri,* 107 U. S. 221, 2 S. Ct. 443; *United States* v. *Hall,* 6 Cranch. 171; *Ex parte Medley,* 134 U. S. 160, 10 S. Ct. 384; and, inferentially, in the case of *Rooney* v. *N. D.,* 196 U. S. 319, 25 S. Ct. 264. The definition of an *ex post facto* law, as gleaned by appellants from the cases cited above in support of their contention, is any law "which inflicts a greater punishment than the law annexed at the time it was committed, or which alters the situation of the accused to his disadvantage." Appellants insist that the situation of Hill and the other prisoners will be changed to their disadvantage within the meaning of this definition if act No. 281 of 1929 is declared constitutional, and they are transferred to the penitentiary, the change wrought in their condition being that they will have to wear prison stripes, be subjected to health conditions not as good, to longer hours of service, prevented from seeing their friends and relatives often,

and compelled to serve with criminals convicted for much longer terms and graver offenses.

The majority of the court hold to the opinion that none of these things will change their condition to their disadvantage, within the meaning of the definition set out above, but that these changes had to do with prison regulations or prison discipline only, and that the instant case is governed by the rule laid down in Cooley's Constitutional Limitations, 459, 8th ed., as follows:

"Any change which should be referable to prison discipline or penal administration as its primary object might also be made to take effect upon past as well as future offenses; as changes of manner in the kind of employment of convicts sentenced to hard labor, the system of supervision, the means of restraint, and the like. Changes of this sort might operate to mitigate or increase the severity of the punishment of the convict, but would not raise any question under the constitutional provision against *ex post facto* laws."

The rule finds support in the following authorities: Bill's Encyclopedia of Criminal Law, vol. 1, p. 131; *Commonwealth* v. *Hall,* 97 Mass. 570; *Ex parte Bethurum,* 66 Mo. p. 545; Black's Constitutional Law, p. 513; *Marion* v. *State,* 20 Neb. 233, 29 N. W. 911; *In re Storti,* 180 Mass. 57, 61 N. E. 759; *Murphy* v. *Commonwealth,* 172 Mass. 264, 52 N. E. 505, 43 L. R. A. 154, 70 Am. St. Rep. 266; vol. 2 Supplement to R. C. L., p. 91; *Liebowitz* v. *Warden of N. Y. County,* 174 N. Y. Supp. 823.

It is next argued that act No. 281 of 1929 is an invasion of the judicial department of the government, because it had the effect of changing judgments entered by the circuit courts ordering said prisoners to be delivered to the road foreman. It will appear, by reference to the orders and judgments made by the circuit court, that each of the prisoners was sentenced to the penitentiary of the State of Arkansas, and this judgment then recited that a road and convict district had been formed in Pulaski and Perry counties, and adjudged that each prisoner be

remanded into the custody of the sheriff of Pulaski County, and by him safely and without delay delivered to the warden or foreman of said road and convict district or system, there to be worked for the period of years which was adjudged against him as a penalty for the crime he had committed. The statute under which these orders or judgments were made by the circuit courts did not authorize the circuit courts to sentence the convicts to be worked upon the county road, as will be seen by reference to § 5394 of Crawford & Moses' Digest, copied at length in this opinion. The section of the statute provides that, upon vote of the board, felons sentenced to the penitentiary for not more than five years, as many of them shall be delivered to the road foreman as he thinks he can control, instead of being delivered to the warden of the penitentiary. The only provision of the section for a sentence to be adjudged by the courts is a sentence to the penitentiary. As no power was given under the section to sentence a convict to be worked upon the county roads, that portion of the judgments was and is mere surplusage

The writer is of the opinion that act 281 of 1929 is, in its retroactive provisions, unconstitutional, because to that extent same is an *ex post facto* law inhibited by both the Constitution of the United States and the State of Arkansas.

No error appearing, the judgment is affirmed.

LIBERTY LIFE INSURANCE COMPANY *v.* OLIVE.

Opinion delivered November 11, 1929.

R. L. Searcy, Jr., G. T. Whatley and *Neill Bohlinger,* for appellant.

HUMPHREYS, J. Appellee brought suit against appellant in the circuit court of Lafayette County to recover damages for discontinuing two life insurance policies for $1,000 each, issued by it to her, alleging that it wrongfully doubled the maximum premium provided for in the policies, and, upon her refusal to pay same, lapsed the policies; that she was ready, able, willing and anxious to carry out the contract by making the payments as provided in the policies, but that appellant refused to accept same, and had violated its contracts.

Appellant filed an answer, denying the alleged breach of its contracts, and this formed the issue in the case.

On March 22, 1929, the cause proceeded to a hearing, and at the conclusion of the testimony, which was conflicting upon the issue joined, appellant tendered and inserted in the record the following written proposal and request:

"The Liberty Life Insurance Company (appellant here), not admitting, but specifically denying, that it has unjustly raised any rates, hereby offers to reinstate the policies sued on at the rate of $1.28 per month, without examination or formality on the part of the insured at all, and put them in force at this date."

Appellee thereupon asked permission to strike out of her complaint the statement that she was "ready, able, willing and anxious to carry out the contract by making the payments as provided in the policy." The trial

court refused her request to strike, over her objection and exception; refused to peremptorily instruct a verdict for appellant, over appellant's objection and exception; and, over the objection and exception of appellant, submitted the cause to the jury under the following instruction relative to the issue joined:

"If you find from a preponderance of the evidence in this case that the defendant company demanded of the assured the payment of more money as premiums than was due under the policies, and that the assured refused to pay the same, and that, because of the failure of the assured to pay the same, defendant company lapsed the policies, then your verdict will be for the plaintiff."

The submission of the case to the jury resulted in a verdict and consequent judgment in favor of appellee for $376.16, the amount of which is not questioned by appellant, if appellee was entitled to recover anything.

Appellant contends for a reversal of the judgment upon the sole ground that it was appellee's duty, under the law, to accept its proposal to reinstate the policies at the maximum rate of $1.28 per month, without examination or formality on her part. In support of this contention, it is argued that this duty rested upon her because she stated in her complaint that she was "ready, able, willing and anxious to carry out the contract by making the payments as provided in the policies * * *;" and because she was alive, and for that reason no damage had accrued to her at the time it offered to put the policies back in force.

The arguments are not sound. In the first place, appellee's statement had reference to the time of the alleged breach of the contract. It was in no sense a continuing offer on her part to carry out the contract after the breach, if permitted to do so. The common form of pleading by one who alleges a breach of a contract for which he seeks damages is to state that, at the time of the breach, he was ready, able, willing and anxious to carry out the contract on his part. In the next place,

at the time appellant offered to reinstate the policies it had not offered to pay the costs of the litigation, and, even if the court had adjudged the costs against the appellant, such judgment would not have included an attorney's fee for appellee nor any remuneration to her for the loss of time in the preparation of the case. The rule applicable to the present case is that announced in 13 Cyc. 657, in the following words:

"Where the renunciation of a contract is treated by the adverse party as a breach, the party cannot, according to some authorities, withdraw his renunciation and offer to perform, although the time for actual performance has not arrived."

This rule is sustained by the cases of *Mutual Loan Soc.* v. *Stow,* 15 Ala. App. 293, 73 S. 202; *Waterman* v. *Bryson,* 178 Ia. 35, 158 N. W. 466; *Quarterman* v. *American Law Book Co.,* 143 Iowa 517, 121 N. W. 1009, 32 L. R. A. (N. S.) 1; *Ault* v. *Dustin,* 110 Tenn. 366, 45 S. W. 981.

No error appearing, the judgment is affirmed.

KORY *v.* LESS.

Opinion delivered November 11, 1929.

Robert C. Powell, W. E. Beloate and *Horace Chamberlin,* for appellant.

Smith & Blackford and *G. M. Gibson,* for appellee.

MEHAFFY, J. This suit was begun by appellees in the Lawrence Chancery Court on August 6, 1927, praying for reformation of a deed from Jake Less and others to Alec M. Less for the forfeiture of life estate of Ida Less Kory, and that appellees be declared the owner and

entitled to the immediate possession; that a lien be declared in favor of Gussie Less for $140 a month; to restrain Ida Less Kory and W. E. Beloate from permitting and committing further waste; and for judgment against Ida Less Kory and W. E. Beloate for damages, for taxes paid, together with interest, and for damages done to the farm and lands constituting the life estate, and also for damages to the homestead; and the complaint also prayed that Ida Less Kory and W. E. Beloate be restrained from further managing and controlling the property, pending the suit, and that a receiver be appointed for the purpose of taking charge of the property and repairing the buildings, fences, improvements, etc., and placing the same in cultivation; for an order fixing the amount due Gussie Less from Ida Less Kory, and for an order directing the sale of the life estate of Ida Less Kory for the satisfaction of the judgment.

The record consists of more than 1,200 pages, and it would make this opinion entirely too long to set out even the substance of all the pleadings and proof. The issues, however, may be stated briefly as follows:

In 1905 Isaac Less, who is now deceased, and appellee, Gussie Less, were divorced. They had been married a number of years, and were the parents of six children, all of whom are of age. The property rights of Isaac Less and Gussie Less were settled by agreement, prior to the granting of the divorce. By this settlement Gussie Less was to receive $140 pr month during the term of her natural life, or until she should remarry, and the payment of this sum was secured by a first lien on practically all the property owned by Isaac Less.

Some years after the divorce was granted, Isaac Less married a second time. In 1917 Isaac Less died intestate, leaving surviving him his widow Ida Less, who later married a man by the name of Kory, and who is now Ida Less Kory, the appellant. His first wife, Gussie Less, also survived him and all the children, who are the appellees here.

After the death of Isaac Less, Ida Less made a contract with W. E. Beloate, whereby she employed him as attorney in the management of her estate, the setting off of her dower and homestead. Beloate was also given an option to purchase the dower lands.

Ida Less filed her petition asking that dower and homestead be assigned to her, and this was done. It would serve no useful purpose to set out a description of the property here. The property was taken by Ida Less subject to charge of $140 a month in favor of Gussie Less, her portion of which amount was $46.66 per month. The property was also subject to a mortgage to the Commonwealth Farm Loan Company. When the mortgage to the Commonwealth Farm Loan Company matured, Ida Less refused to pay any portion of it, and the heirs paid the mortgage debt, and filed suit against Ida Less for contribution. She paid her part, which was $8,166.40. In the same suit the amount due Gussie Less by Ida Less was fixed at $4,209.22, with interest. This was declared a lien on the lands set aside to Ida Less as dower. She was, however, given the privilege to pay this amount due Gussie Less at $46.66 a month.

One of the buildings which was assigned to Ida Less as part of her dower was a two-story brick business building, which was destroyed by fire. Ida Less had no insurance, but the reversioners were protected, and collected $3,000.

Ida Less did not reside on the homestead after the death of Isaac Less. The homestead consisted of more than a block of ground with a two-story frame house and outbuildings. It is alleged by appellees that the houses and barns and fences upon the farming lands were permitted gradually to disintegrate, with very little if any repairs or replacements, and several of the houses and barns, at the time this suit was filed, were completely gone. All of them were practically uninhabitable and unfit for use. That the ditches on the farming lands had been permitted to grow up and fill up, were not cleared

out, and thickets were permitted to grow up all over these lands, and about 300 acres of the 835 acres of land, at the time suit was filed, was laying out, waterlogged, covered with thickets and trees, some of them as large in diameter as a stovepipe, and the entire farm was rapidly reverting back to its natural state. Appellees also alleged that the garage building was likewise neglected. The windows were knocked out, and same was in bad repair in a great many ways; that this condition was progressing, and getting worse each year. They also alleged that Ida Less had ceased to make her monthly payment of $46.66 per month to Gussie Less, and that, in order to save their properties and other lands, the appellees were compelled to make these payments, because it was a lien on their land as well as on the life estate. Ida Less had also failed to pay the taxes, and appellees redeemed the land themselves.

The testimony was voluminous and conflicting. The chancellor appointed a receiver, and, after hearing the evidence, entered a decree reforming the deed; second, rendered judgment in favor of Gussie Less against Ida Less Kory for $4,209.22, with interest from March 24, 1922, at 6 per cent. per annum, less payments made by Ida Less Kory to Gussie Less, and less all payments made to Gussie Less by the other appellees; and, after crediting these amounts, he found against Ida Less Kory in favor of Gussie Less in the sum of $1,430.21, and held that this sum should bear interest from the date of the decree until paid at 6 per cent. per annum.

The chancellor also entered a judgment in favor of the appellees other than Gussie Less against Ida Less Kory for the sum of $1,999.04, with 6 per cent. interest, and also found against Ida Less Kory in favor of the appellees other than Gussie Less in the sum of $415.41 for taxes paid on the dower lands of Ida Less Kory, June 8, 1926, and also the sum of $195.65, taxes paid on said dower lands December 27, 1927, said sums amounting to $685, with interest at 6 per cent. from the date of the decree.

The court also said that the appellees should pay eight-ninths of the improvement district taxes, and fixed the amount in his decree, which was $135.04, the part that appellees should have paid, and decreed that this sum, having been paid by appellant, should be deducted from the $685, leaving a balance due plaintiffs by Ida Less Kory for taxes of $549.96, with interest thereon from the date of the decree. He also decreed a lien, and provided that the amount should be paid out of the funds in the hands of the receiver within 60 days from the date of the decree, and, if payment was not made, the property should be sold by a commissioner.

Ida Less Kory denied the allegations of plaintiff's complaint as to waste and as to all other matters, except the amount due Gussie Less and the taxes, and alleged that they had offered to pay the taxes, but refused to pay illegal penalties. She also resisted the appointment of a receiver.

The court entered a decree against the appellant for $5,112.85 in favor of the appellees, other than Gussie Less, for waste, and decreed that the amounts found against the appellant should be credited with the amounts that appellees were due appellant, and made a finding, after making said deduction, for damages to houses, barns and farm lands of $4,211.51.

The chancellor also found that the receiver, after making the disbursements mentioned, had approximately $5,000 on hand, and that exceptions had been filed to the report by the appellant, and that these would be considered later. He provided that, if the net amount found against Ida Less Kory for waste was not paid within 60 days, the lien should be enforced by a sale of the dower property. He also decreed that there should be no forfeiture of the life estate, and that no decree should be rendered against Beloate. He also decreed that appellees were entitled to no damages by reason of waste to the fences, and that they were not entitled to any damages for loss of rental during the period of alleged rehabilitation of the lands.

The court held that, except the judgment for improvement district taxes, the cross-complaint of Ida Less Kory should be dismissed, and that the cross-complaint for rental claimed on the Mozier house should be dismissed without prejudice. He directed Ida Less Kory to pay the sum of $65.50 for stenographic services, and that the parties should pay their own costs, except the cost of receivership, and that that should be paid by the appellant. He also denied the petition of the receiver to be permitted to employ counsel, and allowed the receiver the sum of $600 additional for his services in full. He dissolved the receivership, and directed the receiver to file his report within 60 days. He also directed the receiver to pay into the registry of the court moneys collected in the receivership not heretofore paid out, and directed the clerk to issue his receipt to the receiver and hold the moneys and properties subject to the further orders of the court.

The decree also provided that Ida Less Kory might appeal from any portion of the judgment she desired, but that, if she desired to appeal from the entire judgment, she should give a surety bond in the sum of $7,125.41; and if she desired to appeal from the judgment of waste only, that she should give a surety bond for not less than the principal sum, said bond to cover interest and costs. It was further provided in the decree that, if the appeal is from the judgment for waste only, the clerk should pay the sum of $1,430.21 to Gussie Less, and $1,483.69 to the other appellees.

It is contended by the appellant that the receivership was illegal. After a careful consideration of all the evidence, we have reached the conclusion that, under § 8600 of Crawford & Moses' Digest, the court was justified in the appointment of a receiver. That section reads as follows:

"Whenever it shall not be forbidden by law, and shall be deemed fair and proper in any case in equity, the court, judge or chancellor shall appoint some prudent

and discreet person as receiver, who shall take an oath faithfully, impartially, diligently and truly to execute the trust reposed in him, and shall also give bond with good and sufficient security, to be approved by the court or judge or chancellor, in such sum as may be deemed sufficient, to the State of Arkansas, for the benefit of all persons in interest, conditioned that he will faithfully discharge the duties incumbent on him, and faithfully account for and pay into court, at such times as the court or law may prescribe, or according to the order of the court, all moneys or assets which shall come to his hands as such receiver in the case, which shall be filed, and a certified copy thereof shall be received as evidence in all courts."

We agree with the statement quoted by appellee from the case of *Franklin* v. *Myer*, 35 Ark. 101, that: "It is a power to be exercised by judges in vacation with great circumspection, as it is harsh and dangerous, but one within their discretion." It is harsh and dangerous, but it was within the discretion of the court to make the appointment, and we think, from a careful consideration of all the evidence on this subject and the result of the receiver's management, that the action of the court in making the appointment was justified.

The appellant had failed to pay the taxes, and failed for approximately two years to pay the $46.66 a month due Gussie Less, and it is admitted by the appellant that she permitted the lands to become delinquent, although she says she had no intention of permitting the lands to get beyond her. It is also admitted that she had failed to pay the amounts due Mrs. Gussie Less, but they say they tendered this amount, or agreed to pay it into the Federal court. It is shown that the receiver so managed the property that he secured tenants for all of it except about 20 acres, and he testified he would have a tenant for that, whereas, according to the proof, there were about 300 acres vacant without tenants when he took charge.

The appellant next contends that the evidence does not show that appellant was liable for waste.

"The general rule of law, however, in respect to waste, is that the act must be prejudicial, or work a substantial injury, to the inheritance, or to those who are entitled to the reversion or remainder, and it may be committed of houses, gardens, orchards, lands, or woods. Such injury to the inheritance may be committed by diminishing the value of the estate, although it need not consist of loss of market value, but may also be caused by increasing the burdens upon the estate, destroying its identity, or impairing the evidence of title; and if the acts committed substantially injure the inheritance, they may constitute waste, although they increase the pecuniary value of the estate. The refusal or neglect of a tenant to pay current taxes, which he is under an obligation to pay, whereby the premises are sold, or are subject to sale, constitutes waste. But mere injury to the reputation of real estate, or the supposed diminution of its value resting on whimsical or emotional grounds, or arising from dictates of custom or taste, do not constitute waste; nor ordinarily will the consequences of waste attach where the injury to the inheritance is trifling or inappreciable." 40 Cyc. 501 *et seq.;* 27 R. C. L. 1011.

It will be seen that, in order to constitute waste, the life tenant must be guilty of some act or omission to the injury of the persons entitled to the inheritance; a wrongful act or omission on the part of the life tenant which results in permanent injury to the inheritance. It is a violation of the obligation of the tenant to treat the premises in such manner that no harm be done to them, and that the estate may revert to those having the reversionary interest without material deterioration.

In the instant case there were numbers of witnesses who testified for both appellant and appellees on the question of the condition of the premises at the time the appellant got possession and at the time suit was brought. There was a hopeless conflict in the testimony. Appellant contends that a greater number of witnesses testified that there was no waste, or rather that the condition

of the property was as good as when she took charge of it, and contends that this constitutes a preponderance of the evidence. The number of witnesses alone does not necessarily constitute a preponderance of the evidence. The evidence in this case, as we have said, is in hopeless conflict, but the strongest testimony probably with reference to waste is that of the receiver, and yet in the short time that he had the management of the property he was able to rent the entire property, except about 20 acres, and we think, when this evidence is considered with all the other evidence, the preponderance clearly shows that there was no waste so far as the property was concerned. We think the clear weight of the evidence shows that the interest of the reversioners was not injured. In other words, that in this respect the testimony clearly shows that there was no waste.

Chancery cases are tried *de novo* here, and while, unless we can say that the findings of the chancellor are against the preponderance of the evidence, his finding will be affirmed, yet when we find that the preponderance of the evidence is against the finding of the chancellor, then his finding must be set aside.

After a careful consideration of the entire testimony, we have reached the conclusion that the chancellor's finding against the appellant as to waste consisting in damage to the property is against the preponderance of the evidence. As to all other issues, we think the finding of the chancellor is supported by a preponderance of the evidence. It would be impracticable to set out the evidence on these issues at length, and, as to the finding against the appellant on the amount due the appellees for what they had paid Gussie Less and the amount still due Gussie Less, there is no dispute. Appellant admits she owes these amounts, and the chancellor correctly found against her in the amount mentioned in the decree as to these items.

The appellees contend that the court erred in adjudging that no forfeiture of the life estate of the defend-

ant Ida Less Kory should be declared. Their contention is that the life estate should have been forfeited, and they call attention to § 10054, C. & M. Digest. That provides, however, that if the tenant shall neglect to pay the taxes so long that such lands shall be sold for the payment of taxes, and shall not redeem within one year after such sale, such person shall forfeit to the persons entitled to the remainder or reversion of the estate that he may have in such lands. A sufficient answer to the contention here is that the tax sales were void, as found by the court.

Appellees also call attention in this connection to the case of *Magness* v. *Harris,* 80 Ark. 583, 98 S. W. 362. Among other things, the court said in that case: "In *Swan v. Rainey,* 59 Ark. 364, [27 S. W. 240], the facts were that the life tenant, while in possession of the land, failed to pay the taxes, and purchased it at the tax sale, and the court held that the purchase amounted only to a payment of the taxes, that the sale was therefore void, and that no forfeiture of the estate of the life tenant was worked under the statute in question. The court there said: 'The sale being void and the taxes paid, there was nothing to redeem, and consequently no redemption was required.' "

Continuing, the court said: "It follows from this that a void sale does not work a forfeiture to a remainderman of the estate of the life tenant. The statute in question manifestly has reference only to a valid sale. And it is a sale for taxes, not a mere failure to pay taxes within the time prescribed by law, which works a forfeiture, as the statute provides that if the life tenant 'shall neglect to pay taxes thereon so long that such lands shall be sold for the payment of taxes, and shall not, within one year after such sale, redeem the same according to law, such person shall forfeit * * * all the estate which he or she, so neglecting as aforesaid, may have in said land.' The manifest purpose of the statute is to afford the remainderman an opportunity to redeem during the last of the two years allowed by law for redemp-

tion of lands from a valid tax sale, and to cause a forfeiture of the estate of the life tenant for failure to redeem from such sale within the first year."

We therefore think the court was correct in holding that there should be no forfeiture of the life estate.

It is next contended by appellees that the court erred in adjudging that eight-ninths of the special improvement taxes paid by appellant upon the dower lands should be adjudged against the appellees.

We said in a recent case: "Obviously, the question whether the life tenant or the remainderman must ultimately bear the cost of a public improvement may be determined by the provisions of the instrument by which the life estate is created. We hold that the assessments for premanent improvements must be ratably and equitably apportioned between the life tenant and the remainderman." *Hicks* v. *Norsworthy,* 176 Ark. 786, 4 S. W. (2d) 897.

In the above case the authorities were reviewed, and the rule was announced that the life tenant must pay the ordinary taxes, and, if improvements are made that are temporary and benefit the life tenant only, the life tenant must pay these assessments. But where the improvements are of a permanent character, the assessments must be ratably and equitably proportioned between the life tenant and the remainderman.

The court in this case evidently undertook to determine, and did determine that the improvements for which taxes or assessments were paid were permanent, and, considering the age of appellee and the character and permanency of the improvement, arrived at what seemed to him to be a just and equitable adjustment. We think the finding of the court was correct. Appellant argues, however, that in the case of *Hicks* v. *Norsworthy* we laid down no rule for the proportionment. No rule could be laid down that would of itself determine the proportion or percentage that each party should pay in all cases. The rules called attention to by appellees them-

selves are stated in 21 C. J. 958, 17 R. C. L. 639, and *Bobb* v. *Wolff*, 54 Mo. App. 515.

Appellees are correct when they state that the question whether it must be borne by the life tenant or the remainderman or proportioned between the two depends to a large extent upon the circumstances of the particular case, and especially on the probable duration of the improvement as compared with the expectancy of the life tenant.

Appellees have cited a great many authorities, which we do not think it necessary to review, because the rule in this State has already been settled, and we think the chancellor undertook to settle the matter, and did settle it in the instant case in accordance with the rule announced by this court.

It is next contended by the appellees that the court erred in adjudging that no damage should be allowed to appellees for the item of $7,555 loss of rental during the period of rehabilitation of the lands. We think the court's finding as to this item is correct, and supported by the great weight of the evidence.

Appellees state that the uncontradicted testimony on the part of the appellees shows that it will take at least five years to rehabilitate the dower lands under the best of husbandry, and during that time there will be a loss of rent of $7,555. It is true that there was such testimony, but it was contradicted by other evidence, and, in addition to that, the undisputed proof shows that the receiver was able to rent all the lands of the dower estate. We think the preponderance of the testimony supports the finding of the chancellor as to this item.

It is next contended by the appellees that the court erred in not adjudging damages to the appellees by reason of waste to fences. The testimony does show that some of the fences were not repaired and kept up, but the undisputed testimony also shows that a fencing district was established which included the lands in controversy, and there was no occasion to have fences. The chancel-

lor's finding as to this item is supported by the preponderance of the evidence.

It is next contended by the appellees that judgment should have been rendered against W. E. Beloate, as well as Ida Less Kory, and that the court erred in dismissing the complaint as to W. E. Beloate. Without setting out the testimony, we think that the testimony shows that Beloate had no such interest in the land as would entitle appellees to judgment against him, and that the court correctly dismissed the cause of action as to him.

The cost of the receivership should be divided, each party paying one-half.

It follows from what we have said, that the decree of the chancery court awarding damages against appellant for waste must be reversed, and the decree otherwise affirmed. The case is therefore reversed, and remanded with directions to enter a decree in accordance with this opinion.

MANERS *v.* WALSH.

Opinion delivered November 11, 1929.

John W. Moncrief and *M. F. Elms,* for appellant.

W. A. Leach, for appellee.

MEHAFFY, J. The appellee, plaintiff below, brought this suit against the appellant and Ida R. Williams, alleging that on the 9th day of July, 1928, she and the defendants entered into the following contract:

"This contract, made and entered into this 9th day of July, 1928, by and between Ida R. Williams and W. H. Maners, parties of the first part, and Edyth Walsh, party of the second part, is as follows, to-wit: Parties of the first part have this day sold to party of the second part the following described property, lying in the Northern District of Arkansas County, Arkansas, to-wit: Lot 14, and 10 feet off the north end of lot 15, all in block 6, Bordfeldt's Addition to Stuttgart, Arkansas, for and in consideration of the sum of $9,762.50, paid and to be paid as follows: $2,000 by transfer of the following property lying in the Northern District of Arkansas County, Arkansas, to-wit: Lots 11 and 12, block 17, Reinsch's Addition to Stuttgart, Arkansas, in Arkansas County, Arkansas. The balance of $7,762.50 shall be divided into 115 installments of $67.50 each, which shall be payable monthly hereafter, the first of which installments shall mature and become due and payable on the 15th day of August, 1928, and one each month thereafter until the entire series of payments or installments is fully paid. The said monthly installments shall bear interest at the rate of eight per cent. per annum after maturity thereof. It is agreed that said monthly installments or payments hereinbefore mentioned are to be paid directly to W. H. Maners until the balance due the said W. H. Maners from Ida R. Williams in accordance with the terms of a cer-

tain decree rendered by the chancery court of the Northern District of Arkansas County, Arkansas, on or about the 11th day of June, 1928, in a cause therein pending, wherein B. L. Williams and others were plaintiffs and R. L. Metsker and others were defendants, and the said W. H. Maners was an intervener therein, said decree being for the principal sum of $2,018.01 in favor of the said W. H. Maners, with costs thereon, and interest thereon at the rate of ten per cent. per annum from the rendition of said decree. After the amount herein mentioned due the said W. H. Maners is fully paid, then the balance of the consideration hereinbefore expressed shall be paid by the said party of the second part unto Ida R. Williams.

"It is understood and agreed among the parties hereto that a mortgage foreclosure upon the above property is now pending in the Chancery Court for the Northern District of Arkansas County, Arkansas, upon which a decree has been rendered, and that it is necessary for the property herein described to pass through a commissioner's sale to the end that the title may be completed, and, after that has been done, the party of the second part agrees to procure a loan from some building and loan association, and pay the proceeds thereof to the said parties of the first part, or unto W. H. Maners, in case said Maners has not been paid in full the amount due him as herein set forth.

"The party of the second part hereby agrees and binds himself to obtain and carry such insurance to protect against the hazards of fire, tornado, windstorm, etc., upon the buildings upon said property, to equal the balance she should at any time owe the parties of the first part, and to have inserted thereon proper mortgage clauses or loss payable clauses in favor of the parties of the first part.

"It is also further agreed that should any one of the said monthly installments or payments herein provided become due and then remain unpaid for a period of ten days, then in that event parties of the first part shall have

the privilege of electing to declare all of the remaining payments then past due and payable, and in such case all payments that have been made shall be taken in consideration as rents for the use and occupancy of said building, the possession of which shall be delivered unto the party of the second part upon the execution of this contract. And, in event that the said party of the second part should become delinquent in her payments, and the said parties of the first part should then elect to declare the said contract breached, the said party of the second part agrees to vacate and deliver up possession thereof without the necessity of any legal proceedings to oust her.

"During the period of time through which this contract runs the party of the second part agrees to keep and maintain said buildings in good repair, and to see that same is cared for and preserved against all abuse of every kind and nature, save ordinary wear and tear and the acts of God or the public enemy.

"In witness whereof said parties have hereunto set their hands on this the 9th day of July, 1928.

(Signed) "Ida R. Williams.
(Signed) "W. H. Maners.
(Signed) "Edyth Walsh."

Plaintiff further alleged that she paid $2,000 on the purchase price, and that the possession of the property was delivered to her, and that on the 15th of August, 1928, she paid the first installment in keeping with the contract. That she owned and operated a cleaning and pressing establishment, and was preparing to move in the purchased property, and that she made lasting improvements upon said property at an expense of $1,000, which improvements enhanced the value of said property in that amount. That on the 4th day of August, 1928, defendants permitted the property purchased by her to be offered for sale by the commissioner in chancery, and permitted said property to be sold to a party other than themselves. That she was notified by the purchaser, and, for that reason, withheld further payments. On October

3, 1928, the sale was approved, and thereafter plaintiff was ejected from the premises by virtue of a writ of assistance. That defendants permitted the property to be sold and title passed to other persons, and breached their contract, and that performance is now impossible, and asks for damages in the sum of $3,000.

Separate answer was filed by W. H. Maners, denying each material allegation in plaintiff's complaint, and alleging that the interest that he had in the property mentioned in the contract was a mortgage to secure him in a loan he had made to the defendant Williams and her husband; that he was engaging in foreclosing at the time the contract was made; that his mortgage was for an indebtedness of $2,018.01 and interest, and was a first lien on the property; that he had secured a decree of foreclosure; that said property was owned by the defendant Williams, and her title was only subject to a mortgage indebtedness due to Maners; that on the 9th day of July, 1928, the plaintiff, Walsh, and the defendant, Williams, sought Maners out, and informed him that plaintiff Walsh was about to purchase the property from defendant Williams, but Walsh was not in a position to make full payment of a mortgage indebtedness held by Maners. He was informed by the plaintiff and the defendant that they were not able to make the deal unless he would agree to accept payment of indebtedness in installments from plaintiff Walsh. Plaintiff, Walsh, had agreed to convey to defendant Williams lots 11 and 12, in block 17, for the price of $2,000, which, it later developed, was incumbered by mortgage indebtedness, thereby constituting a breach of her contract. That plaintiff Walsh agreed to pay Maners in 115 monthly installments of $67.50 each; that she and defendant Williams represented to Maners that Walsh would make payment of monthly installments until the mortgage indebtedness due him was fully paid. It was understood that he had no interest in the property other than stated. He was not selling said property, and only for the purpose of

accommodating plaintiff Walsh and defendant Williams to the end that they might make the deal, and only for the purpose of collecting the indebtedness due him in installments, instead of all immediately, or within a period of 30 days, which he could have done and which he had a right to do under his foreclosure decree, and for the purpose only of securing indebtedness due him, upon a thorough understanding of all these facts with plaintiff, Walsh, and defendant Williams, he signed the contract. He was to receive no part of the consideration or profit of the contract other than the indebtedness due him, and did not receive any part of the consideration or profits, and had no interest in the property, nor did he expect to receive any more than the indebtedness that plaintiff Walsh and defendant Williams sought to secure to him by said contract. That he did not propose in said contract, nor did he at any time agree, to purchase said property at said commissioner's sale, nor was any duty cast on him by the contract to purchase same or to take other steps toward affecting sale or title, as plaintiff Walsh expected to receive title to property from plaintiff. Plaintiff, Walsh, knew that Maners had no title or interest in or to the property other than mortgage indebtedness thereon, and was fully possessed with knowledge of all facts concerning same, and was fully informed that defendant Maners' only interest in same was to secure and collect mortgage indebtedness due him. That the contract, in so far as defendant Maners is concerned, is constituted a mortgage on said property to secure the indebtedness due him, and it was intended by all parties that it should only constitute a mortgage to secure to him the indebtedness due him, and was executed with the understanding of all parties and with that intention of all parties, and defendant Maners tenders back the sum of $67.50 paid by Walsh, with interest.

Defendant Maners filed a demurrer before filing answer, and then with his answer repeated the demurrer, which was to the effect that the plaintiff's complaint did

not set forth facts sufficient on its face to constitute or state a cause of action against Maners. The court overruled the demurrer, and defendant excepted, and then filed a motion to transfer to equity.

The court instructed the jury that the verdict should be against both defendants for such damages as might be shown by the testimony. The jury returned a verdict against both defendants for $1,000 as damages for the property conveyed to Ida L. Williams and $400 damages against both of them for improvements. The property conveyed by Walsh to Williams was in part payment of the property alleged to have been purchased by plaintiff, and it is alleged that the property purchased by her was worth something more than $9,000. Judgment was entered against Maners and Williams for $1,400, with interest and cost.

Williams did not appeal. Maners filed a motion for a new trial, and has prosecuted his appeal to this court.

We deem it unnecessary to set out any of the evidence, because the majority of the court have reached the conclusion that the court erred in not transferring the case to equity. Mr. Justice SMITH and the writer do not agree with the majority that the case should have been transferred to equity.

The undisputed proof in the case shows that Maners had a mortgage on the property mentioned in the contract set out above, to secure an indebtedness of something more than $2,000; that the property was worth approximately $9,000. The only interest, as shown by the pleadings, that Maners had in the property mentioned in the contract was a mortgage to secure the indebtedness due him, and he alleges that all parties knew this, and that the contract was signed with that understanding, and that the only interest he had in it at all was to collect the indebtedness due him; that it was understood by plaintiff Walsh that this was the only interest he had, and that he signed the contract as an accommodation to Walsh and Williams, and agreed to take the money due

him in installments of $67.50 per month, instead of getting it all, as he might have done, by a sale of the property. Maners contends that as to him the instrument or contract was intended to be a mortgage, and nothing more.

A majority of the court are of the opinion that the cause should have been transferred to equity, because it is a settled doctrine of equity that the form of a transaction will never preclude inquiry into its real nature, but in all cases the intention of the parties must control, irrespective of the form; and consequently, if a conveyance is made as a security for money, in whatever form the conveyance is made or whatever cover may be used to disguise the transaction and hide its real character from others, as between the parties and as to all persons who have notice that the property is merely held as collateral security, it will be held and treated as a mortgage. 27 Cyc. 991.

"Another maxim of equity is that equity regards the substance rather than the form, or that equity regards the substance and intent, not the form. This principle is well established, and is expressed in more or less similar language in many cases. * * * This maxim is as applicable at the present time as it was when it was first formulated. By force of principle equity goes behind the form of a transaction in order to give effect to the intention of the parties, either to aid an act abortive at law because formally defective, or to impose a liability as against an evasion by a formal concealment of its true character. In the construction of a written instrument, equity always attempts to get at its substance and to ascertain, uphold, and enforce the rights and duties that spring from the real intention of the parties. In doing so, while it will of course not change the words of the instrument, the court of equity will look into all the circumstances under which it was made, in order to determine the proper meaning of the transaction. It will do this not only to sustain a just claim but to defeat an unlawful demand." 21 C. J. 204-5.

Equity looks beyond the mere form in which the transaction is clothed and shapes its relief in such way as to carry out the true intent of the parties to the agreement, and to this end all the facts and circumstances of the transaction, the conduct of the parties thereto, and their relations to one another and to the subject-matter, are subjects for consideration. *Vance* v. *Anderson,* 113 Cal. 532, 45 Pac. 816; *Crisman* v. *Kingman Plough Co.,* 106 Ark. 166, 152 S. W. 989; *Petty* v. *Gacking,* 97 Ark. 217, 133 S. W. 832, 33 L. R. A. N. S. 175; *Lane* v. *Walker,* 77 Ark. 103, 91 S. W. 22.

The defendant Williams not having appealed, the judgment entered in the lower court against her is not affected by the appeal.

The court having reached the conclusion that the case should have been transferred to equity, it becomes unnecessary to discuss either the evidence or the instructions.

The judgment of the circuit court is reversed, and the cause remanded with directions to transfer same to equity.

EDWARDS *v.* STATE.

Opinion delivered November 11, 1929.

Partain & Agee, for appellants.

Hal L. Norwood, Attorney General, and *Robert F. Smith,* Assistant, for appellee.

McHaney, J. Appellants, who are brothers, were separately indicted, charged with assault with intent to kill one Marion King by shooting him with a pistol. The indictment against Lee Edwards contained a second count, charging him with accessory before the fact to assault with intent to kill the same person. On a joint trial by consent, Galvin was convicted of aggravated assault and sentenced to pay a fine of $500 and one day in jail. Lee was convicted of "accessory to aggravated assault," and sentenced to pay a fine of $100 and one day in jail.

For a reversal appellants urge the following errors:

1. That the court erred in overruling their motion for a continuance on account of the absence of two witnesses, Harrison Sanders and Troy Boyd, who, only a day or two before the return of the indictments, had left

their homes at Piney, Arkansas, and gone to Oklahoma. The indictments were returned on July 2. Sanders left June 30 and Boyd on July 2. The subpoenas were issued on July 5, and an effort to serve them on the 9th disclosed their absence. The motion is in statutory form, but we do not think the court committed reversible error in refusing the continuance. The general rule, as announced by this court in many cases, is that continuances in both civil and criminal cases are addressed to the sound discretion of the trial court, and that this court will not reverse a case on such ground unless it clearly appears that the court has abused its discretion, and that such refusal manifestly operates as a denial of justice. *Allison* v. *State,* 74 Ark. 444, 86 S. W. 409; *Wood* v. *State,* 159 Ark. 671, 252 S. W. 897; *Eddy* v. *State,* 165 Ark. 289, 264 S. W. 832. There has been no denial of justice in this case. It is not shown, except in the unsupported motion of appellants, that these witnesses could have been served for the next term of court, as no evidence was offered or received as to why they were gone or when they would return. We do not review the evidence it is alleged Sanders would give, or that of Boyd, as it would serve no useful purpose. The court did not err in overruling the motion.

2. It is next said the court erred in refusing to permit Lee Edwards to detail a difficulty between King and Harrison Sanders which occurred some days before Galvin shot King. This testimony was irrelevant to the matter before the court, and was properly excluded.

3. Instructions 7 and 8, of which appellants complain, are as follows:

"Gentlemen of the jury, if you find from the testimony in this case that the defendant, Lee Edwards, stood by, aided and consented to his brother, Galvin Edwards, to assault the prosecuting witness, Marion King, with a deadly weapon, with intent to kill, he would be guilty the same as if he had committed the crime himself.

"If you find that he advised and encouraged Galvin Edwards to make an assault upon the prosecuting wit-

ness, Marion King, with the intent to take his life, he would be guilty as if he had committed it himself."

It is said they assume the guilt of Galvin Edwards, and omit the right to act in necessary self-defense. No specific objection was made to these instructions on these or any other grounds. As to the omission of the self-defense plea, the next instruction fully covers the subject, and we do not think the jury could have been misled on either proposition. If appellants had thought the instructions assumed the guilt of Galvin, they should have specifically objected on this ground, and the court might have so worded it to eliminate the objection.

4. It is finally insisted there should have been a directed verdict for Lee Edwards. We cannot agree with this contention. Taking the evidence in its most favorable light to the State, we cannot say there is no substantial evidence to support the verdict. It shows that appellants were driving toward town in their car, and met King in a wagon; that Galvin told King to get out, that he, King, had been mistreating his brother Lee; that Galvin got out of the car, and shot him twice; that Lee said: "Don't shoot the son of a bitch any more. You have done killed him, I guess." Lee, who is small and deformed, had a row with King that morning, and the jury was justified in finding that he had reported the trouble to Galvin, and that the two of them got in the car to hunt him down and shoot him. We cannot say therefore that the verdict as to Lee was without any substantial evidence to support it.

No error appearing, the judgments are affirmed.

SIMMS OIL COMPANY *v.* DURHAM.

Opinion delivered November 11, 1929.

Gaughan, Sifford, Godwin & Gaughan, for appellant.
McNalley & Sellers, for appellee.

McHaney, J. Appellee brought this action against appellant to recover damages for personal injuries received while in its employ as a pumper on one of its oil leases in Ouachita County. His duties were to keep the pumps going from twelve o'clock midnight until twelve o'clock noon, when he was relieved by another pumper. The pumps were operated by 4-cycle Superior gas engines burning natural gas. On account of the weakness of the gas pressure, at times, the engines would stop, and it was his duty to start them running again. On the night of his injury, January 15, 1928, while making his rounds of the wells that were pumping, appellee discovered that one of the engines had stopped running, and undertook to start it, in the usual and customary way, if

not the only way, which was to throw out the clutch, set the gas, set the spark, or wyco, as it is called, and kick the engine off by placing the left foot on a spoke of the fly-wheel and pulling forward with both hands hold of the spokes of the wheel until it fired. Appellee did all this in the usual way, but, instead of firing and running forward, the engine backfired with such force that it threw him up against the ceiling of the engine house, from whence he fell back on the engine, thence to the floor, resulting in serious, painful and permanent injuries to him.

The ground of negligence alleged and relied on was that the lug bolts which pass through oblong slots in the attachment plate of the wyco into threaded holes in the engine plate or bed, and which were intended to attach the wyco firmly and immovably to the bed of the engine, were old, and the threads thereon had become broken or stripped, so that the wyco was not held firmly in place, but would drop down slightly, causing the driving bar of the wyco to come in contact with the cam or eccentric sooner than intended and sooner than is indicated by the set lever controlling the spark, which caused the engine to backfire.

There was a trial to a jury, resulting in a verdict and judgment for appellee for $25,000.

Appellant first says that its request for a directed verdict should have been given for two reasons: (a) "Appellee failed to show that his injury was due to the negligence of appellant, and (b) appellee clearly assumed the risk." We cannot sustain appellant in this assignment for either of these reasons. The evidence was ample to support the finding of the jury that appellant was negligent in that the threads of the lug bolts which fasten the wyco to the engine had become worn, the bolts loose, and the wyco unstable. It was further shown that in this condition the vibration of the engine would cause the wyco to drop or sag slightly, which brought the instrumentality for making and breaking the

spark closer to the cam or eccentric, thereby causing the spark to be emitted too soon, and that this would cause the engine to backfire. Appellee knew that the wyco was somewhat loose a few days before the accident, notified appellant thereof, and received a promise that it would be repaired at once. A day or two before the accident he saw a repairman working on this engine, and was assured by him that he would have no more trouble with it.

Appellant says that appellee is uncertain as to what caused the engine to backfire; that this kind of engine will backfire if the wyco slips down, or if the timing gear comes loose. But we fail to find any evidence that there was anything wrong with the timing gear. On the contrary the evidence is quite definite and certain that the backfire was occasioned because of the condition of the wyco. Therefore the case of *St. L. S. F. R. Co.* v. *Smith,* 179 Ark. 1015, 19 S. W. (2d) 1102, has no application against appellee. We there said that: "Juries are not permitted to base verdicts on mere conjecture or speculation. There must be substantial testimony of essential facts, or facts which would justify a reasonable inference of such essential facts, on which to base a verdict, before it will be permitted to stand." But in this case we have the essential facts, testified to by many witnesses, on which to base a verdict. Moreover, the proof shows that the defects in the lug bolts were such as would require an inspection to discover. They were not patent, but hidden. True, appellee knew the wyco was somewhat loose, but had been promised that it would be repaired, and a repairman had worked on the engine, and advised him it would give no more trouble. The law in this State, and generally, is that the employee does not assume the risk of injury caused by a defective piece of machinery or appliance in cases where the master has promised to repair and during a reasonable period of time in which to make repairs, or until the lapse of such a period of time after the promise as would preclude all reasonable expectation that it would be done. *Western Coal & Mining Co.* v. *Burns,* 84 Ark. 79, 104 S. W. 535. Of course, if the

machinery or appliance is so obviously dangerous that a reasonably prudent person would not use it at all, the master is relieved of liability. *Newport Mfg. Co.* v. *Alton,* 130 Ark. 542, 198 S. W. 120; *Pekin Coop. Co.* v. *Duty,* 140 Ark. 135, 215 S. W. 715. In *Newport Mfg. Co.* v. *Alton, supra,* appellee was injured by his hand coming in contact with a saw with two defective saw teeth which he had been operating four months on a promise to install a new saw as soon as possible. It was held that appellee had not as a matter of law assumed the risk.

In this case appellee had worked only a few days after promise to repair, did not know it had not been repaired, but, on the contrary, was justified in believing it had been repaired.

Appellant complains of instructions 4 and 6 given at appellee's request. We do not set No. 4 out, as it would unduly extend this opinion. It is a correct declaration of the law relative to the rights, duties and liabilities as between employer and employee in working with defective machinery where there has been a promise to repair. As we read the instruction, it is in exact accord with the principles of law already stated, and we will not repeat them. We find no error in this instruction.

Instruction No. 6 is short, and is as follows:

"You are instructed that the law furnishes you no measure of damages for physical pain and suffering, and the amount to be assessed by you, if you find for the plaintiff, on account of physical pain and suffering, if any, must be left to your sound discretion and good judgment, based upon the evidence in the case."

In *St. L. I. M. & S. R. Co.* v. *Dallas,* 93 Ark. 209, 124 S. W. 247, an instruction was given as follows: "The law furnishes you no measure of damages for pain and suffering. The amount to be assessed by you, if any, must be left to the sound judgment and fair discretion of the jury." This was assigned as error. In disposing of it against appellant's contention it was there said: "The instruction is to some extent ambiguous and mis-

leading in this, that it might be inferred from it that the jury should render a verdict for any amount they deemed right for pain and suffering, regardless of the evidence. But the defect could have been cured by a specific objection.

"While, as we have said, it is difficult to fix a measure of damages for pain and suffering, for the reason that none would be an acceptable inducement to suffer it, yet, in determining the amount of compensation for it, the jury must be governed by the evidence in the case."

While there was a specific objection here, the last words of the instruction, "based upon the evidence in the case," save it from the error pointed out in *St. L. I. M. & S. R. Co.* v. *Dallas, supra.* We conclude therefore that no error was committed in giving this instruction.

It is finally insisted that the verdict is excessive. There is nothing in the record to show that the jury was influenced against appellant by passion or prejudice. On the other hand, appellee is only twenty-five years old, with an expectancy of nearly thirty-nine years, based on American experience tables, and was working seven days per week at $5.50 per day. The evidence given on his behalf showing the nature and extent of his injuries was evidently accepted by the jury. It shows that he has not only suffered great pain and anguish, but that he will continue to so suffer. It shows that he is totally and permanently injured in both the muscular and nervous systems. We will not undertake to set out in detail the evidence on the subject. We have examined it carefully, and it has given us no little concern. If appellee is totally and permanently disabled, and the evidence is sufficient to sustain the jury's finding and verdict that he is, then the verdict is not excessive.

We find no error, and the judgment is affirmed.

BERGER *v.* FULLER.

Opinion delivered November 11, 1929.

[redacted]

Chas. D. Frierson, for appellant.

Caraway, Baker & Gautney, for appellee.

BUTLER, J. Henry Fuller and Lizzie Fuller, husband and wife, being indebted to the appellant, Alex Berger, executed several promissory notes evidencing the indebtedness, and, to secure the same, executed and delivered to Berger a mortgage on forty acres of land in Craighead County. Afterwards Henry Fuller and one Reynolds executed to appellant a promissory note for $240, the same being for the purchase price of certain timber, vendor's lien to which was retained by Berger to secure the payment of the note. At about the same time Fuller was having his transactions with the appellant he was also doing business with the American Trust Company, and from time to time gave them notes in small amounts, which were secured by mortgage on eighty acres of land in Craighead County, the homestead of Henry and Lizzie Fuller. This eighty acres of land included no part of the forty-acre tract mortgaged by the Fullers to the appellant, Berger. Later on the Fullers executed another note

to the American Trust Company for $560, which was merely to consolidate and be in lieu of the notes before then executed to the trust company. This last note was secured by the same eighty acres of land mortgaged to the trust company, and was executed on a collateral note form.

The Fullers were negroes. They made payments to the trust company which reduced their indebtedness to it on the notes to the sum of $361, to which was added certain taxes paid by the trust company for Fuller. Alex Berger purchased this note from the trust company, and procured an assignment of it and the mortgage securities to himself. He then brought this suit, asking for foreclosure of the mortgage given by the Fullers to him and of the vendor's lien contained in the timber contract, and also for foreclosure of the mortgage given by the Fullers to the American Trust Company. In his suit he prayed for foreclosure on the mortgage purchased by him from the trust company for not only the debt of Fuller and wife to the trust company, but also for all other debts due Berger arising out of other and separate transactions, contending that he was entitled to this relief, because of a stipulation in the mortgage to the American Trust Company, which is as follows:

"It is also agreed that this debt herein secured shall include not only the notes above recited, but also whatever sums may be due from mortgagors to mortgagee at the time of foreclosing this mortgage, whether such sums be for payment of taxes on these lands, for release of liens or incumbrances, for fire insurance premiums, for protecting the title and possession of the premises, for the debts not incurred in respect of this land, such as personal account, or unsecured note, or a judgment or any indebtedness of whatsoever sort or nature that may be due from mortgagors to mortgagee at the time of foreclosing this mortgage," and because of an identical clause contained in the mortgage from the Fullers to Berger upon the separate forty acres of land.

The appellees admitted the execution of the various notes and mortgages and the balances due as claimed by Berger, and admitted his right, as assignee of the American Trust Company, to the debt due by them to that company, and the right to have the mortgage to said trust company foreclosed. They denied the right of Berger to foreclose said mortgage for any other debts than those owing by Fuller to the American Trust Company at the date of the assignment of the note and mortgage by it to the appellant, Berger. This issue was submitted to the court, which, after making the findings about which there is no dispute, concluded as follows:

"And upon the note above set out, signed by Henry Fuller and Lizzie Fuller, to the American Trust Company, and by it indorsed to the plaintiff, Alex Berger, the court finds that Alex Berger is entitled to the balance of principal and interest due upon the note, together with interest according to the terms thereof, and also to the taxes and special assessments above recited, which were paid upon the land embraced in the mortgage to American Trust Company; and that, default having been made in said mortgage, the said Alex Berger is entitled to a foreclosure of the mortgage executed to American Trust Company by the said Henry Fuller and Lizzie Fuller, *et cetera* * * *. But the court finds that, as to any and all other indebtedness due to the said Alex Berger by the said Henry Fuller and Lizzie Fuller, there is no lien upon the land described in the said mortgage from Henry and Lizzie Fuller to the said American Trust Company, and that the first series of notes above set out as due originally to the said Alex Berger cannot be declared liens on the land described in the mortgage to American Trust Company, but that only such debts as become due originally to the American Trust Company are collectable as against the lands in the mortgage to the American Trust Company, and that the said Berger, by the purchase of said mortgage and notes, did not acquire the right to tack his other indebtedness onto the indebtedness

of the American Trust Company which he purchased, nor to make the same a lien against the lands described in said mortgage to American Trust Company, and that portion of the complaint is dismissed for want of equity, and the finding is in favor of the defendants in that regard only, but otherwise for the plaintiff."

From that part of the decree hereinbefore recited Berger prosecutes this appeal. He contends that he is entitled to recover his entire indebtedness, of whatsoever nature, due from Fuller, and, under the mortgage which appellant purchased from the American Trust Company, is entitled to foreclose for the sum of all debts of whatsoever nature. He argues that the language of the mortgage is sufficiently broad to support this contention, and cites the case of *Hollan* v. *American Bank of Commerce & Trust Co.*, 168 Ark. 939, 272 S. W. 654, to uphold this view.

In that case Hollan executed a mortgage to the bank to secure the payment of two notes, each for $2,000, payable one year after date, with interest. The mortgage contained the following clause: "This deed of trust shall be security for any other indebtedness of whatever kind or character that may be owing by grantor to said American Bank of Commerce & Trust Company up to the time of foreclosure of this deed of trust, whether then matured or not." Hollan became further indebted to the appellee as indorser on two negotiable promissory notes executed by one Williams to him, and by him sold and indorsed over to the appellee. Liability on these two notes was established by a judgment rendered in favor of the bank, and subsequently thereto the bank brought its action to foreclose the mortgage both as to the notes specifically mentioned therein, and also for the indebtedness represented by the Williams notes and the judgment therefor. The court said: "The only point at issue in the case was whether or not the indebtedness described above, in addition to the two notes specifically mentioned in the mortgages, fell within the terms of the mortgage

and were secured thereby. * * * Each instrument, of course, must be interpreted according to its particular language * * *. We must interpret the language of this mortgage to mean just what it says—that it secures any indebtedness incurred up to the time of the foreclosure.'' The court then decided that all of the indebtedness before mentioned was included in the mortgage, and in concluding its opinion the court distinguished the phraseology of the mortgage in the case then before it from that in the case of *Lightle* v. *Rotenberry,* 166 Ark. 337, 266 S. W. 297, saying: ''The language in the present case is far broader, for it reads, 'other indebtedness of whatever kind or character that may be owing.' It is difficult to imagine how more appropriate language could have been used by the parties with the intention of accurately describing the particular kind of indebtedness involved in the present case. It is clear that the parties meant to include every kind of indebtedness or liability of appellants to the appellee, whether it arose directly or indirectly. The chancery court was therefore correct in holding that the mortgage of appellants to appellee embraced and secured, as against the appellants as mortgagors, the additional indebtedness heretofore described.''

It will be observed that in this case and in the case of *Myers* v. *Shain Lumber Co.,* 178 Ark. 174, 10 S. W. (2d) 20, relied upon, the mortgages construed were made to secure indebtedness due by the mortgagor to the mortgagee, and it was in none of these cases held that indebtedness secured by another and different mortgage upon other and different property could be embraced and secured in another and independent mortgage. Nor did the court in the case of *Hollan* v. *American Bank of Commerce & Trust Company, supra,* so hold. The language in the conclusion of the decision above quoted was merely illustrative in its character, and in no wise essential to a decision of the question before the court.

The language of the mortgage under consideration—''or any indebtedness of whatsoever sort or nature that

may be due from mortgagors to mortgagee at the time of foreclosing this mortgage''—is clearly referable to the character of indebtedness named in the language of the clause preceding, and cannot be extended to include the class of indebtedness other than those specifically mentioned. This language, as we construe it, has reference only to the debts due primarily from the mortgagor to the mortgagee, and does not include debts which might be purchased from third parties. Mortgages of this character have been denominated ''anaconda mortgages,'' and are well named thus, as by their broad and general terms they enwrap the unsuspecting debtor in the folds of indebtedness embraced and secured in the mortgage which he did not contemplate, and to extend them further than has already been done would, in our opinion, be dangerous and unwise; for, if this should be done, some one who might have been engaged extensively in business, and by reason of financial reverses become largely indebted, and who had selected from his property a small portion upon which he and his family might dwell as their homestead, and from that vantage point begin the battle of life anew, might be deprived of it by grasping and unconscionable creditors. He might apply to some one for a loan of a small sum in order to enable him to make his crop, only such sum as was necessary for his direst necessities, and, to secure it, place a mortgage on his home. The mortgagee might then buy up for some small price the debts before then incurred by his mortgagor, and when, at the end of the year, that mortgagor should have brought to him the money he had borrowed, might find that his home was incumbered by all these outstanding debts, and the last refuge of himself and family be swept away. No such principle can be implied from the language of the learned justice in *Hollan* v. *American Bank of Commerce & Trust Co., supra,* nor did he intend to lay down any such rule.

We hold that the decree of the chancellor in the instant case is supported on every principle of reason and

equity, and is correct, and that a mortgagee buying up claims held against his mortgagor by third persons cannot have them embraced in, and secured by, his mortgage, or included in a foreclosure decree, unless the language of the instrument provides in the clearest and most unmistakable terms for their inclusion, and that such stipulation was expressly called to the mortgagor's attention, and, after having fully understood the same, he assented thereto. 20 Am. & Eng. Enc. 964, and cases cited; *Provident Mutual Bldg. & Loan Assn.* v. *Shaffer,* 2 Cal. App. 216, 83 Pac. 274; *Perrin* v. *Kellog,* 38 Mich. 720.

The decree is affirmed.

School District No. 38 *v.* Board of Education of Clay County.

Opinion delivered November 18, 1929.

Hunter & Hunter and *Holifield & Upton,* for appellants.

Arthur Sneed, for appellees.

HART, C. J., (after stating the facts). It appears from the record that Piggott Special School District No. 52 was created by special act of the Legislature. Subsequently, another Legislature passed act 48, amending the original act under which the district was created. Special Acts of 1923, p. 98. That special act gives the county board of education of Clay County the authority to make changes in the boundary line of the Special School District of Piggott under certain conditions, which are recited in the act. It is not necessary to set out in detail the provisions of special act No. 48, because the record shows that they were carried out in annexing the territory from Common School District No. 38 to the Piggott Special School District.

It is earnestly insisted, however, that the special act has been repealed by implication by act 156 of the act of 1927, amending § 8823 of Crawford & Moses' Digest. We cannot agree with counsel in this contention. There is no irreconcilable repugnancy between the special act in question and the later general act on the same subject. The general clause in the later act, repealing all laws in conflict with it, does not operate to repeal any

law not in conflict with it, and especially is this true where there is a prior special act on the same subject which is not irreconcilably inconsistent or repugnant to the general act. *Jones* v. *Oldham,* 109 Ark. 24, 158 S. W. 1075.

In that case, it was held that the general act passed by the Legislature of 1913, creating the Department of State Lands, Highways and Improvements, does not repeal a special act of the same Legislature creating certain road improvement districts in Lonoke and Prairie counties. See too the case of *Baugher* v. *Rudd,* 53 Ark. 417, 14 S. W. 623, where it was held that the road law of 1871 for an appeal from a final decision of the county court opening a county road is not repealed by the general act, although of later date, regulating appeals from final orders and judgments of the county court. The reason is that the more specific provisions of the specific act controls the terms of the general act. The two acts are interpreted as operating together, the specific provisions furnishing exemptions and qualifications to the general act. Again, in *State* v. *Adams*, 142 Ark. 411, 218 S. W. 845, it was held that a special act of 1919, regulating the taking of fish in certain lakes in Chicot County was not repealed by the general act passed at the same session of the Legislature amending the law creating a game and fish commission. Other cases applying the rule according to the particular facts of each case are *Martels* v. *Wyss,* 123 Ark. 184, 184 S. W. 845; *Ward* v. *Wilson,* 127 Ark. 266, 191 S. W. 917; *Bartlett* v. *Willis,* 147 Ark. 374, 227 S. W. 596; and *Bank of Blytheville* v. *State,* 148 Ark. 504, 230 S. W. 550.

The Supreme Court of the United States has held that the presumption against implied repeals has peculiar and special force when the conflicting provisions which are thought to work a repeal are contained in a local or special act and a later general act. *Petri* v. *Creelman Lumber Co.,* 199 U. S. 487, 26 S. Ct. 133. See also *Washington* v. *Miller,* 235 U. S. 422, 35 S. Ct. 179.

Here there is no irreconcilable inconsistency or repugnancy between the two acts, and the changes in the boundary lines of the Piggott Special School District No. 52 can be carried on under the provisions of the special act without the necessity of applying any of the provisions of the general law except those expressly provided for in the special act for holding the election.

What we have said with regard to the provisions as to notice applies with equal force to the other provisions of the general school act with regard to the reducing the number of pupils in Common School District No. 38 to less than thirty-five, as provided in the general acts on the subject. In this connection, however, we desire to call attention to the decision in the case of *Chicago Title & Trust Co.* v. *Hagler Special School District,* 178 Ark. 443, 12 S. W. (2d) 881, which holds that, while the Legislature has full and complete power to create and change the boundaries of school districts, it is a violation of our own Constitution, as well as the Constitution of the United States, to pass a law impairing the obligation of a contract. The record in this case does not show that any existing contract of Common School District No. 38 will be impaired by the act of the county board of education under consideration, and we merely refer to this in a cautionary way. To the same affect see *Ancient Order United Workmen* v. *Paragould Special School District;* 143 Ark. 498, 222 S. W. 368.

There is no merit whatever in the allegation of the complaint that the same person is a director of Special School District No. 52, and is also a member of the county board of education. In any sort of consideration of the matter he would be a *de facto* member of the county board of education, and his acts as such would be legal and binding.

Therefore the judgment of the circuit court will be affirmed.

DENHAM *v.* STATE.

Opinion delivered November 18, 1929.

Wm. H. Glover, for appellant.

Hal L. Norwood, Attorney General, and *Pat Mehaffy,* Assistant, for appellee.

HART, C. J. Brady Denham prosecutes this appeal to reverse a judgment of the circuit court revoking a suspension of sentence against him for unlawfully selling intoxicating liquors. On the 17th day of January, 1927, at a regular term of the Hot Spring Circuit Court, Brady Denham entered a plea of guilty to the crime of selling intoxicating liquors. The court, upon the request of the prosecuting attorney, and because it appeared that the defendant had already served seven months in the Federal prison for the same offense, granted him a suspension of sentence conditioned on his making a new bail

bond in the sum of $500, and upon good behavior. It was, therefore, ordered and adjudged that the suspension be granted upon the conditions above set forth.

On the 30th day of July, 1929, at a regular term of court, upon motion of the prosecuting attorney and after hearing the evidence of witnesses, the court found that the suspension of sentence should be revoked, and an order to that effect was entered of record.

Upon a hearing of the motion to revoke the suspended sentence, two revenue officers of the United States and a deputy sheriff of Hot Spring County were introduced as witnesses by the State. According to their evidence, they went to the house where Brady Denham and Clyde Otts were living in Hot Spring County, and looked around the woods trying to find signs of a still being operated. They finally came to a spring near the house, and, at a little distance from it, they found a still set which, from the circumstances around it and from their experience as revenue officers, they thought had been operated a day or two before. The spring near which it was situated had plain tracks from there to the house where Brady Denham and Clyde Otts lived. From the appearance of things around there, Denham and Otts got their drinking and using water from the spring, and also washed their clothes there. In a little out-house, which was locked up, they found two barrels of mash and a cap and stillworm. The barrels of mash had been put down into a hole in the ground, and then covered up. They waited there for a while and saw Brady Denham and Clyde Otts coming towards the house. When they arrested them, Denham told Otts that this would mean Tucker Farm (meaning the penitentiary farm) for them and also exclaimed, "Oh, my God! what will become of my wife and children now?" When the officers first saw Denham and Otts coming towards them, they turned around and started to go back in the direction from which they came; but the officers stopped them and then arrested them.

According to the testimony of Clyde Otts, the still belonged to him, and Denham was not in any way interested in its ownership or operation. He said that he had only made one run with the still, and that Denham had nothing to do with it.

It was first contended that, because more than a year had elapsed between the date of the suspension of sentence by the circuit court and the order of that court revoking the suspension of sentence, that the order of revocation was void. This is based on the fact that, under § 6161 of Crawford & Moses' Digest, any person convicted of selling intoxicating liquors shall be guilty of a felony and imprisoned in the State Penitentiary for one year.

In *Davis* v. *State,* 169 Ark. 932, 277 S. W. 5, this court held that the circuit court had no authority to suspend execution of sentence indefinitely in the absence of a statute conferring it. It was held that the act conferring the authority upon circuit courts by the Legislature of 1923, did not have the effect to stay the execution of sentences already pronounced. In that case it was also said that the defendant, while at large under void orders of the circuit court to which he had assented, was in the same situation that he would have been had he escaped from custody. Therefore, the court said that the sentence of imprisonment was not satisfied by the lapse of time after it was pronounced, but could only be satisfied by suffering the imprisonment imposed by the sentence.

The Legislature of 1923 passed an act authorizing the circuit courts to suspend sentences under certain conditions, and also giving them the power to revoke the suspension of sentences for certain reasons. Acts of 1923, p. 40, and Castle's Supplement to Crawford & Moses' Digest, §§ 3229a and 3229b. The first section provides that the circuit court shall have authority, if it shall deem it best for the defendant and no harm to society, to postpone the pronouncement of final sentence and judgment upon such conditions as it shall deem proper and

reasonable as to probation of the person convicted. The second section gives the circuit court the power to revoke the suspension and postponement of sentence, and to pronounce sentence and enter final judgment in each cause whenever that course shall be deemed for the best interests of society and such convicted person. The statute itself does not confine the time within which the court may revoke the suspension of sentence.

In *Ketchum* v. *Vansickle,* 171 Ark. 784, 286 S. W. 948, the court held that, where the circuit court, without authority, suspended the execution of a sentence for one year in the penitentiary, to which suspension the defendant consented, the court had authority, more than a year later, to direct that the sentence be enforced. Again, in *Stocks* v. *State,* 171 Ark. 835, 286 S. W. 975, it was held that, where a sentence of imprisonment was suspended in 1910 with the defendant's consent, and was imposed in 1926, the sentence was not barred by the statute of limitations. The court recognized the rule laid down in the Davis case that a sentence of imprisonment is satisfied, not by lapse of time after it is pronounced, but by the actual suffering of the sentence imposed by it. The reason is that the time during which a sentence may be carried into execution is not provided by statute, and forms no part of the judgment of the court. That rule applies here in the absence of a statute limiting the time within which the court may revoke the suspended sentence.

In the case at bar, the sentence was suspended during good behavior. It will be remembered that the statute gives the circuit court the power to postpone final sentence and judgment upon such condition as it shall deem proper and reasonable as to probation of the convicted person. The court had the right to impose this condition.

In *Huyser* v. *Commonwealth,* 116 Ky. 410, 76 S. W. 174, it was contended that so much of the liquor statute as empowered the court, after two convictions for a violation of its provisions, to require of the convicted person a bond

for his good behavior, was void for uncertainty because it failed to indicate in express language what was meant by the words "good behavior." The Court of Appeals of Kentucky held against that contention, and said the defendant was placed in a state of trial with respect to the subject-matter of the statute, and that he must for a given time so conduct himself as to be amenable to the statute. The court further said that the defendant must keep himself within the letter and spirit of the statute by refraining from any further violation of its provisions during the period of probation.

In *State* v. *Greer,* 173 N. C. 759, 92 S. E. 147, the court said that, when judgment is suspended in a criminal action upon good behavior or other conditions, the proceedings to ascertain whether the terms have been complied with are addressed to the reasonable discretion of the judge of the court, and do not come within a jury's province.

This would also result from our own decisions holding that a statute authorizing and empowering circuit courts to suspend sentences under certain conditions to be constitutional. It would seem that the language of the statute authorizing the suspension of the sentence and also giving the circuit judge the power to revoke the suspension of the sentence when that course shall be deemed for the best interest of society and for the convicted person, expressly conferred upon the circuit court the power to pass upon the question without the aid of a jury.

It cannot be said that the finding of the circuit court that the suspension of the sentence should be revoked was either unreasonable in itself or without evidence to support it. According to the testimony of the revenue officers, the still was found about 150 yards away from the house in which the defendant lived. It was close to a spring where he and another person who lived in the house with him got water for family use, and where their family washing was done. The cap and worm to the still were found in an outhouse nearby, which was locked up,

and two barrels of mash ready for distillation were also buried in the ground in the outhouse. When he was arrested, Denham stated to Otts that this meant the Tucker Farm (the penitentiary farm) for them. This was in the nature of a confession, and the circumstances surrounding the whole transaction showed that the defendant realized that he was at least guilty of having a still in his possession. This was a kindred crime to the one he had been convicted of, and warranted the court in setting aside or revoking the suspension of sentence.

Therefore, the judgment will be affirmed.

BAKER *v.* HILL.

Opinion delivered November 18, 1929.

R. E. Wiley and *John F. Park,* for appellant.

Hal L. Norwood, Attorney General, and *Walter L. Pope,* Assistant, for appellees.

HART, C. J. This is an appeal by a taxpayer from a decree of the chancery court sustaining a demurrer to and dismissing for want of equity a complaint filed by him seeking to restrain the members of the Arkansas Construction Commission from carrying out the provisions of an act of the Legislature of 1929 to provide adequate buildings for the Hospital for Nervous Diseases and for the Tuberculosis Sanatorium and the issuance of State bonds therefor.

The Legislature of 1929 first passed an act to provide for the levying and collecting of a tax on incomes, which was to be known as the Income Tax Act of 1929. The same Legislature subsequently created the Arkansas Construction Commission for the purpose of constructing and equipping adequate buildings for the Hospital for Nervous Diseases, and buildings for the Tuberculosis Sanatorium. The first act referred to is No. 118, and was approved March 9, 1929. The later act is No. 180, and was approved March 22, 1929. The In-

come Tax Act of 1929 contains 44 sections, and its constitutionality was sustained in *Stanley* v. *Gates,* 179 Ark. 886, 19 S. W. (2d) 1000.

The constitutionality of act 180 is assailed in the case at bar. Section 9 of the act provides that, for carrying out the purposes of the act, the State shall borrow not exceeding the aggregate sum of $3,250,000, and shall issue the bonds of the State for the amount so borrowed, provided not more than $750,000 shall be issued in 1929. Section 10 provides that the bonds shall be known as State Construction Bonds, and contains regulations for their issue. Section 11 provides for the annual payment of the bonds from the revenue from act 118, Income Tax Act of 1929, and that the remainder shall go to reduce the State property tax under the regulations contained in the section. Section 12 defines the nature and terms of the construction bonds. It also provides that the bonds shall be negotiable paper, notwithstanding they are payable out of a special fund. Section 13 provides for the sale of the bonds, and the prices thereof. Section 14 provides for the registration of the bonds in the office of the State Treasurer. Section 15 provides for an appropriation for two years of a designated sum for construction and equipment for the State Hospital for Nervous Diseases. Section 16 contains a similar provision for the State Tuberculosis Sanatorium. Section 20 contains an emergency clause which provides that: "It is found as a fact that the State Hospital for Nervous Diseases is not adequate to take care of the patients now in the institution; the buildings at the Tuberculosis Sanatorium are insufficient to properly house and otherwise take care of those who are entitled to be admitted to that institution; the foregoing needs are so pressing that delay in responding to them may result in loss of life, prolonged sickness, and impairment of the efficiency of these institutions; and that the immediate operation of this act is essential for the protection of the wards of the State." Acts of 1929, vol. 2, p. 884.

In *Stanley* v. *Gates,* 179 Ark. 886, 19 (2d) S. W. 1000, the emergency clause was held valid as to the Income Tax Act of 1929, and the court said that the act took effect from and after its approval by the Governor, which was March 9, 1929. The court held that the action of the Legislature in declaring when an emergency exists, under Constitutional Amendment 13, is supreme, and that, if it states facts constituting an emergency so that its action cannot be said to be arbitrary, courts cannot say that it has not performed its constitutional duty, even though they might disagree with the Legislature as to the sufficiency of declared facts to constitute a sufficient reason for immediate action. That decision controls here, and it may be said the emergency in the act under consideration is stated in a plain and concise as well as comprehensive manner; therefore we hold that the act took effect March 22, 1929, the date of its approval.

The principal ground relied upon for a reversal of the decree is that the act violates § 8, art. 16, of our Constitution, which reads as follows:

"The General Assembly shall not have power to levy State taxes for any one year to exceed in the aggregate one per cent. of the assessed valuation of the property of the State for that year."

The basis of the contention is that, under the allegations of the complaint, which are admitted to be true by the demurrer, our severance tax, cigar and cigarette stamp tax, the inheritance tax, and the income tax of 1929, when added to the general property tax for State purposes of 8.7 mills on the dollar for each dollar of the assessed value of property in the State for taxation, exceeds in the aggregate one per cent. of all the assessed valuation of the property of the State for one year. We do not agree with counsel for appellant in the construction they have placed on this section of our Constitution. The provisions of § 8, art. 16, containing a restriction or limitation as to the amount or rate of taxation, refer exclusively to a property tax, but there is noth-

ing in the section which prevents the Legislature from selecting other subjects of taxation and prescribing the amount or rate of tax that it may see fit to levy thereon. According to our construction of our Constitution, other sources of revenue for State purposes than property tax may be resorted to. If the Legislature has power to raise revenue for State purposes by a property tax, it may also levy a tax for that purpose upon any other legitimate subject of taxation. There is a marked distinction in our Constitution as recognized in our adjudicated cases, between property and other subjects of taxation. The phrase, "subjects of taxation," embraces all property as such, and all other items on which a tax rate may be laid as a source of revenue for the support of the State Government. Since the Constitution contains no restriction on the power of the Legislature to levy taxes except as to property as such, the Legislature has full and complete power in the levy of taxes for State purposes as to other recognized subjects of taxation. The section under consideration is a part of article 16 of the Constitution on the subject of "Finance and Taxation." Section 5 of the same article is commonly called the equality and uniformity clause of the Constitution, and has been uniformly construed by this court as relating to property only.

In *Fort Smith* v. *Scruggs,* 70 Ark. 549, 69 S. W. 679, 58 L. R. A. 921, 91 A. S. R. 100, the court held that the Legislature had the power to authorize cities to impose a tax upon the privilege of driving vehicles upon the public streets of the city, and that, because the ordinance does not attempt to tax property but to tax a privilege, the provisions of § 5, art. 16, of the Constitution, requiring that all property "shall be taxed according to its value," and in such manner as to make the same equal and uniform throughout the State, do not apply, since they refer to taxes upon property only.

In *State* v. *Handlin,* 100 Ark. 175, 139 S. W. 1112, an inheritance tax law was upheld on the ground that in-

heritance taxes are not laid upon property, but upon the privilege or right of succession thereto, and are not subject to the same tests with respect to equality and uniformity under § 5, art. 16, of the Constitution as taxes levied upon property. The same rule was laid down as to a tax on corporate franchises. *St. Louis S. W. Ry. Co.* v. *State,* 106 Ark. 321, 152 S. W. 110, affirmed in 235 U. S. 350, 35 S. Ct. 99.

In *Floyd* v. *Miller Lumber Co.,* 160 Ark. 17, 254 S. W. 450, 32 A. L. R. 84, the court sustained the validity of a severance tax law, and in doing so necessarily held that it was not a property tax, and therefore did not violate § 5, art. 16, of the Constitution, that all property subject to taxation shall be taxed according to its value.

In *Sims* v. *Ahrens,* 167 Ark. 557, 271 S. W. 720, it was held that, while the act under consideration subjecting all persons and corporations to a gross income tax was void because it necessarily operated in a discriminatory and arbitrary manner, still it was within the power of the Legislature to pass a properly classified net income tax law. This rule was reaffirmed in *Stanley* v. *Gates,* 179 Ark. 886, 19 (2d) S. W. 1000. In that case the court again held that an income tax was not a property tax, and that the act therefore was not violative of the equality and uniformity clause of § 5, art. 16, of the Constitution, which relates exclusively to property taxes.

It necessarily results from these decisions that there are other sources of revenue for State purposes than that derived from the taxation of property. If the equality and uniformity clause of § 5, art. 16, refers exclusively to property taxes and not to other subjects of taxation for State purposes, such as inheritance taxes, severance taxes, income taxes and privilege taxes, we can perceive no good reason why the limitation of the rate of taxation referred to in § 8, art. 16, should not also be confined exclusively to property taxes. Judge Cooley expressly recognizes that the amount of tax authorized by State Constitutions to be levied on property as such has no reference

to specific taxes. The learned author says that tax limitations on rate or amount generally apply only to those taxes usually classified as property taxes as distinguished from excise or license taxes. Cooley on Taxation, 4 ed. vol. 1, § 168. Among the decisions cited in support of the text are cases from Alabama construing sections of the Constitution of that State similar to §§ 5 and 8 of our Constitution. In *Ex parte City Council of Montgomery in re Knox,* 64 Ala. 463, it was held that the General Assembly, not being restrained by any constitutional provision, may delegate to a municipal corporation the power to tax occupations, trades, employments and professions; and that the constitutional provision which limits municipal taxation on property to "one-half of one per cent. of the value of such property as assessed for State taxation during the preceding year" has no reference to specific taxes which may be imposed on privileges.

In *Western Union Telegraph Co.* v. *State Board of Assessment,* 80 Ala. 273, 60 Am. Rep. 99, it was held that the constitutional provisions which declare that "all taxes levied on property shall be assessed in exact proportion to the value of such property," and inhibit the levy of "greater rate of taxation than three-fourths of one per centum of the value of taxable property within this State," prescribe a rule and limit of taxation on property, but do not include all the legitimate subjects of taxation, some of which are not susceptible of determinate value. Again in *Goldsmith* v. *Mayor and Aldermen of Huntsville,* 120 Ala. 182, 86 So. 56, 11 A. L. R. 300, it was held that the amount of tax authorized by the Constitution and laws of the State to be levied upon property as such, real and personal, has no reference to specific taxes which may be imposed on occupations and privileges.

It is true that in *Eliasberg Bros. Mercantile Co.* v. *Grimes,* 204 Ala. 492, 86 So. 56, 11 A. L. R. 300, the Supreme Court of the State of Alabama held that the term "property" as used in the Constitution of 1901, § 214,

providing that the Legislature shall not have the power to levy a greater rate of taxation than sixty-five one-hundredths of one per centum of the value of taxable property within the State, includes incomes as defined and taxed by the Revenue Act of 1919, but the holding was based upon the determination that income was property within the meaning of the constitutional provision limiting the tax rate to a certain percentage of the value of the taxable property of the State as above set forth.

From reading the Alabama decisions it will be seen that the Supreme Court of that State always adhered to the view that a property tax and income tax were one and the same thing, as distinguished from an occupation or privilege tax. We have taken the contrary view, as will appear from our cases cited above, and have expressly held that an income tax and a property tax are not one and the same thing. It is perfectly evident that, if the Alabama Supreme Court had been of the opinion that an income tax was not a property tax, it would not have held that the imposition of taxes upon incomes by the Revenue Act of 1919 was void, because it exceeded the constitutional rate which might be levied on the value of the taxable property in the State.

In *Magnes' Estate,* 32 Colo. 527, 77 Pac. 853, the Supreme Court of Colorado held that a State inheritance tax law did not contravene art. 10, § 3, of their Constitution requiring uniform taxation, for the reason that the section of the Constitution related only to taxes on property, while the inheritance tax was a privilege and not a property tax. In that case it was further held that, because the inheritance tax was a tax on privilege only, it did not contravene art. 10, § 11, of the Constitution limiting the rate of taxation on property for State purposes. These principles control here, and we hold that § 8, art. 16, of the Constitution is a limitation upon the taxing power, so far as the same applies to taxation of property, and only limits the percentage rate or amount which may be levied upon property for State purposes for any one year.

Section 11 of the act under consideration provides for the payment of the "State Construction Bonds" in annual payments from revenue under act 118, Income Tax Act of 1929, and regulates the manner of payment and the disposal of the fund remaining. In this respect the act is valid and falls squarely within the rule announced in *Grable* v. *Blackwood, ante* p. 311, and cases cited.

It is next insisted that act 180 was repealed by acts 271 and 272 passed at the same session of the Legislature. Act 180, as will appear from its title and from the language of the act itself, was passed for the purpose of constructing and equipping adequate buildings for the Hospital for Nervous Diseases and buildings for the Tuberculosis Sanatorium, and authorizing the commission created to issue bonds in payment of same. Acts 1929, vol. 2, p. 884. Act 271 was an act making appropriations for purchasing site and erecting and equipping buildings for the Arkansas Tuberculosis Sanatorium. Act 1929, vol. 2, p. 1158. Act 272 was for the same purpose for the State Hospital for Nervous Diseases. Neither of the later acts contain any express repeal of act 180. Implied repeals are not favored. It is only where there is an invincible repugnancy between the two acts, as where it is evident that the last act is a substitute for the first act, or where the last act takes up the whole subject anew and covers the entire ground of the subject-matter of a former statute, that a repeal by implication is accomplished. *Massey* v. *State,* 168 Ark. 174, 269 S. W. 567; *Babb* v. *El Dorado,* 170 Ark. 10, 278 S. W. 649; and *State* v. *White,* 170 Ark. 880, 281 S. W. 678. Here there is not only no repugnancy between the first act and the two later, but it is manifest that the two later acts were passed in aid of the first act, and not as a substitute therefor, or with the implied intention of repealing it.

Finally it is insisted that the source of revenue provided for the payment and retiring of the bonds under

act 180 is exclusively the fund from act 118, the Income Tax Law of 1929, and that this renders the act uncertain and void. We do not think so. Section 9 provides that the State shall borrow a sum of money to carry out the requirements of the act, not to exceed a designated amount, and shall issue the bonds of the State for the amount so borrowed. Section 10 provides that the bonds shall be known as "State Construction Bonds," and shall be signed by the Governor, the State Treasurer and the chairman of the commission, and shall be attested by the Secretary of State under the Great Seal of State. It further provides that the bonds shall state on their face that the full faith and credit of the State is pledged for their payment. Section 12 provides that the bonds shall be negotiable paper, notwithstanding they are payable out of a special fund. Section 14 provides that, when any bonds shall have been issued, they shall be registered in the office of the State Auditor, in a book to be provided for that purpose; and the Auditor or deputy auditor, shall indorse on each bond a certificate that in the issuance thereof all the conditions of law have been complied with. Thus it will be seen that the General Assembly, by legislative enactment, the most solemn and binding way in which it could act, pledged the full faith and credit of the State to the payment of the bonds, as well as provided a special fund to insure their payment.

The Legislature had the power to authorize the issuance of the bonds, and also to levy a tax for their payment upon any legitimate subject of taxation. This branch of the case is thoroughly settled by the principles of law decided in *Bush* v. *Martineau,* 174 Ark. 214, 295 S. W. 9.

The result of our views is that the decree of the chancery court was correct, and it will be affirmed. It is so ordered.

CALHOUN *v.* STATE.

Opinion delivered November 18, 1929.

Chas. D. James, for appellant.

Hal L. Norwood, Attorney General, and *Robert F. Smith, Assistant,* for appellee.

SMITH, J. Appellant was tried and convicted under the following indictment: "The said Charley Calhoun, on or about the 3d day of February, 1929, in the said Western District of Carroll County and State of Arkansas, Eli Cox, who was in custody, after lawful ar-

rest and before conviction for a felony, knowing and being informed that the said Eli Cox was lawfully arrested, did unlawfully and feloniously, by unlawful means set at liberty the said Eli Cox, and did unlawfully and feloniously and voluntarily and corruptly and of purpose let the said Eli Cox escape."

He filed a demurrer before his conviction, and a motion in arrest of judgment afterwards, questioning the sufficiency of the indictment. For the reversal of the judgment it is also insisted that incompetent testimony was admitted, and that the testimony is insufficient to sustain the conviction.

It is true, as appellant insists and as the statute provides, that the indictment must be direct and certain as regards "the particular circumstances of the offense charged where they are necessary to constitute a complete offense" (paragraph four, § 3012, C. & M. Digest), and that the language of the indictment must contain "a statement of the acts constituting the offense, in ordinary and concise language, and in such a manner as to enable a person of common understanding to know what is intended" (paragraph two, § 3028, C. &. M. Digest). But it is also true that the indictment is sufficient if it can be understood therefrom that it was properly found, and that the offense charged was committed within the jurisdiction of the court, and that "the act or omission charged as the offense is stated with such a degree of certainty as to enable the court to pronounce judgment on conviction according to the right of the case." Section 3013, C. & M. Digest. The statute also provides that "no indictment is insufficient, nor can the trial, judgment or other proceeding thereon be affected by any defect which does not tend to the prejudice of the substantial rights of the defendant on the merits." Section 3014, C. & M. Digest.

Here the offense charged is a statutory crime, and it is charged in the language of the statute, which is ordinarily sufficient, unless the circumstances of the case are

such as to make a more particular statement of the facts necessary to enable the person accused to properly prepare his defense, and to plead an acquittal or conviction as a bar to a further prosecution for the same offense.

At § 18 of the chapter on Escape, 10 R. C. L., page 591, it is said: "An indictment for an escape, prison breaking or rescue, or for permitting a prisoner to escape, is of course to be governed generally by the ordinary rules of law which govern indictments and informations. Generally speaking, an indictment is sufficient if it contains a statement of the acts constituting the offense, in ordinary and concise language, in such a manner as to enable a person of common understanding to know what is intended, and if the act or omission charged is stated with such a degree of certainty as to enable the court to pronounce judgment of conviction according to the rights of the case." The language quoted is substantially identical with that of the statutes of the State which we have cited. In the note to the text quoted the case of *Houpt* v. *State,* 100 Ark. 409, 140 S. W. 294, is cited, and the case is annotated in Ann. Cas. 1913C 690.

In the Houpt case it was said: "An indictment for a statutory offense must state all the ingredients essential to constitute such offense, but it is sufficient ordinarily to follow the language of the statute in charging the statutory offense. One of the essential elements constituting the crime of escape is that the prisoner was in the lawful custody of the officer, and this must appear from the allegations of the indictment. It is, however, sufficient to meet this requirement by general averments in the language of the statute that the prisoner was in the lawful custody of the officer."

Here the indictment alleges that the prisoner rescued was in lawful custody, charged with the commission of a felony, and that appellant was aware of that fact. The indictment does not allege what felony was charged; but this was entirely immaterial.

The indictment does not allege the means employed to effect the rescue; but this was not required. The case

of *State* v. *Embrey,* 135 Ark. 262, 204 S. W. 1139, was a prosecution for obstructing process, and it was there said:

"It is insisted that the indictment is defective because it does not charge the particular circumstances of the offense. The indictment charges that H. W. Finger, who was sheriff of Polk County, was attempting to arrest Julius Carden and Bettis Alston in said county for a felony on the 16th day of November, 1917, and that appellee did unlawfully, knowingly and willfully obstruct and resist him when attempting to make the arrest. The indictment stated all the ingredients essential to constitute the offense of obstructing a peace officer in an attempt to arrest a party for a felony. This is all that is required in charging statutory crimes. The manner and mode of resisting the officer is a matter of evidence. *Putman* v. *State,* 49 Ark. 449, 5 S. W. 715; *Houpt* v. *State,* 100 Ark. 409, 140 S. W. 294.

The majority are therefore of the opinion that the indictment sufficiently charges the crime of which appellant was convicted.

The assignment of error, that the testimony is not sufficient to support the verdict, may be disposed of by a brief review of the testimony offered on the part of the State. It was to the following effect: Davidson, a justice of the peace, testified that an affidavit for a warrant of arrest was made before him by some one, and it was his recollection that the affiant was George Garrison, Jr., although he was not sure, as the affidavit had been lost; and that the warrant, when issued, was delivered to either the constable of the township or the chief of police of the city of Eureka Springs, who was also a deputy sheriff, as these officers were together when the warrant was issued, but the warrant had been lost. The constable testified that he made the arrest under the warrant which Davidson had issued, and the chief of police had assisted him in doing so, and these officers put Cox in jail. Other witnesses testified that appellant effected the rescue of Cox by breaking off the lock on the door of the jail.

Objection was made to the testimony of Davidson that an affidavit had been made before him, upon which he had issued the warrant of arrest, and to the testimony in regard to the warrant itself, for the reason that the best evidence of these transactions would have been the production of the affidavit and the warrant. But the loss of these writings was shown, and parol eivdence was admissible of that fact and to show the nature and character of the lost instruments. *Leake* v. *State,* 149 Ark. 621, 233 S. W. 773.

The judgment must, therefore, be affirmed, and it is so ordered.

HILL *v.* ÆTNA INSURANCE COMPANY.

Opinion delivered November 4, 1929.

J. G. Thweatt & Sons, for appellant.

W. L. Jean and *Clayton & Cohn,* for appellee.

MEHAFFY, J. On March 21, 1928, the appellees filed their complaint in the common pleas court against the appellants, asking judgment in the sum of $191.42 and interest.

Roy F. Hill, one of the appellants, had entered into a contract with appellees whereby he agreed to write fire and tornado insurance as agent, and was to receive as his commission 20 per cent. of the premium on all policies written; it was the contention of appellee that, according to the contract, appellant would return to plaintiff any unearned commission paid on that part of the premium returned to assured, either on a policy or application for same after cancellation. It was also alleged that a bond was executed by Roy F. Hill, as principal, and the other appellants, Joe K. Hill and Glynn P. Hill, as sureties.

The defendant answered, and denied there was anything due under the contract and bond.

The case was heard on the 14th day of May, 1928, and the court found for appellants, and judgment was entered on that date. The court adjourned on the afternoon of May 14. Before the court adjourned, however, attorney for appellee prayed an appeal in open court to the circuit court of Prairie County, and the court granted the appeal. The undisputed facts, however, show that he did not enter the order or mark his record showing the appeal granted, but he testified that he meant to do so. The court also told the attorney for the appellee that it would be all right for him to go back to Little Rock, and prepare his motion and affidavit for appeal and mail them back to DeValls Bluff to be filed of record. The attorney for appellee came to Little Rock, prepared the affidavit, and on the same day, the 14th of May, wrote a letter to the clerk of the common pleas court of Prairie County, DeValls Bluff, Arkansas, inclosing the affidavit for appeal. The clerk, however, did not get this affidavit from the postoffice until the morning of the 15th. The attorney for appellee told the court that he would go to his office and fix up the affidavit and mail it right back, and the court said that would be all right. He immediately went to Little Rock, prepared the motion,

and sent it back to the clerk. This was done about 1:30 in the afternoon of the 14th, and, in the ordinary course of the mails, should have reached the clerk's office at DeValls Bluff that afternoon.

The clerk testified that court met on May 14 and closed the same day, and that that was the day that the case was tried, and that the records did not show any motion and affidavit by the Ætna Insurance Company on that day. It does show that it was filed on the 15th. He testified that he received it in the morning's mail May 15. He said he did not know whether it came to DeValls Bluff about 3:30 or 4 o'clock on May 14, but it might have done so. He did not get it until next morning.

The transcript was filed in the circuit court, and, when the case was called in circuit court, appellants moved to dismiss the appeal on the ground that a written motion for appeal was not filed, and the appeal was not granted by the common pleas court at the term when the cause was tried. The court heard evidence, and sent the case back to the common pleas court, directing the common pleas court to enter a *nunc pro tunc* order as of May 14, 1928. The common pleas court had the order entered, and it showed the granting of the appeal on the 14th day of May to the circuit court. When the case came on for hearing again in the circuit court, after this *nunc pro tunc* order was entered, the appellants again filed a motion to dismiss, which the court overruled, and, after hearing the evidence, directed a verdict in favor of appellee.

The appellants first contend that the motion to dismiss the appeal should have been sustained. The common pleas court of Prairie County was created by act 61 of the Acts of 1875, and this act prescribes the procedure for taking an appeal from a judgment of the common pleas court. The act provides that any person aggrieved may appeal upon complying with the following requisites: (1) The applicant (appellant) or agent shall make and file with the clerk an affidavit that the appeal is not taken for the purpose of delay, but that justice may be done. (2) The appellant, or some person for him, together with one

or more securities, to be approved by the clerk, must enter into an obligation to the adverse party in a sum sufficient to secure the payment of such judgment and the costs of appeal. (3) The appeal shall be granted by the court as a matter of right, upon motion filed at the same term of the court at which the judgment was rendered; and the entering of the order granting the appeal shall be sufficient notice to the adverse party that an appeal has been taken. (4) In order to make the appeal effectual, the affidavit and bond for appeal must be filed with the clerk within thirty days after the appeal is granted; and, upon the filing of said affidavit and bond, all further proceedings in said court shall be suspended; provided, that either party may appeal without giving any bond, but in such cases the judgment shall not be superseded.

It is the contention of the appellants that the appeal was not properly taken, and he cites and relies on the case of *Ferguson* v. *Doxie,* 33 Ark. 663. In that case, however, the court said: "Appellants made no motion for an appeal, and none was granted at the term. But they filed with the clerk in vacation, and within thirty days after the judgment was rendered, an affidavit and bond for an appeal, and he transmitted the original papers with the affidavit and bond and a certified transcript to the clerk of the circuit court as in cases of appeal."

In that case no appeal was granted by the court, and no request was made, and no motion was made during the term. The act provides that the court, and not the clerk, may grant the appeal, and in that case the court did not grant the appeal, and no motion was made for an appeal during the term of court. In the instant case, immediately after the decision of the common pleas court, and in open court, the appellee made a motion, and the court granted the appeal, and on the same day the affidavit was mailed to the clerk, and should have reached there about 3:30 or 4 o'clock, although the clerk did not get the affidavit until next morning.

In the case in the 33d Arkansas, as we have said, there was no motion for appeal, and the court never

granted any appeal. The appellant in that case filed a motion with the clerk after the adjournment of court, and of course the clerk had no authority to grant an appeal. In the instant case the appeal was granted by the court during the term, although no record was made of it. But a party could not be deprived of his right to appeal simply because the officer failed to note it on the record. The appeal was granted when the motion was made.

We said in a recent case: "The judgment of the court is the pronouncement of the judge upon the issue submitted to him. When spoken, it is the court's judgment. Necessarily, the giving of the judgment must precede its historical engrossment. The clerk of the court executed the mechanical act of recording in some manner so as to give permanence to the evidence of the judgment that the court has delivered." *McConnell* v. *Bourland,* 175 Ark. 253, 299 S. W. 44.

The same thing may be said with reference to the court in granting the appeal in this case. The pronouncement of the judge, when the motion was made granting the appeal, was all that was necessary for him to do.

We also said in the above case: "It has been said that it must be manifest that the record is not the judicial act. It is only historical. Its practical use is evidential. * * * A decree becomes effective from the day of its rendition, and not from the day of its entry on record. Where a judgment or decree has been actually rendered but not entered on the record, in consequence of an accident or mistake, or the neglect of the clerk, the court has power, at a subsequent term, to order that the judgment or decree be entered of record *nunc pro tunc*, provided the fact of its rendition is satisfactorily established."

The undisputed proof in the instant case shows that the appeal was actually granted. Therefore it was proper to require the judge of the common pleas court to enter it of record *nunc pro tunc.*

The appellant next calls attention to the case of *Katz* v. *Goldman,* 64 Ark. 395, 42 S. W. 901. In that case the

court said that the requirement of the statute that a motion be made and filed (implying that it be in writing) is directory to the court, for when the affidavit and bond for appeal are filed and the court's attention is called to them, the appeal goes as a matter of course. And in the Katz case, above referred to, the court said, in reference to the case of *Ferguson* v. *Doxie, supra*: "The appellants in that case made no motion for appeal in the common pleas court." And the court further said, in speaking of the dismissal: "Obviously there is but one way of taking an appeal provided, and it must be moved for and taken at the term at which judgment is rendered. This not having been done, the circuit court acquired no jurisdiction. The clerk could not grant the appeal under the act, and only the common pleas court could, and in the case at bar the appeal was granted by the court at the term at which the judgment was rendered. The circuit court erred in dismissing the appeal."

The same is true in the instant case. The clerk could not grant the appeal, but the appeal was granted by the court at the term at which the judgment was rendered. We think there was a substantial compliance with the statute, and that the appeal was properly taken.

The fourth paragraph of the act providing for an appeal in act 61 of the Acts of 1875 provides: "In order to make the appeal effectual, the affidavit and bond for appeal must be filed with the clerk within thirty days after the appeal is granted." The appeal might have been granted by the court as it was in this case and the affidavit and bond filed any time within the thirty days.

Appellant next calls attention to the case of *Drainage Dist.* v. *Stuart,* 104 Ark. 113, 147 S. W. 460, as authority to sustain his contention that the circuit court could obtain no jurisdiction unless an appeal was actually granted. This is true. Unless an appeal was actually taken, the circuit court would of course acquire no jurisdiction.

Appellant argues that the court cannot extend the time for filing the motion. But it is of course immaterial in this case whether that is correct or not, because time

to make the motion for an appeal was not extended, and the appeal was granted on the day the judgment was entered, and time was given merely for filing the affidavit, which the statute itself says may be filed within thirty days.

It is next contended by the appellant that the court should have directed a verdict for him. There is no dispute about the contract entered into between Roy F. Hill and the appellee, and no dispute about the bond. There is a dispute about the indebtedness; that is, about the construction of the contract. The contract in regard to the cancellation of policies and the return commission reads as follows: "In case of cancellation of any policy, the party of the second part agrees to return to the party of the first part any unearned commission paid him on that part of the premium returned to the assured on such canceled policy or the application for same; said unearned commission to be paid to party of the first part on or before the 15th of the month next following the month in which such policies or applications are canceled."

It is contended by the appellant that, by the terms of the contract, appellant was not to return unearned commissions on policies canceled by the appellee, but he was to return unearned commissions on the part of the premiums that had been returned to the assured, and that, unless such parts of premiums had been returned and until the same had been returned, there could be no duty on appellant to return any commissions. The obligation under the contract was upon the appellee to return the premiums, and it is admitted by appellant that, if it had returned the premiums to the assured, that the appellant would have to return the unearned commissions. We think that under the contract the appellant, Roy F. Hill, was liable for the unearned commissions which he had collected.

The testimony showed that when the policy was canceled they returned to the insured $32.40, and the $6.48 which was due from Hill, 80 per cent. going to the company and 20 per cent. to Hill. Only one policy was in-

troduced, and the court asked if there was any dispute as to the amount due the company. The attorney for the defendant stated: "The amount is correct. But we contend that we don't owe it." The attorney for the appellee said: "The total amount we claim due the company is $191.42."

It is unnecessary to set out all the testimony here, but we think the testimony was sufficient to justify the court in directing a verdict for the appellee.

The judgment of the circuit court is therefore affirmed.

SCOTT *v.* STATE.

Opinion delivered November 4, 1929.

[redacted]

H. B. Means, for appellant.

Hal L. Norwood, Attorney General, and *Pat Mehaffy,* Assistant, for appellee.

MEHAFFY, J. The appellant was convicted for malicious mischief in the justice of the peace court on June 15, 1929. It was charged that he unlawfully, willfully and maliciously cut and tore down a wire fence, the property of C. C. McGrew. He appealed to the circuit court, where he was tried, found guilty by a jury, and fined $50, and he has appealed to this court for a reversal of the judgment.

His first contention is that the court erred in refusing to give instruction No. 1 requested by the defendant. Said instruction was as follows: "You are instructed that under the law and testimony of this case you should find the defendant was not guilty." It is contended that there was no legal evidence upon which to base the verdict.

C. C. McGrew testified that on the 3d day of June, 1929, he was informed that his hogs were out of the pasture; that he went down to the pasture, and found that the net-wire fence was cut, and saw hog tracks where the hogs went out, and that there were also a man's tracks there. It had rained the night before, and he could see the tracks. He could find the man's tracks and hog tracks all along at different places, and tracked them down to the road that turns down to John Scott's house. He looked in Scott's pasture, and found hog tracks going out of his lot into his pasture. He did not find his hogs, but they returned home on the third day after his fence was cut.

Oscar Deal testified that on the same day he saw Roy Scott tolling two hogs; that he turned down the railroad.

Mrs. Jonah Hartsell testified that she saw Roy Scott on the third day of June tolling two hogs, and that he tolled them up toward John Scott's (appellant's father's) house.

Mrs. John Henson testified that on the same day she saw Roy Scott tolling hogs, and he carried the hogs in the direction of his father's house, and the next day the

same hogs came to her house. A son of Mrs. Henson testified to the same effect.

Joe Pilcher testified that on the 3d day of June he passed McGrew's pasture, and saw his fence had been cut, and saw a man's tracks and hog tracks where the fence was cut.

Shorty Nugent also testified that he saw Roy Scott tolling hogs, and the defendant did not testify, but his father, John T. Scott, testified that he had two hogs that got out on the 3d of June; that Roy Scott found the hogs, and tolled them home and put them in his pasture; that one of the hogs was the mother of the two that McGrew had, and the other was the sister that was marked the same as the two McGrew had.

It will be seen therefore that the testimony tending to show that the appellant cut the fence was circumstantial, but we think the testimony that the fence was cut, the hogs missing, and that Roy Scott was seen tolling hogs of the description of McGrew's hogs, was sufficient to submit the question to the jury as to whether Roy Scott cut the fence.

This court has said repeatedly that the jury are the judges of the credibility of the witnesses and the weight to be given to their testimony, and in testing the legal sufficiency of the evidence to warrant the jury in returning a verdict of guilty it must be viewed in the light most favorable to the State. *Campbell* v. *State,* 170 Ark. 936, 282 S. W. 4.

Appellant next contends that instruction No. 2 given at his request, and instruction No. 8 given at the request of the State, are in hopeless conflict. We do not agree with appellant in this contention. Instruction No. 2 given at the request of the defendant was as follows: "You are instructed that a defendant, at his own request, but not otherwise, shall be a competent witness on the trial, but his failure to make such request shall not create any presumption against him."

No. 8 was an instruction telling the jury that they were the sole and exclusive judges of the weight of the

evidence and credibility of witnesses, and it told them that, in weighing a witness' testimony, they might take into consideration certain things. But it also told them that the defendant's testimony must be weighed by the same rule as the testimony of other witnesses. This instruction was the usual instruction given in cases where the defendant testifies, and doubtless the court overlooked the paragraph in it with reference to the testimony of the defendant. But it was a correct instruction as a whole, and the defendant did not make any specific objection nor call the court's attention to the fact that the instruction mentioned defendant's testimony. There is certainly no conflict between it and No. 2 given at defendant's request. No. 2 simply told the jury that the defendant might testify, but that his failure to do so should not create any presumption against him. Certainly that cannot be said to be in conflict with a statement to the jury that they should weigh a defendant's testimony by the same rules they do the testimony of other witnesses. At any rate, no specific objection was made, and, for that reason, appellant cannot urge the error here. But he says it was prejudicial because it necessarily called the jury's attention to the fact that the defendant had failed to testify in his own behalf. The fact is that the appellant himself had asked the instruction calling the jury's attention to this fact.

Appellant also contends that the court erred in giving instruction No. 7. This is an instruction frequently given, and no specific objection was made to that part of it of which the appellant now complains. The instruction reads as follows: "You are instructed that a reasonable doubt is not any possible or imaginary doubt hatched up for the purpose of an acquittal, because everything that depends upon human testimony is susceptible of some possible doubt. To be convinced beyond a reasonable doubt is that state of the case which, after entire consideration of the testimony, leaves the minds of the jurors in that condition that they feel an abiding conviction to a moral certainty of the truth of the charge."

The appellant says that this was a reflection on the witnesses in the case, the defendant and the attorneys, to use the expression "hatched up for the purpose of an acquittal." We do not think so. It was not a reflection on any one, but it was a statement to the jury that the doubt referred to as a reasonable doubt was not any possible or imaginary doubt hatched up for the purpose of an acquittal. We think this expression, "hatched up for the purpose of acquittal," should not have been used in the instruction, but the appellant made no specific objection. If he had called the court's attention to it, it would have doubtless been corrected, and he failed to do this.

The defendant was convicted on circumstantial evidence, but there is no difference in the effect between circumstantial evidence and direct evidence. In either case it is a question for the jury to determine, and, if the jury believes from the circumstances introduced in evidence, beyond a reasonable doubt, that the defendant is guilty, it is the duty of the jury to find him guilty just as it would be if the evidence was direct. There is no greater degree of certainty in proof required where the evidence is circumstantial than where it is direct, for in either case the jury must be convinced of the guilt of the defendant beyond a reasonable doubt. They are bound by their oaths to render a verdict upon all the evidence, and the law makes no distinction between direct evidence of a fact and evidence of circumstances from which the existence of the fact may be inferred. Nichols' Applied Evidence, vol. 2, § 4, 1065; Underhill's Criminal Evidence, pages 14 and 16.

We think the evidence was sufficient to warrant the jury in finding the defendant guilty, and that there was no reversible error committed by the court, and the judgment is therefore affirmed.

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

Opinion delivered November 18, 1929.

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

SMITH, J. Appellee recovered a judgment against the appellant railway company to compensate a personal injury sustained by her. The circumstances of the injury were as follows: She was walking between the main line, and a sidetrack at a point where there is a sharp curve. No road or street crossed the tracks near the place of her injury. The main line track was the outer one, and there were seven or more cars on the curve of the sidetrack, which ran parallel with the main line track, and at the usual distance from it. A person could have stood in the space intervening between the cars on the sidetrack and a passing train on the main line track without being struck by the train. Appellee was walking around the curve when a train approached from behind her, without ringing the bell or blowing the whistle, according to the testimony offered in her behalf, and, before she was

aware of the approach of the train, it passed her, and in doing so threw her violently to the ground and inflicted a painful injury.

It is apparent from the facts stated that appellee was a trespasser at the time of her injury, and, under the principles of the common law, the railroad company was under no duty to anticipate her presence and give her warning of the approach of the train by ringing the bell or blowing the whistle; nor was there any duty to maintain a lookout to discover her presence. The only duty owing to her, as a trespasser under the common law, was to exercise ordinary care under the circumstances to avoid injuring her after discovering her presence on the track and consequent peril. But, by an act of the General Assembly approved May 26, 1911, which appears as § 8568, C. & M. Digest, it is made the duty of all persons running trains in this State to keep a constant lookout for persons and property upon the track, and it is therein provided that, if any person or property shall be killed or injured by the failure to keep such lookout, the railroad company operating the train is made liable and responsible for all damages resulting from such neglect, notwithstanding the contributory negligence of the person injured, where, if such lookout had been kept, the person charged with the duty of keeping it could have discovered the peril of the person injured in time to have prevented the injury, by the exercise of reasonable care after the discovery of such peril, and the burden is imposed upon the railroad to establish the fact that the duty to keep such lookout had been performed.

This statute has been construed and applied in numerous cases arising under it, and no useful purpose would be served by reviewing them. In one of the latest of these—that of *Kelly* v. *DeQueen & Eastern R. R. Co.*, 174 Ark. 1000, 298 S. W. 347—we said: "We do not think the railroad company is liable for hitting a trespasser on the track, unless the plaintiff shows that the injury might have been avoided if a proper lookout had

been kept," by which was meant, as is made plain by other portions of the opinion from which we have just quoted, that it must be shown by the person asserting liability that the injury complained of was inflicted at such a place and under such circumstances that the presence of the injured party or property would have been discovered had the lookout required by the statute been kept. Upon such a showing being made, the burden then shifts to the railroad company to show that the duty to keep a lookout had been performed, and, to escape liability for the injury complained of, the railroad company must also show that the injury was unavoidable by the exercise of ordinary care. Numerous cases have defined the measure of this duty under particular facts.

The engineer testified that he was keeping a lookout, but, on account of the curve in the tracks and the presence of the box-cars on the sidetrack, he did not, and could not, see appellee until he was within about forty feet of her, and that the train was running at a speed of only twelve or fifteen miles per hour, as it had entered the limits of the city of Blytheville, and that he immediately applied the emergency brake, and the front of the train, which was a motor-car, rolled up to appellee without striking her, but, before the train could be stopped, some portion of it, probably a ladder running up the side of the car, struck her, and the train stopped within fifty feet after striking her. There is no contradiction of this testimony in that of any of the numerous witnesses who testified in the case, or in any fact or circumstance deducible therefrom appearing in the evidence.

As there was no fact or circumstance in evidence substantially contradicting the testimony of the engineer, it was an arbitrary act on the part of the jury to disregard his testimony. *St. L. S. F. R. Co.* v. *Harmon,* 179 Ark. 248, 15 S. W. (2d) 310. If the engineer's testimony is accepted as true, as it should have been in the absence of any contradiction thereof, or if his testimony did not appear of itself to be so unreasonable or improbable as

not to be worthy of belief, then there was no negligence on his part, and consequently no liability on the part of the railroad company can be predicated under § 8568, C. & M. Digest, *supra.*

Nor can any liability be predicated upon § 8575, C. & M. Digest, which provides that, in suits against railroads for personal injury or death, contributory negligence shall not prevent a recovery where the negligence of the person killed or injured is of less degree than that of the employees of the railroad company causing the damage complained of; it being provided in such case that the amount of the recovery shall be diminished in proportion to such contributory negligence. This is true because, as was said in the case of *St. L. S. F. R. Co.* v. *McClinton,* 178 Ark. 73, 9 S. W. (2d) 1060, "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."

A verdict should therefore have been directed in favor of appellant, and the judgment in appellee's favor must be reversed, and, as the case appears to have been fully developed, it will be dismissed.

DUDNEY *v.* WILSON.

Opinion delivered November 18, 1929.

Marsh, McKay & Marlin and *Patterson & Rector,* for appellants.

R. E. Wiley, for appellee.

HUMPHREYS, J. This suit was brought by appellants against appellee, in the Second Division of the Chancery Court of Union County, to charge with a trust the one-half interest acquired by him in the east one-half of the northeast quarter of the northeast quarter of section 16, township 17 south, range 16 west, in Union County, Arkansas, under a redemption deed from the State of Arkansas to Mary E. Benton and Susan R. Perry, as sole heirs of W. H. Tatum, deceased.

The gist of the complaint is that, after accepting employment from them to procure the sale of said land by proceedings in the county court of said county provided by statute for sales of sixteenth section lands, and, after filing the petition for that purpose in said court, he redeemed same for the Tatum heirs, under prior employment by them, from the State of Arkansas, that had acquired title thereto under the overdue tax sale in Union County in 1883, upon information acquired by him as to the State's title in the course of his employment by appellants, and thereby defeating or preventing the accomplishment of the purposes for which they employed him.

Appellee interposed the defenses that he accepted the employment to procure a judicial sale of the said land through a mutual mistake that it was a part of the sixteenth section school lands which had never been sold, and that, after filing a petition for the public sale thereof

under his employment, he discovered from an independent source that it was State land acquired under the overdue tax sale of 1883, and land in which he owned an interest by virtue of a contract to recover same for Mary E. Benton and Susan R. Perry as heirs of their father, W. H. Tatum, and that, immediately after making the discovery, he notified appellants of his employment by the Tatum heirs, severed the relationship of attorney and client with them, and redeemed the land for said heirs. The cause was submitted to the court upon the pleadings and testimony introduced by the respective parties, which resulted in a dismissal of appellants' complaint for the want of equity, from which is this appeal.

The record reflects that, at the time of the employment of appellee by appellants, the land in question was not a part of the unsold sixteenth section school lands of the State, but had been sold prior to the Civil War to W. H. Tatum, who allowed it to forfeit for taxes, and that the State acquired title thereto under the overdue tax sale in Union County in 1883.

The testimony is in conflict as to whether the employment was to obtain a public sale of the land provided it was a part of the unsold sixteenth section school lands, or whether broad enough to include the procurement of a public sale thereof if acquired by the State under the overdue tax sale of 1883. Appellee proceeded, however, by petition under § 9104 of Crawford & Moses' Digest, providing for sales of original sixteenth section school lands.

The testimony is also in conflict as to whether, after filing the petition, appellee obtained the information that the State acquired title thereto under the overdue tax sale of 1883 in the course of his employment by appellants, or whether he acquired the information from an independent source.

The testimony is also in conflict as to whether, immediately after discovering the source of the State's title to the land, and that it was the particular land Mary E.

Benton and Susan R. Perry had employed him to redeem for them prior to his employment by appellants, appellee fully revealed all the information he had acquired, and that he at once severed his connection or fiduciary relationship with them. Appellants admit that he told them that the land was not a part of the original sixteenth section school land, and that it was land that he had theretofore been employed to redeem for the Tatum heirs, but they disputed his claim that he severed his fiduciary relationship with them; they also admit that they suggested that he procure a deed to the land from the Tatum heirs to them in order that they might redeem it themselves. Appellee testified that, after revealing the source of the State's title to them and informing them that he intended to redeem the land for his other clients, he agreed to their proposal to get a deed from his other clients to them, provided they would pay his other clients the fair market value thereof, and that they all drove out to view the land in order to determine, if possible, the fair market value thereof; that, after inspecting it, Dudney offered $12,000 for it, stating that he had tentatively sold the land, if they acquired it at the sale, for that sum; that he told Dudney the land was worth from $500 to $1,000 an acre, which price appellants refused to consider. Dudney does not dispute appellee's testimony in this particular. It stands in the record as an undisputed fact. We deem it unnecessary to decide where the weight is as to the disputed facts, as the undisputed fact just related is sufficient within itself to sustain the decree of the trial court. The rule of law governing one under fiduciary relationship or duty is succinctly and tersely stated in the case of *Trice* v. *Comstock,* 121 Fed. 620, as follows:

"Every agency creates a fiduciary relation, and every agent, however limited his authority, is disabled from using any information or advantage which he acquires through his agency, either to acquire property or to do any other act which defeats or hinders the efforts of

his principal to accomplish the purpose for which the agency was established."

Under this rule any violation or miscarriage of the trust must defeat or prevent the purpose of the trust before the principals can follow any property derived therefrom by their agent who claims same. The purpose of the trust in the instant case was that appellants might gain or obtain the privilege of buying the particular land in question at a public sale. This meant that they would have to bid something like the value of the land if they procured it in that way, for the land was valuable as an oil prospect. Appellants were offered the land for the fair market value, and refused to consider the offer. This fact differentiates the instant case from the Comstock case, *supra,* upon which appellants rely for a reversal of the decree of the trial court.

No error appearing, the decree is affirmed.

ROBERTSON *v.* EVANS.

Opinion delivered November 18, 1929.

Rice & Dickson, for appellants.

Duty & Duty, for appellees.

HUMPHREYS, J. This suit was brought in the chancery court of Benton County, on June 28, 1929, by appellants against appellees to recover rents for and damages to a residence property in Rogers, Arkansas, occupied

by appellees from the 4th day of April, 1926, to July, 1928, under deed, which was construed by this court in the case of *Evans* v. *Robertson,* reported in 177 Ark. at page 419, 6 S. W. (2d) 536, to be a mortgage, from which the appellants herein might redeem the property by the payment of the mortgage indebtedness. Reference is made to the case cited for a full statement of facts leading up to the institution of this independent suit for rents and waste.

Appellees interposed the defense of *res judicata* to the independent suit for damages on account of cutting shade trees on the property, and for rents on account of the occupancy of same from August 12, 1927, the date of the original decree in the redemption suit, and tendered the rents from and after that date to July, 1928, when they vacated the property, as the correct balance due them on the mortgage indebtedness.

The cause was submitted to the trial court on the pleadings and testimony adduced by the respective parties, as well as the entire record in the original redemption suit, with the result that the plea of *res judicata* was sustained, and a judgment rendered in favor of appellees for $357.30, balance due upon the mortgage after deducting the rents, which amount was declared a lien against the real estate involved, from which is this appeal.

The only question presented by the appeal is whether appellant's claim for rents and waste was within the issues in the original redemption suit referred to above. Appellants contend that their claim for rents and waste was not pleaded in their original suit for a redemption of the property, and that they were not awarded anything upon their claim for either item in the decree in their redemption suit. Appellants have fully abstracted the pleadings and decree rendered in the redemption suit, the record of which was introduced in this case, but have not fully abstracted the evidence therein. It may be that the issue for rents and waste was presented by the evi-

dence introduced in the redemption suit. The probability is that it was, as appellees herein have abstracted testimony introduced in the original case relative to cutting down the shade trees on the property, and to the effect that they were cut down before the redemption suit was tried in the lower court. The test in determining a plea of *res judicata* is not alone whether the matters presented in a subsequent suit were litigated in a former suit between the same parties, but whether such matters were necessarily within the issues and might have been litigated in the former suit. *Gosnell Special School Dist. No. 6* v. *Baggett,* 172 Ark. 681, 290 S. W. 577; *Cole Furniture Co.* v. *Jackson,* 174 Ark. 527, 295 S. W. 970; *Prewett* v. *Waterworks Imp. Dist. No. 1,* 176 Ark. 1166, 5 S. W. (2d) 735. A suit for the redemption of property necessarily includes any claim for rents on account of the occupancy thereof or waste committed during said time. Rents and waste follow right to redeem property.

Under the rule announced the trial court did not err in sustaining the plea of *res judicata* interposed by the appellants herein to the action for rents and waste brought by appellees.

The decree is therefore affirmed.

WESTERN UNION TELEGRAPH COMPANY *v.* CHAPPELLE.

Opinion delivered November 18, 1929.

[redacted]

Elmer L. Lincoln and *Rose, Hemingway, Cantrell & Loughborough,* for appellant.

DuLaney & Steel, for appellee.

KIRBY, J., (after stating the facts). Appellant insists that, since the telegram erroneously transmitted was an interstate message, there is no liability on its part, since no claim for damages for its erroneous transmission was made in writing within 60 days after it was filed for transmission. It is true that no claim for the damages suffered because of the negligent transmission of the message was presented the appellant company in writing within 60 days after the message was filed for transmission, but it is also true that the appellee had no knowledge or information that the message had not been correctly transmitted, as it was the duty of the appellant company to do, until he went to collect the reduced rent, when due from his tenant, as fixed by him in the message filed and agreed to be paid by the reply thereto, and there was no

intimation of any mistake made in the transmission of the message in the reply thereto received, nor any cause for appellee's making an investigation to ascertain whether appellant company had transmitted correctly the message filed with it, as was its duty to do. Although it is not claimed that appellant company did anything to mislead the appellee, or that it was through its fault that appellee had no information or did not know of the incorrect transmission of the message until the 60 days had passed, but only that appellee is held to a literal application of the 60-day rule of filing his claim for damages, regardless of the fact that he had no intimation that his message had been incorrectly transmitted, resulting in his damage, until after the 60 days for making claim therefor had expired. Having duly received a reply to his message accepting its terms, without any indication therefrom of any mistake made in its transmission, and having no information of any circumstances that might lead a reasonable person to believe that such was the case and make investigation to determine it, he was not bound by the rule to present his claim in writing within 60 days after the filing of the telegram with the company for transmission.

We think a proper interpretation of this rule would allow a reasonable time for presentation of the claim for damages after the fact became known, nor do we understand that it has been held otherwise in *Western Union Telegraph Co.* v. *Czizek,* 264 U. S. 281, 44 S. Ct. 328, or in any other of the Supreme Court's decisions relied upon by appellant, as contended. The claim was presented in writing immediately upon ascertainment of the fact of the incorrect transmission of the message and the suit brought shortly thereafter, and, under the circumstances, we hold that it was presented within a reasonable time, and that appellee's claim is not barred by his failure to comply with the literal terms of the 60-day rule.

The appellant company was the agent of the appellee in transmitting his message making the reduction

in the rent, and he was bound by the mistake made in its transmission or by the terms in which it was delivered to the sendee, and he could not compel the payment of a greater sum than he had agreed in such message to accept for the rent. *Des Arc Oil Mill Co.* v. *Western Union Tel. Co.*, 132 Ark. 335, 201 S. W. 273, 6 A. L. R. 1081.

The testimony of Rae, the tenant, that he would have accepted the reduction and paid the amount of rental as correctly designated in the telegram filed, was not incompetent. He had already agreed and was bound to the payment of a greater amount for rent, and there was nothing unreasonable in his saying that he would have paid the amount designated, and his refusal to pay more than the amount he agreed to pay by accepting the terms of the telegram as erroneously delivered is in no wise contradictory thereof or inconsistent therewith.

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

LICHTY *v.* FAISST.

Opinion delivered November 18, 1929.

I. J. Friedman and *Dean, Moore & Brazil,* for appellant.

G. B. Colvin, for appellee.

KIRBY, J. (after stating the facts). Appellant insists that the court erred in not directing a verdict in his favor, and the contention should be sustained. Appellee

admitted the execution of the conditional sales contract for the machine sold him by Lichty reserving the title to the ice-plant machine until paid for, and default made in the payment, and made no allegation of any defense to the claim for possession further than to deny that appellant was the party from whom he purchased the machine, and entitled to the possession of the property under the contract made. He alleged no defense to the suit, obviously one to collect the balance of the purchase money due under the contract of sale, by way of counterclaim or set-off, as he had the right to do (§ 8654a, C. & M. Digest; *Brunswick-Balke-Collender Co.* v. *Culberson,* 178 Ark. 957, 12 S. W. (2d) 903; *Boddy* v. *Thompson,* 179 Ark. 71, 14 S. W. (2d) 240), and admitted having made default in the payment of the purchase money under the terms of the contract he executed. In other words, he admitted making the purchase of the property, the execution of the conditional sales contract retaining the title by the seller until paid for, having made payments of the purchase money under its terms, and only claimed that it had not been executed to Lichty as it appeared to have been in the signature upon the original contract.

The undisputed testimony showed that Lichty had purchased and paid for the plant or machine sold by him to appellee, that it was invoiced and delivered to the appellee by Lichty under the name of one of his trading companies, and that no one else had any interest in or claim upon the property under the conditional sales contract with appellee at the time of the suit brought, and that appellee had made default in the payments under the contract warranting the recovery of the property in the replevin suit by the owner for the collection of the balance of the purchase money due.

The court should have granted a peremptory instruction in appellant's favor, and for his failure to do so the judgment will be reversed, and the cause remanded with directions to enter a judgment for appellant for the possession of the property or its value, the amount of

the purchase money still due under the sales contract. It is so ordered.

HILL *v.* BUSH.

Opinion delivered November 18, 1929.

Roy D. Campbell, for appellant.

Ross Mathis, for appellee.

MEHAFFY, J. The appellee brought this suit to recover from appellant $1,384.03, which he alleged was due him from appellant, and also to require the appellant to surrender the note executed by W. J. Loveless and indorsed by appellee.

The facts, briefly stated, are as follows: In 1922 W. J. Loveless was indebted to S. M. Bush, appellee, in the sum of $1,384.03. Loveless at that time was indebted to F. P. Hill, appellant, in the sum of $1,285.80. Loveless was also indebted at that time to the First National Bank in the sum of $1,991.41. Appellee was indorser on the note of Loveless to appellant.

On January 3, 1922, an agreement was entered into by Loveless, Bush, Hill and the First National Bank. This agreement of the parties was that Loveless and his wife should execute notes to F. P. Hill, and, to secure the payment of these notes, was to execute a deed of trust to F. L. Maxwell, trustee for F. P. Hill, for the sum

of $4,612.44, the amount of the three debts owing by Loveless. Bush was to be relieved as indorser on the Loveless note, and his note was to be delivered to him. The notes and deed of trust were executed and delivered to Argo, who delivered them to Hill, and the deed of trust was thereafter recorded.

In August, 1922, suit was brought in the Woodruff Chancery Court by Loveless and wife to cancel the deed of trust on the alleged grounds of fraud practiced by Argo and Hill. Hill was made a party, and served with summons, but failed to appear, and a decree was entered canceling and setting aside the deed of trust. The property conveyed by the deed of trust was the homestead of Loveless and his wife, and was worth approximately $6,000. Shortly after the decree setting aside the mortgage, Loveless and wife sold the property for $6,000. The appellee, Bush, did not know of the suit to cancel the mortgage until after the decree and after the property had been sold. After he found out that the deed of trust had been canceled, and that Loveless and his wife had sold the property, he began this suit to collect his debt from Hill, and to require Hill to surrender his note. Loveless was insolvent.

The object of the parties in entering into the agreement was to obtain security or a deed of trust on the home belonging to Loveless to secure the debts due them. Bush, the appellee, desired to be relieved from his liability as indorser on Loveless' note to Hill, and to secure the payment of the $1,384.03 due him. Hill desired to get security for the $1,285.80 due him, and the bank desired to get security for the $1,991.41 due it. It appears that the amount due Hill was stated as $1,237, when the actual amount due him was $1,285.80, and his contention is that he never consented to accept the notes as made, and that for that reason the agreement never went into effect. The court found in favor of appellee in the sum of $1,384.03 and interest from January 3, 1922, at 10 per cent. per annum, and canceled the note on which appellee was indorser.

It is earnestly insisted that the suit brought in chancery court to cancel the deed of trust could not affect the interest of Bush because he was not made a party to that suit, as he was a holder of one of the notes, and that he therefore had his remedy against the property conveyed in said deed of trust. We cannot agree with appellant in this contention. The notes were made to F. P. Hill, and the deed of trust was made to F. L. Maxwell, trustee for F. P. Hill. Bush's name is not mentioned in the deed of trust. The deed of trust was executed by Loveless and wife to F. L. Maxwell, trustee for F. P. Hill.

Appellant contends that, since Bush was not made a party, he was not bound, and argues that the parties necessary to a foreclosure suit should have been made parties to cancel the deed of trust.

Section 1092 of C. & M. Digest provides, among other things, "that a person with whom or in whose name a contract is made for the benefit of another * * * may bring an action without joining with him the person for whose benefit it is prosecuted." It seems clear that, under this section, to foreclose under the deed of trust, the parties plaintiff would have been Maxwell, trustee, and Hill, and the parties for whose benefit the contract was made would not have been necessary parties. In the suit to cancel the deed of trust Bush was not a necessary party. His name is not mentioned in the deed of trust. The deed of trust was made to Maxwell, trustee for Hill, and the suit to cancel the deed of trust was based on the alleged fraud and deceit by Hill. He was made a party to the suit, summons was served on him, and the decree in that case recites that Maxwell and Hill, though duly served with summons, make default. No defense was made to the suit by Maxwell or Hill. Hill was one of the largest stockholders in the bank, and it appears from the record that, as a compromise or agreement with the bank, the bank was paid $1,000 by Loveless when this deed of trust was canceled, or when the property was sold.

It is argued that the necessary parties to the suit were the same as they would be in a foreclosure suit. That is, all persons having either an equitable or legal interest and all who are entitled to the money must be before the court. And appellant calls attention first to *Smith* v. *Richardson*, 32 Ark. 297. In that case the court held that, in a bill to foreclose a mortgage after the death of the mortgagor, the heirs were necessary parties. But that was a case where the mortgagor, after the execution of the mortgage, had died, and the suit was against the administrator, and not against the heirs. The court said that, in a bill to foreclose, the heirs of the deceased mortgagor should be made defendants, or some excuse for not making them defendants should be shown. This case has no application to the facts in the instant case, and moreover the statute above referred to authorizes a suit to foreclose by the party in whose name the contract is made.

Appellant next calls attention to *Boyd* v. *Jones*, 44 Ark. 314, in which the court held, citing the section of the Digest which provides that every action must be prosecuted in the name of the real party in interest, except, etc., that this section was not to apply to cases where the trustee or fiduciary might have sued in his own name before the act. The court further said: "If the object of the bill were to recover the fund with a view to its administration by the court, the parties interested must be represented. But it merely seeks to recover the trust moneys so as to enable the trustee to distribute them hereafter agreeably to the trust declared. It is therefore unnecessary to bring before the court the parties beneficially interested."

The next case to which attention is called by the appellant is *Howell* v. *Walker*, 111 Ark. 362, 164 S. W. 746. In that case the court simply held that the trustee in a mortgage on land is a necessary party to a foreclosure proceeding. Here, in the suit to cancel the deed of trust, the trustee was made a party.

Neither of the cases referred to by the appellant is applicable here.

It is next contended by the appellant that the agreement was not consummated. This is purely a question of fact. While the appellant himself testified that the note for him was not for as great amount as it should be by approximately $60, yet the evidence shows that the notes and deed of trust were delivered to him, were recorded, and he himself says that it would have been perfectly all right if they had paid him the difference, and his contention is that he did not accept it, or, if he did at all, it was conditional upon Bush paying him the difference.

According to the testimony of appellee's witnesses, the agreement was consummated, the deed of trust executed securing appellee, and the undisputed proof shows that Loveless was insolvent, and that the decree canceling the deed of trust was entered, and the property actually sold by Loveless before the appellee ever knew anything about the suit.

We have not set out the evidence in detail, but we have carefully considered the entire evidence, and have reached the conclusion that the finding of the chancellor is supported by a 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. *Turner* v. *Adams*, 178 Ark. 67, 10 S. W. (2d) 11; *Fort Smith* v. *Norris*, 178 Ark. 399, 10 S. W. (2d) 861; *Barton* v. *Hardin*, 178 Ark. 432, 10 S. W. (2d) 878; *First National Bank* v. *Tate*, 178 Ark. 98, 13 S. W. (2d) 587; *Lynn* v. *Quillen*, 178 Ark. 1150, 13 S. W. (2d) 624; *Henry* v. *Erber*, 175 Ark. 641, 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; *Ferguson* v. *Guydon*, 148 Ark. 295, 230 S. W. 260.

Having reached the conclusion that the finding of fact by the chancellor is sustained by a preponderance of the evidence, the decree is affirmed.

MISSOURI PACIFIC RAILROAD COMPANY *v.* BERRY.

Opinion delivered November 18, 1929.

Thomas B. Pryor and *Harvey G. Combs,* for appellant.

J. H. Black, for appellee.

MEHAFFY, J. On October 16, 1928, the appellee filed suit in the justice court in Marion County, Arkansas, alleging that, on the second day of May, 1928, the railroad company recklessly, carelessly and negligently ran over and killed a bird dog belonging to appellee of the value of $100. It was alleged that the dog was killed about 11 o'clock in the forenoon of said day. After judgment in the justice court an appeal was taken to the circuit court.

The defendant filed a motion to require the complaint to be made more definite and certain and, among

other things, requested that he be required to state the direction and character of the train which struck plaintiff's dog. It stated that it could not prepare its defense until it knew what day the dog was killed, the time of day and the direction of the train and character of the train, whether passenger or freight. It alleged that it had several trains passing this point, and, without this information, it could not possibly be apprised of its defense.

The court overruled the motion, and appellant then filed an answer, denying all the material allegations of the complaint.

James Smith, a witness for the plaintiff, testified that he lived about 100 yards from the railroad. He had been a locomotive engineer for 32 years, but, at the time of testifying, he lived about one-half a mile northwest of Summit, and about 100 yards from the railroad. He had in his possession the dog that belonged to appellee, and had had it for about seven months. It was killed on the railroad. Witness found it along the track in a cut about one-fourth mile from his house. The cut was 1,200 feet long, cut through stone. The dog was found about 750 feet from the south end of the cut. The back part of its body was broken, its hips skinned, and there was blood on the ties. The cut at that place is about 20 or 25 feet high. This witness saw the dog about seven or seven-thirty in the morning when he left, and when he came back he found the dog about two or three o'clock in the afternoon. This witness did not know the exact date the dog was killed; did not remember whether it was May or June.

The appellee testified that the dog was killed about the first of May; he did not remember the exact date, but said he had filed a claim with the railroad company after the dog was killed which showed the exact date. He knew nothing about the killing of the dog. He testified that its market value was $100.

The engineer, Reedy, testifying for the appellant, said he was running an engine on the second day of May,

but he did not remember whether he was going north or south. He did not believe that he killed any dog. He saw some kind of a dog, which he did not think was a bird dog, but he did not think the train hit him. He testified he was keeping a proper lookout, and that it would have been impossible to stop the train and prevent the killing of the dog, but said he did not kill this dog. The dog was brown color, and he did not think it was a bird dog.

Another engineer, C. H. Jenkins, testified that he was an engineer for the Missouri Pacific, and had had experience both as engineer and fireman, and had seen many dogs, and hogs too. When you pass them in a cut, often the engine gets by, they get scared and try to get away, and go under the train. Witness has seen them jump in front of the train, and has also seen the engine hit them. This witness, however, did not testify anything about running a train at that place or at that time.

There was a verdict for $50 for the appellee, and appellant filed a motion for a new trial, which was overruled, and he prosecutes this appeal to reverse the judgment. While his motion for a new trial states several grounds, appellant only argues two. One of his grounds is that the evidence is insufficient to entitle appellee to recover, and the other is that the court erred in overruling his motion to make the complaint more definite and certain.

We think the testimony that the dog was found in a cut like the one described by witnesses, with his hips skinned and his back broken, and that blood was found on the ties, was sufficient to submit the question to the jury as to whether he was killed by the running of the train. And while the defendant said it ran several trains by there, the engineer who testified as to operating a train evidently was not operating the engine that killed this dog, and there was therefore no testimony showing that, at the time this dog was killed, the railroad company was exercising any care at all. The fact is that there is no testi-

mony from any employee operating the train at the time the dog was killed. If the dog was killed by the operation of the train, as the jury found, this made a *prima facie* case, and was sufficient to take the case to the jury, unless the railroad company offered some evidence that it was at the time in the exercise of care and did not negligently kill the dog. There is no such testimony in the record.

Appellant's next contention is that the court erred in overruling its motion to make the complaint more definite and certain. The complaint stated that it was on the second day of May, about 11 o'clock in the forenoon. This was certainly sufficient to enable the appellant to prepare for its defense. No one saw the dog killed, and it was therefore impossible for the plaintiff in his complaint to state what train killed him or what direction it was going. The appellee, however, testified that, while he was not sure of the time, he thought it was the first of May, but that, after the killing he notified the railroad company, and gave them the exact date when the dog was killed. It was true the witness Smith testified that he did not know whether it was May or June, but there was no objection to this testimony, and the testimony of the appellee himself makes it plain that it was the time alleged in the complaint, the second of May, and evidently between 7:30 in the morning and 3 in the afternoon. The railroad company had this information, and had it in time to make investigation and determine what witnesses it needed to show the operation of its train during those hours.

This is just a question of the sufficiency of the evidence, and we think the circumstances testified to are sufficient to connect the killing of the dog with the running of the train. Of course, the finding of a dog dead near the track would not of itself raise a presumption of negligence, but when the dog is found by the track with his back broken, his hips skinned and blood on the ties, we think this is sufficient from which the jury might conclude that the dog was killed by the operation of the

train, and, since there is no evidence by the persons who operated the train that killed this dog tending to show that they were in the exercise of care, the judgment must be affirmed. It is so ordered.

SPENCER *v.* JOHNS.

Opinion delivered November 18, 1929.

E. D. Chastain, for appellants.

Dave Partain and *C. M. Wofford,* for appellees.

McHANEY, J. This is an appeal from an order of the chancery court requiring each party to pay his own costs in this litigation.

It appears that appellants were about to close a public road, and, on petition of appellees, they were temporarily enjoined from so doing. An agreement was entered into by appellants granting a thirty foot right-of-way across their lands, and appellees agreed to dismiss that suit, each party to pay half the costs. Before a dismissal was actually entered, appellants built a fence up the center of the road. Thereupon appellees filed an information for contempt. A temporary restraining order

was issued. There was a hearing before the chancellor, and it developed that, between the time of the filing of the information and the hearing, appellants had widened the road, and were not in contempt of court. On motion to tax the costs, the court entered an order requiring each party to pay his own costs.

As appellants admit, courts of equity have a wide discretion in the matter of taxing costs against litigants, and this court will not reverse unless it be shown that the court has abused its discretion or acted arbitrarily. We are unable to say from the record presented that there has been a sufficient showing made to justify us in setting aside the action of the court in taxing the costs to each of the parties which they had incurred.

Affirmed.

FEDERAL LAND BANK OF ST. LOUIS *v.* RICHLAND FARMING COMPANY.

Opinion delivered November 18, 1929.

W. H. Bengel, for appellant.
Oliver & Oliver, for appellee.

BUTLER, J. G. W. King was indebted to the appellant on the first day of February, 1923, in the sum of $3,700, bearing interest at the rate of 5½ per cent. per annum, evidenced by his promissory note of that day, payable in sixty-nine annual installments, and, to secure same, on the 22d day of February, 1923, executed and delivered to the appellant his mortgage, conveying to it a farm containing 240 acres of land in Clay County, Arkansas. G. W. King was also indebted to the appellee company in the sum of $2,700, evidenced by his promissory note for that sum, and executed, on April 2, 1923, his mortgage on the same lands as that contained in his mortgage to the appellant bank to secure said note, which mortgage, however, stipulated that it was subject to the prior mortgage aforesaid.

The facts in this case are not in dispute, and such as are necessary for the determination of the questions presented may be briefly stated as follows: The semi-annual payments due appellant were promptly made each year down to and including the payment due in August, 1928, which payments were made by G. W. King, the mortgagor, and by the appellee company. Just which of the payments were made by the appellee company is not shown. During the years 1924, 1925, 1926 and 1927 the appellant bank made an inspection of the records of the collector of revenue in order to ascertain if the taxes due on the lands were being regularly paid, and also (the lands being embraced in a drainage improvement district) to ascertain if the drainage assessments were being paid, there being a stipulation in the mortgage executed by King to it that, should the mortgagor fail to pay the taxes and assessments, the mortgagee might, at its option, declare the entire debt due and proceed to foreclose its mortgage.

The taxes and drainage assessments were regularly paid each year for the years 1924, 1925, 1926 and 1927. The records kept by the collector of revenue showed the taxes for all of said years were paid by the mortgagor,

G. W. King, and that the drainage assessments for the years 1925 and 1926 were paid by the same party, and for the years 1924 and 1927 were paid by the appellee. The receipts issued by the collector correspond with the records. While the records and receipts showed payment of taxes and assessments for all of said years, except the assessments for the years 1924 and 1927, were being paid by the mortgagor, King, they were in fact being paid by the appellee company, which, during that time, was collecting from the mortgagor various sums and applying same to the indebtedness due it by said mortgagor. It collected and made application as aforesaid the sum of $670 on January 1, 1924, $480 January 1, 1925, $160 July 1, 1928, and $225.58 January 1, 1929. This last credit was for rents for the year 1928 collected and appropriated by the appellee company; from what source the prior credits were obtained by appellee is not shown.

The appellant bank had no actual notice prior to December 15, 1928, that the taxes and drainage assessments had been paid by the appellee. In January, 1929, appellee brought this suit, alleging that it had paid the taxes and drainage assessments aforesaid to protect the lien in its favor; that said taxes and assessments constituted liens on the land paramount to the rights of the appellant, and prayed for subrogation, judgment, foreclosure, *et cetera.* To this complaint the appellant filed its answer, and afterward the appellee filed a response thereto.

Upon these pleadings and agreed statement of facts the case was submitted to the court. The court found by its decree that the appellee was entitled to be subrogated to the State and drainage district liens for taxes and assessments, gave judgment for the amounts of said items paid by the appellee company, less $225, rents collected for the year 1928, *et cetera.* The total amount of general taxes paid by the appellee company for the years above mentioned was $138.94, the total amount of drain-

age assessments for said years $1,120, which sums, together with interest, amounted to $1,466.33, from which the court deducted the item of $225 rents collected in 1928, leaving a balance of $1,241.33, for which judgment was given and declared to be prior and paramount to the lien of the appellant. From that decree both parties prosecute this appeal.

The appellee, plaintiff below, brought his action on the theory that it was obliged, in order to protect its interest, to discharge certain general taxes and drainage assessments due on the lands included in the mortgage given to the appellant bank and to it, and is therefore entitled to be subrogated to the paramount liens of the State and drainage districts in the amounts of the taxes and assessments paid by it. Undoubtedly a junior mortgagee who in good faith pays taxes due to protect his lien may be subrogated to the State's lien therefor and recover the amount paid, even as against the prior mortgagee. *Ringo* v. *Woodruff,* 43 Ark. 469; *Lester* v. *Richardson,* 69 Ark. 198, 62 S. W. 62. But, as the doctrine of subrogation was evolved by courts of equity for the prevention of injustice, it is administered not as a legal right, but the principle is applied to subserve the ends of justice, and to do equity in the particular case before the court. Therefore no rule can be laid down for its universal application, and whether it is applicable or not depends upon the particular facts and circumstances of each case as it arises, and is subject to that most ancient maxim, "he who seeks equity must do equity."

A consideration of the nature and purposes of this benevolent creation of the courts of equity and a comparison of its principles with the inferences implied in the facts of the instant case make it apparent that it can have no application here. *Flowers* v. *Bricker,* 178 Ark. 764, 12 S. W. (2d) 394. In all the cases cited by the appellee there was no element of *mala fides,* but this cannot be said of the case now before us. While the appellee, perhaps, was not motivated by a conscious intention to

deceive the senior mortgagee and thereby gain an advantage, yet such was the necessary result of its conduct. There was a concealment, whether intentional or not, of an important fact, namely, that the mortgagor was not in fact the person who was discharging the taxes and drainage assessments, and the appellant was, because of this, lulled into a sense of security, and prevented from exercising its judgment as to what procedure it would take to protect its own interests. On account of its lack of knowledge of the default, and, further, by reason of the semi-annual payments made by King and the appellee, it was deceived into the belief that its security was unimpaired except from natural causes, and that it had no right to ask for a foreclosure of its mortgage if it so desired. During this time, and while the appellant was unaware of the true situation, appellee was making use of its superior opportunities and collecting yearly sums materially lessening its debt, and, judging by its subsequent conduct, was attempting to secure by a lien superior to that of the appellant the sums it was yearly paying in taxes and drainage assessments, while all the time the security was depreciating in value—so much so that, while at the date of the giving of the two mortgages to the appellant and the appellee, it is probable it was thought ample security for both, it now is worth less than the appellant's debt and the taxes and assessments for the years for which appellee has made payment. Appellee knew the mortgagor was not discharging the general taxes and assessment liens, and the appellant did not; if it thought appellant, as senior mortgagor in that state of the case, was obligated to pay the taxes, it certainly ought to have notified it of the delinquency and given it the opportunity to do so. Instead of this, it voluntarily assumed the burden.

Appellee argues that the appellant bank was not misled, because an examination of the record of the collection of drainage assessments for 1924 and 1927 would have disclosed the fact that the payments of the assess-

ments for those years were made by it, and not by the mortgagor, King. A sufficient answer to this contention is that in the year 1924 appellee secured from some source and by some means a payment of $670, and the regular tax records showed the payment of the general taxes by King, and, as the assessments for the following years, 1925 and 1926, were shown by the records to have been paid by King, appellant might have reasonably concluded that there had been some understanding between appellee and King for this payment; especially as the semi-annual payments of its accrued interest and principal were paid by King and the president of the appellee company, and because no complaint was made of the mortgagor's failure to make the assessment payment for that year. What is said of the 1924 payment of the drainage assessment applies to that of the year 1927, for, from all of the information available, the appellant might have naturally assumed that, if the appellee was paying these two assessments in an honest effort to protect its lien, it would have given notice of some kind to the appellant bank. When the appellant made examination of the tax records and found the general taxes for each year paid by the mortgagor, it must have assumed that the drainage assessments were also paid by him, as it had no actual knowledge otherwise until December 15, 1928.

The appellee also contends that the falsity of the records was the act of the collector of revenue, for which it ought not to be held responsible. While the actual notation was the act of the collecting officer, still the appellee must have known of this, as the receipts issued and delivered to it contained the false statement of the record, viz., that the taxes and assessments were paid by King. It is also reasonable to presume that the appellee not only knew, but directed the receipts to be made in the name of King; for one does not usually accept payment by one person and issue the receipt to another without some authority for so doing.

The decree is reversed, and cause remanded, with directions to enter a decree conforming to this opinion.

CUSH *v.* STATE.

Opinion delivered November 18, 1929.

[redacted]

June R. Morrell, for appellant.

Hal L. Norwood, Attorney General, and *Pat Mehaffy,* Assistant, for appellee.

BUTLER, J. Appellant was tried and convicted on a charge of larceny, and the testimony adduced by the State tended to establish the following facts:

On an afternoon in the cotton picking season, a wagon containing about 1,000 pounds of cotton in the seed was left standing in the field of the owner, and early in the morning of the day following it was discovered that the wagon had been emptied during the night, and its contents carried away. There were a number of horse tracks at the wagon, which, on being followed, led to

the house of one Martin Roberts, some distance away. On the porch of this house a large pile of cotton was found, which had been placed there by several persons during the preceding night, without Roberts, who was in bed, knowing who they were. During the night several persons were seen with horses loaded with sacks of cotton about a mile and a half from Martin Roberts' and going from the direction where the cotton had been in the wagon and toward Roberts' house. On the same day an officer, having obtained information that appellant was one of the persons who had stolen the cotton, arrested appellant at his house, which was in the neighborhood of Roberts' house, and of that where the cotton had been carried away.

The officer making the arrest testified, without objection, that at the time of the arrest, or shortly after, appellant stated that he had gone horseback on the second trip with others, and that he had brought back 169 pounds of seed cotton which was weighed by Roley Roberts, Martin's son. Appellant further said that he hated to be in trouble, but it looked like he was. This statement was made at or shortly after appellant was arrested, and either at his house or just after he got into the officer's car.

One witness testified that seed cotton at the time was worth "5, 6 or 7 cents" per pound.

Several grounds for reversal are presented by appellant, which will be stated and discussed in the order presented by appellant in his brief.

■ That there is no testimony to show that the cotton on the porch of Martin Roberts is the cotton that was missing, and that the testimony regarding appellant's confession was incompetent because it was not shown that the confession was free and voluntary; that, as there is no other evidence tending to connect the appellant with the commission of the crime, the court erred in submitting the case to the jury.

The evidence was sufficient to lead to the reasonable inference that the crime was committed, and that the cotton found on the porch of Martin Roberts was the cotton which had been stolen; the wagon was found emptied of its contents; the tracks of horses were found leading from there to the house of Roberts; persons were seen on the night of the larceny with horses loaded with sacks of cotton going from the direction of the wagon towards the home of Roberts, and when Roberts went to bed he had between 75 and 150 pounds of cotton on his porch, which grew during the night to 1,031 pounds. As stated, this evidence, while wholly circumstantial, was amply sufficient to warrant the inference that it was the identical cotton taken from the wagon found on the porch of Martin Roberts, and that the crime had been committed by some one. This, with the appellant's confession, if competent, was sufficient to support the verdict. Crawford & Moses' Digest, § 3182; *Melton* v. *State,* 43 Ark. 367; *Johnson* v. *State,* 135 Ark. 377, 205 S. W. 646; *Standridge* v. *State,* 169 Ark. 294, 275 S. W. 336.

An examination of the record discloses that appellant did not object to the testimony of the officer to whom the confession was made, but cross-examined him relative to the time and place and substance of the confession. If the question of the voluntary nature of appellant's confession had been raised, undoubtedly the burden to show its free and voluntary character would have rested upon the State. *Hall* v. *State,* 125 Ark. 263, 188 S. W. 801; *Fenn* v. *State,* 127 Ark. 204, 191 S. W. 899. But the appellant permitted the testimony to go unchallenged either by objection or motion to exclude it from the jury's consideration, and is not now in position to complain because of it. *Harding* v. *State,* 94 Ark. 65, 126 S. W. 90; *Warren* v. *State,* 103 Ark. 165, 146 S. W. 477 Ann. Cas. 1914B, 698; *Howell* v. *State, ante* p. .....

Moreover, the circumstances surrounding the confession were such as to have justified the jury in the conclusion that the statement of appellant connecting himself

with the larceny was the free and spontaneous disclosure of the facts, which he doubtless felt were already known to the officer. This question was fairly presented to the jury in an instruction by which it was told that it must find, before it could consider the alleged confession, that same was in fact made, and was the one repeated by the witness, and was in fact the truth; that the confession was made voluntarily, and that, in order to be so, it must have been made without hope of reward and without fear of punishment. In the same instruction the jury was told that the burden was upon the State to show that such confession was voluntarily made.

In view of this instruction, the presumption is that the jury must have found from the circumstances surrounding appellant's confession that it was free and voluntary. *Logan* v. *State,* 150 Ark. 489, 234 S. W. 493.

■ Appellant insists that, even though the evidence might be sufficient to warrant a verdict of guilty, the crime proved was petit larceny only, because the value of the cotton stolen did not exceed $10. Appellant is mistaken. First, the evidence was to the effect that cotton was worth from 5 to 7 cents; the jury was at liberty to accept any figure between the minimum and maximum value, and was justified in its finding of more than $10 in value. Besides, it is manifest that, on the trip appellant confesses he made, he was criminally responsible, not only for the cotton actually carried away by himself, but also for that asported by his fellow thieves, which was largely in excess of the minimum for grand larceny.

■ Appellant complains of the variance between the indictment and the evidence, in that there was no evidence to show one of the persons, L. B. Anderson, in whom joint ownership of the cotton was laid, had any interest in it further than a landlord's lien for rent; and that instruction No. 2, given by the court, in which the jury was told, if it found defendant stole cotton, the property of L. B. Anderson and others named in the indictment, was erroneous and prejudicial. Again appellant

is mistaken. The proof is positive that Anderson and the others each had an undivided one-fourth interest in the cotton, and each were to have one-fourth of the proceeds when sold.

Lastly, appellant assigns as error the giving by the court of a part of instruction No. 7, which is as follows: "You are instructed that it is competent to convict upon circumstantial evidence as upon positive testimony. Positive testimony is that of eye-witnesses, witnesses who testify as to the transaction that show the guilt or innocence of the defendant. Circumstantial evidence is evidence of circumstances by which guilt or innocence is proved or disproved." The portion of the instruction which follows is the part of which complaint is made. "In so far as the evidence is circumstantial in this case, to convict the defendant it is necessary that the circumstances not only point to and be consistent with the guilt of the defendant, but should be inconsistent with his innocence." It is said by appellant: "This part of the instruction, in effect, told the jury that there was circumstantial evidence in the case, for it says 'in so far as the evidence is circumstantial in this case,' it is necessary that the circumstances not only point to his guilt * * *. It was a matter solely for the jury to determine as to whether there had been any evidence of a circumstantial nature introduced, but the court told them there is circumstantial evidence."

While not approving the phraseology of the instruction as a whole, we are of the opinion that a fair consideration of the phrase, "in so far as the evidence is circumstantial," does not justify the construction placed upon it by the appellant, namely, that by it the court told the jury that "there is circumstantial evidence." The introductory words, "in so far," implies a conditional statement, which may or may not be true. And the court by the expression only meant to say, whatever circumstances are proved, these should be considered and weighed by the rules announced. The court did not say

there were circumstances proved, but that, whatever were shown, they must point to his guilt and be inconsistent with his innocence. The court had already told the jury the burden was upon the State to prove the defendant guilty beyond a reasonable doubt, and no prejudice could have resulted. *Carr* v. *State,* 81 Ark. 589, 99 S. W. 831.

The judgment is affirmed.

MISSOURI PACIFIC RAILROAD COMPANY *v.* WILLIAMS.

Opinion delivered November 25, 1929.

Thos. B. Pryor and *H. L. Ponder,* for appellant.

C. E. Yingling, for appellee.

HART, C. J., (after stating the facts). It is first earnestly insisted that a verdict should have been directed in favor of appellant. The suit was brought under the provisions of section 8568 of Crawford & Moses' Digest, commonly called the lookout statute. It was the

contention of appellee that the appellant was negligent in failing to keep an efficient lookout as required by the statute, and in failing to give the statutory warnings for the approach of the train to the public crossing. Under Crawford & Moses' Digest, section 8568, providing that, if any person or property shall be killed or injured by the neglect of any employee of any railroad to keep a lookout, the company shall be responsible, notwithstanding the contributory negligence of the person injured, where, if such lookout had been kept, the employee could have discovered the peril of the person injured in time to have prevented the injury, it was held that the protection applies to property damage as well as to personal injury, and that, in the case of an injury to property, the contributory negligence of the owner is not a bar to a recovery. *Huff* v. *Mo. Pac. Rd. Co.,* 170 Ark. 665, 280 S. W. 684; *Blytheville, Leachville & Arkansas Southern Ry. Co.* v. *Gessell,* 158 Ark. 569, 250 S. W. 881; and *Kelly* v. *DeQueen & Eastern Rd. Co.,* 174 Ark. 1000, 298 S. W. 347.

Under the evidence, viewed in the light most favorable to appellee, the latter was traveling south along a public highway parallel with the railroad, and started to cross at a grade crossing in the town of McRae from west to east. On the west side of the track, some distance north of the crossing, there were two toilets on the right-of-way of the railroad. Weeds extended from these toilets nearly up to the rails of the track of the railroad company. The weeds were six or eight feet in height, and, together with the toilets, obstructed the view of an approaching train from the north so that he could not see an approaching train until he was nearly on the track. According to the testimony of appellee, he looked up and down the track for an approaching train before attempting to go on the crossing. His sense of hearing and his sense of sight were both normal. He was traveling at a very low rate of speed, of from three to five miles an hour, and did not see or hear any approaching train.

There was a cut about one-half mile north of the crossing which would prevent him seeing an approaching train until after it had run out of the cut on its way south. Appellee and two witnesses for him all testified that it was a clear, bright day, and that the statutory signals for the public crossing were not given. Two of the witnesses were looking at the approaching train, and said that the bell was not ringing, and that the whistle was not blown for the crossing until the train was within fifty or sixty yards of it. It is true that their testimony is contradicted by that of the engineer and that of the fireman, but it was within the province of the jury to find these disputed questions of fact in favor of the appellee. The jury might have found that the fireman and engineer were negligent in not giving the proper statutory signals for the crossing, and that, if they had been keeping an efficient lookout, they could have seen appellee in time to check the train, and thereby avoid demolishing the automobile.

It is next insisted that the court erred in giving instruction No. 2, which reads as follows:

"You are instructed that it is the duty of all persons running trains in this State, upon any railroad, to keep a constant lookout for persons or property upon the track of any and all railroads; and if any property shall be injured by the negligence of any employee of any railroad to keep such lookout, the company owning or operating any such railroad shall be liable and responsible for all damages resulting from negligence to keep such lookout, notwithstanding the contributory negligence of the person injured, where, if such lookout had been kept, the employee or employees in charge of such train of such company could have discovered the peril of the person injured in time to have prevented the injury, by the exercise of reasonable care after the discovery of such peril, and the burden of proof shall devolve upon such railroad to establish the fact that this duty to keep such lookout has been performed."

It is claimed that the instruction was misleading and prejudicial in the use of the phrase, "notwithstanding the contributory negligence of the person injured," since appellee was not at all injured in his person. It is the settled rule of this court not to reverse a judgment except for errors prejudicial to the rights of the appellant. This suit was not brought to recover compensation for injuries to the person of appellee. It was founded entirely upon the destruction of his automobile. The whole instruction is to be read together, and it is perfectly plain that the use of the words just quoted refer to the contributory negligence of the person injured in his property. Under the statute the railroad may be liable for injury to persons or property, notwithstanding the contributory negligence of the person receiving bodily injury or being injured in his property. We do not think that this assignment of error is well taken, and cannot perceive how appellant could have been in any sense prejudiced by the giving of the instruction.

Other errors are assigned, both as to the giving of instructions at the request of appellee and the refusing of others asked by appellant. We do not deem it necessary to set out any of these instructions. The court fully and fairly submitted the issues arising from the conflict of evidence under the principles of law decided in the cases above cited and many others which might be cited. The instructions asked by appellant and refused by the court were either covered by other instructions requested by appellant or the instructions were misleading on account of the language used in them.

We have carefully considered the assignments of errors set out, and find nothing therein prejudicial to the rights of appellant. The judgment is therefore affirmed.

STROUD *v.* HENDERSON.

Opinion delivered November 25, 1929.

Duty & Duty and *McGill & McGill,* for appellant.

Paul Anderson and *John W. Nance,* for appellee.

HART, C. J., (after stating the facts). Under our view of the law, the issues raised by the appeal have been settled by the construction already placed by this court under § 1716 of Crawford & Moses' Digest, which 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 by him kept for that purpose; and no transfer of stock shall be valid as against any creditor of such stockholder until such certificate shall have been deposited."

This court has several times held that the transfer of stock referred to in this section is the absolute transfer of the legal and equitable title to the stock, and not pledges or liens by way of collateral security. *Batesville Telephone Co.* v. *Myer-Schmidt Grocer Co.,* 68 Ark.

115, 56 S. W. 784, and *Hudson* v. *Bank of Pine Bluff,* 75 Ark. 493, 87 S. W. 1177. In the latter case the court was asked to overrule its holding in the case first cited, and declined to do so. The court said that the prior case was well briefed on both sides, and all authorities bearing on the question had been cited and considered. Therefore the court adhered to the construction given the statute in the Batesville Telephone Company case.

Again, in the case of *Loeb* v. *German National Bank,* 88 Ark. 108, 113 S. W. 1017, the court said that the section of the statute providing for the recording of the transfers of corporate stock with the county clerk does not apply to transfers for collateral security, but only to absolute sales.

In the case at bar the record shows an absolute transfer of stock by H. L. Stroud to his wife, Sallie R. Stroud, and there was no attempt to comply with the provisions of § 1716 of the Digest.

In *Scott* v. *Houpt,* 73 Ark. 78, 83 S. W. 1057, this identical question came before the court for consideration and determination. It was held by a divided court that a transferee of corporate stock, the transfer of which had not been deposited with the county clerk, as required by the statute, could not hold the stock as against attaching creditors of his transferrer, although such creditors had notice of the transfer prior to the completion of their levies, and prior to a sale under judgment rendered in the attachment suit. Judge BATTLE wrote a dissenting opinion, in which he wanted to apply the same rule that had been applied with regard to pledges of stock as collateral security in the opinion prepared by him for the court in the Batesville Telephone Company case.

Before the opinion of the Supreme Court was delivered in *Scott* v. *Houpt,* 73 Ark. 78, 83 S. W. 1057, the question came before Judge ROGERS in a case arising in a circuit court of Arkansas. The learned Judge said that, after most careful consideration, he had

reached the conclusion that the language of the statute was so certain as to prohibit the court to place any interpretation upon it than to hold that a shareholder could not, by absolute sale, transfer any stock so as to affect the rights of his creditors without complying with the terms of the statute. Judge ROGERS pointed out that the statute was out of harmony with most of the statutory law on the subject in the various states, but said that, while this was true, it was the province of the court, not to amend the statute, but to interpret and enforce it. *Fahrney* v. *Kelly* (C. C.), 102 Fed. 403.

The opinion in the case of *Scott* v. *Houpt,* 73 Ark. 78, 83 S. W. 1057, which was delivered on November 19, 1904, has been generally recognized by the bench and bar as the existing law on the subject until the passage of the Uniform Stock Transfer Act by the Legislature of 1923. See Acts of 1923, p. 358, and Castle's Supplement to Crawford & Moses' Digest, 716a *et seq.* Therefore the decision of the chancery court was correct.

Under the authority of the cases above cited, the transfer of the stock of H. L. Stroud in the Rogers Wholesale Grocery Company to his wife, Sallie R. Stroud, did not become effective as to his creditors because the terms of § 1716 of the Digest had not been complied with. We are not concerned with the reason of the statute. It has been said that the section was passed in aid of the creditors of shareholders because only the stockholders and the corporation itself have access to the books of the corporation, and the creditors of stockholders could not know who owned the shares of stock unless all transfers should be deposited with the county clerk as required by statute.

It follows that the decree must be affirmed.

MERCHANTS' NATIONAL BANK *v.* HOME BUILDING & SAVINGS ASSOCIATION.

Opinion delivered November 25, 1929.

[redacted]

Daily & Woods and *Henry Moore, Jr.*, for appellant.

John D. Arbuckle, for appellee.

SMITH, J. The Home Building & Savings Association is a domestic corporation, having its principal place of business at Fort Smith, and is engaged as a building and loan company in making loans on real estate, to be repaid by maturing building and loan stock sold to the borrower for that purpose. The details of its method of operating are set out in the opinions in the cases of *Midland Savings & Loan Co.* v. *Home Building & Savings Assn.*, 177 Ark. 236, 6 S. W. (2d) 5; *Gate City Building & Loan Assn.* v. *Crowell*, 177 Ark. 539, 7 S. W. (2d) 329; and *Lavender* v. *Buhrman-Pharr Hdw. Co.*, 177 Ark. 656, 7 S. W. (2d) 755. The facts stated in these opinions are explanatory of those out of which this litigation arises.

The Home Building & Savings Association, hereinafter referred to as the association, had a resident agent at Texarkana named Dewberry, who was clothed with full authority to act for the association in all matters relating to applications for loans and in closing them up, and it was usual, in the discharge of the duties of his agency,

for him to disburse money loaned to borrowers in satisfying existing liens upon the property offered as security for the loans; in fact, this duty was intrusted to Dewberry and to no one else, and it is not questioned that, in the discharge of this duty, he was acting as the agent of the association.

After an application for a loan had been approved by the association, the custom was to make a check for the amount of the loan payable to the joint order of Dewberry and the borrower, and the instructions to Dewberry were to procure the indorsement of the check by the borrower and to indorse it himself, and, after cashing the check and discharging any existing liens with the proceeds thereof, to pay the excess, if any, to the borrower. These checks were always sent to Dewberry.

The secretary of the association, whose office is in Fort Smith, admitted in his testimony that he knew that Dewberry's practice was to have the mortgagors indorse the checks, and to deposit them to his agency account, after indorsing them himself, at a bank in Texarkana, and to then issue his personal checks against this account in satisfaction of prior liens, and, if there was any excess, the amount thereof was paid to the borrower by a check drawn by Dewberry on this agency account.

The association carried a commercial account with the Merchants' National Bank of Fort Smith, hereinafter referred to as the bank, and the checks to the joint order of Dewberry and the borrower heretofore referred to were drawn against this account.

Applications in proper form were forwarded by Dewberry to the association which apparently had been made by H. C. McDaniel and S. E. Green, and when, in due course, the applications had been approved, checks were forwarded for the loans applied for. One of these checks was payable to the order of Dewberry and McDaniel, and the other to the order of Dewberry and Green, and both were sent direct to Dewberry.

It was a part of Dewberry's duty, as agent for the association, to receive the monthly payments on the stock issued to the borrowers for the purpose of maturing the loans, and to forward the payments to the association. After the ostensible loans had been made to McDaniel and Green, Dewberry made monthly remittances on account thereof to the association as the loan agreements contemplated, and it was assumed by the association that these remittances covered payments made by McDaniel and Green.

The entire transaction proved to be a fraud and a part of Dewberry's general scheme to swindle, and, when he realized that his peculations could not longer be concealed, he absconded and left for parts unknown, and the officers of the law have been unable to serve a warrant which was issued for his arrest. Dewberry left no property behind him. The date of Dewberry's flight was about April 1, 1927.

After Dewberry's flight, suits were brought to foreclose the mortgages purported to have been given the association by McDaniel and Green, but the defense was successfully interposed in those suits that the transactions were fraudulent, and that McDaniel and Green had not received any money from Dewberry, and that the indorsement of their names on the checks payable to their joint order with that of Dewberry were forgeries. The bank knew nothing of these defenses until after decrees favorable to McDaniel and Green had been rendered in the foreclosure proceedings, and the association itself appears to have been ignorant of these defenses until about two months before the suits were tried.

In the meantime the bank at Texarkana, where Dewberry carried his agency account, and where he had cashed the checks above referred to, had liquidated its affairs and had gone out of business.

Suits were then brought against the bank by the association for having cashed the checks upon forged indorsements. The cases were tried by the court sitting

as a jury, and numerous findings of fact were made and others were refused, to all of which exceptions were saved by the party adversely affected. The court found the fact to be that the indorsement of the check in the McDaniel case was a forgery, while that in the Green case was genuine, and upon this finding rendered judgment against the bank in the McDaniel case, and in its favor in the Green case, and both parties have appealed.

The finding of fact in the Green case would, of course, be conclusive of it if there is sufficient testimony to support that finding, but we do not review the testimony as to the genuineness of these signatures, as, in our opinion, it is unnecessary to do, as we think the bank is not liable in either case under the undisputed facts developed at the trial from which this appeal comes herein stated.

Dewberry was the agent of the association, and no loss would have been sustained but for his rascality practiced in the discharge of his agency. McDaniel and Green were named as payees in the checks, but the checks were not sent to them. The proceeds of these checks reached Dewberry's hands and were credited to his agency account, and this is exactly what would have happened had the checks been properly indorsed. The loss was sustained through Dewberry's improper use of the money after it came to his hands. It is true the money did not reach his hands in the manner the association expected, but it is nevertheless true that it did reach him and was credited to his agency account, and was thereafter misused, and thus the loss was caused.

The case is sufficiently similar to that of *Cureton* v. *Farmers' State Bank,* 147 Ark. 312, 227 S. W. 423, to be controlled by it. The facts in that case were that Cureton took a mortgage, as he supposed, from A. J. Carmon to secure advances of money to be subsequently made. But the mortgage was executed by H. V. Carmon, who falsely represented that he was A. J. Carmon, and, upon the security of this mortgage, checks were delivered to H. V. Carmon, payable to the order of A. J. Carmon,

which were cashed upon presentation by H. V. Carmon at the bank upon which they were drawn. These checks were charged by the bank against the account upon which they were drawn, and, when Cureton discovered the deception which had been practiced upon him, he brought suit against the bank for the amount of these checks. In denying Cureton's right to recover we said:

"This court, in *O. J. Lewis Mercantile Co.* v. *Harris,* 101 Ark. 4-7 [140 S. W. 981], announced the well-established doctrine that 'the holder of commercial paper, payable to order, must trace his title through a genuine indorsement, and that the drawee of a draft, payable to order, who pays upon a forged or unauthorized indorsement, does so at his peril.' See also *Koen* v. *Miller,* 105 Ark. 152, 150 S. W. 411. But, as is said, in *Land Title & Trust Co.* v. *Northwestern National Bank,* 196 Pa. 230, 46 A. 420, 79 Am. St. Rep. 717: 'This doctrine is confined to cases in which the depositor has done nothing to increase the risk of the bank. It should not apply when the check is issued to one whom the drawer intends to designate as the payee: First, because in such a case the risk is not the ordinary risk assumed by the bank in its implied contract with its depositor, but a largely increased risk, as it follows that a check thus fraudulently obtained will be fraudulently used. The bank is deprived of the protection afforded by the fact that a *bona fide* holder of a check will exercise care to preserve it from loss or theft, which are the ordinary risks. There is thrown upon the bank the risk of antecedent fraud practiced upon the drawer of the check, of which it has neither knowledge nor means of knowledge; secondly, because in such a case the intention with which the drawer issued the check has been carried out. The person has been paid to whom he intended payment should be made; there has been no mistake of fact, except the mistake which he made when he issued the check, and the loss is due, not to the bank's error in failing to carry out his intention, but primarily to his own error

into which he was led by the deception previously practiced upon him.' *McHenry* v. *Old Citizens' National Bank,* 85 Ohio St. 203, 97 N. E. 395, 38 L. R. A. (N. S.) 1111; *Meridian National Bank* v. *First National Bank,* 7 Ind. App. 322, 33 N. E. 247; *Robertson* v. *Coleman,* 141 Mass. 231, 4 N. E. 619. If it be conceded that the appellant was guilty of no negligence in delivering the checks to H. V. Carmon, and that appellee bank and the appellant were both innocent in the transaction, which must result in financial loss to one or the other of them, then the case under the facts would come clearly within that principle of natural justice and equity which requires that, as between two innocent parties, the loss must fall upon that one whose acts contributed most to produce it. See *Stout* v. *Bemoist,* 39 Mo. 277, 90 Am. Dec. 466, and cases there cited.''

So here, the checks were not sent to McDaniel and Green, and they were not advised by the association that checks had been issued and sent to Dewberry, in which they were named as payees along with Dewberry, and the proceeds of the checks were credited to Dewberry's agency account, as was intended, although not in the manner intended. One of two innocent persons must suffer, and it is our opinion that the loss should fall upon the association, because its acts contributed most to produce it.

The judgment on the appeal of the bank will be reversed, and on the cross-appeal of the association will be affirmed, and judgment will be entered here in accordance with this view.

VANCE *v.* WHITE.

Opinion delivered November 25, 1929.

[redacted]

C. W. Norton, for appellant.

G. B. Knott and *J. M. Prewett,* for appellee.

SMITH, J. On September 30, 1920, W. P. Brandon, who was the senior member of the copartnership of Brandon & Baugh, sold a tract of land to Jeff White, and in part payment thereof took three notes, each for the sum of $544.33, due respectively November 15, 1921, 1922 and 1923, and to secure their payment a vendor's lien was reserved in the deed.

In the fall of 1922 Mrs. Addie Vance commenced working for Brandon & Baugh in the capacity of a saleswoman, and, having $8,000 in cash, she loaned it to her employers and took their note therefor. Payments were made on the note which reduced it to $6,700, and a new note for this amount was taken, which fell due in November, 1925, and at the time of its execution there was delivered to Mrs. Vance certain notes as collateral, and

among the number was the last note to mature which White had executed to Brandon.

White died February 16, 1922, and his son, Jeff, took charge of the land for the benefit of himself and the other heirs, and paid one of the notes, which was surrendered to him, and he made payments on the third and last note, and on October 23, 1924, paid the balance then due. His father had paid the first note. At the time of this payment young White demanded the surrender of the note, and was told by Mr. Baugh, of the firm of Brandon & Baugh, to get it from the bookkeeper, but, after searching, the bookkeeper advised that he could not find the note, but proper credit of the payment was made on the books of Brandon & Baugh. Later White again demanded surrender of the note, but was told that it was probably in the bank, but it was not found, and Baugh thereafter went with White to the office of the circuit clerk and recorder and entered upon the margin of the record where the deed had been recorded the following indorsement: "The lien retained in this deed is satisfied in full and canceled, this 6th day of January, 1925. (Signed) W. P. Brandon, by J. D. Baugh." This indorsement was attested by the clerk and recorder. No indorsement had been made upon the record showing the transfer of any of the notes secured by the vendor's lien there reserved.

Mr. Baugh, of the firm of Brandon & Baugh, frequently discussed the note with Mrs. Vance, and assured her that it would be paid, and payments were made on it from time to time, but, before the note fell due, Brandon & Baugh made a voluntary assignment of all of their assets to two receivers, who took charge of the assets and proceeded to administer them, pursuant to the terms of the assignment, for the benefit of the creditors. These assets consisted of a large mercantile business, and about $200,000 in accounts, and large planting interests. Brandon & Baugh had done a furnishing business, and had advanced large sums of money and supplies to nu-

merous customers, and had many accounts on their books. This assignment was made at a date subsequent to the maturity of the $6,700 note, but thereafter Mrs. Vance was given assurance by Mr. Baugh that the note would be paid, and there appears to be no reason to doubt that all parties expected this would be done.

Mrs. Vance made collections on account of the collateral notes given her, but they did not suffice to pay the principal note. On one occasion she spoke to one of the receivers about the White note, and was told by him that the note was without value, as it had been paid. This statement was based upon the fact that the books of Brandon & Baugh showed the note had been paid, and, without further inquiry as to the facts concerning the note, Mrs. Vance proceeded to make what she could out of the collateral notes, and, when it appeared that they would not suffice to pay her note, she filed it with the receivers, and consulted an attorney, who advised her that she could enforce the vendor's lien reserved in the deed to White, and this suit was brought for that purpose. The suit was filed May 22, 1928.

An answer was filed, in which it was alleged that plaintiff was barred from prosecuting the suit on account of her laches in bringing it. It was also alleged that Mrs. Vance was estopped from prosecuting the suit for the reason that she knew payments were being made on the White note to Brandon & Baugh at the time she held the note, and that she made no objection to these payments.

The defense of estoppel does not appear to be now insisted upon, and it is certainly not sustained by the testimony, as it very clearly shows that Mrs. Vance did not have this information. She was employed by Brandon & Baugh at the time the payments on the White note were made, but her employment was as a saleswoman only, and she had no information as to what was going on in the office.

Upon final submission the court found for the defendants, "for the reason of the delay on the part of the plaintiff in making presentment for payment of the note of Jeff White either to the maker or, after his death, to his heirs—the defendants herein." The testimony supports the finding that no demand was made on the heirs prior to the institution of this suit.

We think the court erred in denying the relief upon the ground of laches. It is not contended that plaintiff's cause of action was barred by any statute of limitations. It was not, as fully appears from the facts already stated, and we perceive no reason why she should be charged with laches for delaying for a time which did not exceed the statute of limitations before bringing the suit. Unlike the statute of limitations, no fixed time is required to establish the defense of laches, but it has been held that: "In the absence of some supervening equity calling for the application of the doctrine of laches, a court of chancery should and will by analogy follow the law, and not divest the owner of title by lapse of time shorter than the statutory period of limitations." *Earle Imp. Co.* v. *Chatfield,* 81 Ark. 296, 99 S. W. 84. And it has also been held that the supervening equities mean some element of estoppel aside from the mere lapse of time. *Updegraff* v. *Marked Tree Lumber Co.,* 83 Ark. 161, 103 S. W. 606.

There are no elements of estoppel in this case. Mrs. Vance was not aware that the payments were being made on the note to Brandon & Baugh, and she did nothing to induce such payments, except only to delay bringing suit. Mrs. Vance was not required to notify the maker of the note or his heirs that she was the legal holder of the note. On the contrary it was their duty to make payments to the legal holder, and payments otherwise made were made at their peril.

The judgment in the case of *Hamilton National Bank* v. *Emigh,* 127 Ark. 545, 192 S. W. 913, was reversed be-

cause of the refusal of the court to give an instruction reading as follows:

"4. A maker of a promissory note is charged with the knowledge that the note is negotiable and may be transferred and indorsed by the person or firm to which it is payable to some third party or indorsee; and when such maker pays the person to whom said note was originally payable the amount of the said note, or any part thereof, without the production of the original note, such payment is made at the maker's peril, and such payments so made are of no effect as against the third party or indorsee thereof who had possession of the note at the time the payments were made."

This is an elementary principle in the law of commercial paper, and further citation of cases is not required, although many might be made, some quite recent.

Section 7399, C. & M. Digest, and the case of *Kinney* v. *North Memphis Savings Bank,* 178 Ark. 716, 11 S. W. (2d) 486, which construed it, are invoked to sustain the decree of the court below. This section of the statute provides that satisfaction of any lien on the margin of the record, where the instrument creating it or securing it is recorded by the owner of record of the indebtedness secured, shall be full and complete protection for any subsequent purchaser, mortgagee, or judgment creditor of the mortgagor or grantor, where there has been no marginal indorsement on the record showing that the indebtedness secured had been transferred or assigned. But the persons thus protected by the failure to indorse the transfer of the indebtedness on the margin of the record are subsequent purchasers, mortgagees, or judgment creditors. The defendants are the heirs of the maker of the note, and, as the statute does not apply to him, it cannot be applied to them. They are not subsequent purchasers, mortgagees, or judgment creditors, but stand in the stead of their ancestor, with the same rights and obligations that he had.

It was said in the Kinney case, *supra,* that "in other words, unless and until the statute (§ 7399, C. & M. Digest) 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." But this opinion is not to be interpreted in the light of this detached sentence alone. It must be read in connection with the opinion in its entirety and considered in connection with the facts there under consideration. In that case the right of the bank to enforce the vendor's lien securing the note was denied because the rights of a subsequent purchaser had intervened, and subsequent purchasers, as well as subsequent mortgagees and judgment creditors, are protected by the statute. The words, "any one," as there used, must therefore be construed to mean any one belonging to any of these three classes.

The rights of no such person have intervened here. If the original grantee in the deed reserving the vendor's lien were living, he would not be heard to say that he had paid the amount of his note to a person who did not own it, and was not in possession of it when he made the payment, and had thereby discharged the lien which secured the note. Nor can his heirs. He, as well as they, could and would have been protected had they made the payments on the note to the person entitled to receive them.

The briefs discuss the question of the insolvency of the estate of Brandon & Baugh as administered by the receivers; but we do not consider this question, as we are of the opinion that Mrs. Vance is entitled to enforce the vendor's lien regardless of that fact.

The relief prayed should therefore have been granted, and the decree of the court below will be reversed, and the cause remanded, with directions to enforce the vendor's lien.

FEDERAL COMPRESS & WAREHOUSE COMPANY *v.* JONES.

Opinion delivered November 25, 1929.

Buzbee, Pugh & Harrison and *C. A. Cunningham,* for appellant.

W. R. Donham, for appellee.

HUMPHREYS, J. The only question presented by this appeal is whether there is any substantial evidence in the record tending to show that appellee received an injury through the negligence of appellant's employee while acting in the scope of his employment. Appellee recovered a judgment of $1,500 against appellant, upon the theory that appellant's employee was sent to the Board of Commerce Building, in Little Rock, to get sacks of cotton belonging to Randolph Scott & Company, for the purpose of transporting same to its compress in North Little Rock to be baled, and, while in the discharge of such duty, negligently failed to give a signal to the employee of

Randolph Scott & Company, who was dropping the cotton out of a third-story window to the sidewalk on the side of said building, to be loaded on appellant's truck, that appellee was approaching, or to warn appellee of the danger in walking on the sidewalk immediately under the window.

Appellant contends for a reversal of the judgment because the record reflects, according to the alleged undisputed evidence, that its employee got the cotton in a different manner from the way instructions were given to obtain it, and that, even though its employee was not violating instructions in the way he was obtaining the cotton, he was not giving signals to the employee of Randolph Scott & Company, or warning pedestrians of the danger at the time of the injury, but that, instead, a third party, not in its employ, was performing such duties as a volunteer at the time appellee received his injury. The evidence with reference to instructions given to the employee of appellant to receive the cotton is found in the testimony of its general superintendent, E. Wade, to the effect that he instructed the drivers of trucks to accept loose cotton from the cotton offices at their doors opening on the sidewalk, and that he forbade them going into the building for it; that he remarked many times that it was dangerous to throw cotton out of windows onto the sidewalk, and directed the drivers to have nothing to do with it.

According to the undisputed testimony in the record, on February 16, 1928, in response to a telephone call from Randolph Scott & Company, appellant sent its truck by Fred Harris to the Board of Commerce Building in Little Rock for sacks of cotton. Harris stopped the truck on the sidewalk on the side of the building to receive the cotton, which had been put in sacks, and was being dropped from the third-story window onto the sidewalk by Harvey Burke, an employee of Randolph Scott & Company. Burke was unable to see pedestrians passing along the sidewalk, and was dropping the sacks in ac-

cordance with signals from Fred Harris. Harris allowed a boy by the name of James McQueen, who wanted to ride across the river with him, to get on the truck and give signals to Burke while he was in the truck loading cotton. As appellee passed along the sidewalk under the window, Burke released a sack of cotton, weighing about forty pounds, which struck and injured him. James McQueen did not warn appellee of the danger before he walked under the window, and the testimony is in dispute as to whether he signaled Burke not to drop the sack of cotton which fell upon and injured appellee.

The main contention of appellant for a reversal of the judgment, that its employee was violating instructions, and thereby exceeding his authority in receiving the cotton in the manner he did at the time appellee was injured, cannot avail to relieve it from liability. It must be remembered that the business in hand was to get the cotton. That is what appellant sent its employee to do, so, in receiving the cotton, the employee did not step aside to attend to business of his own wholly disconnected from his duties to appellant. The undisputed facts do not bring the case within the rule announced in the cases of *Wells Fargo Express Co.* v. *Alexander,* 146 Ark. 104, 225 S. W. 597; *American Railway Express Co.* v. *Mackley,* 148 Ark. 227, 230 S. W. 598; and *Healey* v. *Cockrill,* 133 Ark. 327, 202 S. W. 229, L. R. A. 1918D, 115, relied upon by appellant for a reversal of the judgment. In the telegraph and automobile cases cited, the employees had stepped aside from their employer's business to perform independent acts of their own, disconnected from that of their employer.

The rule governing the instant case was correctly announced in the case of *Little Rock & Fort Smith Ry.* v. *Miles,* 40 Ark. 298. 48 Am. Rep. 10, and reaffirmed in the case of *Pine Bluff Water & Light Co.* v. *Schneider,* 62 Ark. 109, 34 S. W. 547, 33 L. R. A. 366; *Robinson* v. *St. L. I. M. & S. Ry. Co.,* 111 Ark. 208, 163 S. W. 500; and *Campbell Baking Co.* v. *Clark,* 175 Ark. 899, 1 S. W. (2d)

35. This court said in the Miles case: "The rule is firmly established that the master is civilly liable for the tortious acts of his servant, whether of omission or commission, and whether negligent, fraudulent or deceitful, when done in the line of his employment, even though the master did not authorize or know of such acts, or may have disapproved or forbidden them."

In the application of this rule in the Clark case this court, in summing up the rule which had been announced in the Miles case and reaffirmed in the other cases mentioned above, took occasion to say: "As we understand the law applicable to cases of this character, although an agent may exceed his authority to the extent even of violating instructions, if, at the time, he is engaged in the business he was employed to perform by his employer, his employer would be responsible for injuries from his torts."

Neither can appellant's further contention, that its employee allowed a third party, a volunteer, to give signals to the employee of Randolph Scott & Company when to drop cotton from the third-story window and to warn pedestrians passing by against the danger, relieve it from liability in this case. It was negligence on the part of appellant's employee to substitute another to give the signals and warn the public. *Tchula Cooperative Store* v. *Quattlebaum,* 176 Ark. 780, 4 S. W. (2d) 919.

No error appearing, the judgment is affirmed.

FIRST NATIONAL BANK OF STUTTGART *v.* PEOPLE'S NATIONAL BANK.

Opinion delivered November 25, 1929.

[redacted]

John L. Ingram, for appellant.

John W. Moncrief and *A. G. Meehan,* for appellee.

HUMPHREYS, J. This is an appeal from a decree of the chancery court of Arkansas County, Northern District, awarding rents in the sum of $791.39 out of the proceeds of a rice crop grown and harvested in the year 1927 by George Carlson, on a farm in said county owned by his wife and himself, half and half, upon petition of appellant for a distribution of said rent in a foreclosure proceeding, wherein the appellee herein, People's National Bank, was plaintiff, and appellant herein and George and Ramona Carlson were defendants. Appellant's petition for a distribution of the rent was heard by the trial court upon an agreed statement of facts, in substance, as follows:

On January 16, 1925, George and Ramona Carlson borrowed $12,000 from the People's National Bank of Stuttgart, and secured same by a mortgage on the south half of section 17, township 3 south, range 4 west, in said county. They defaulted in payment of same at maturity, whereupon appellee herein instituted a foreclosure proceeding against the Carlsons, in which appellant herein, mortgagee of the 1927 rice crop grown on said land, was made a party defendant. The rice crop of 1927 had been planted after the foreclosure suit was instituted, and before or about the time the decree therein

was rendered. The foreclosure decree, rendered on the 6th day of June, 1927, recited that the sale of the land should not take place prior to September 14, 1927. It also recited: "that one-fifth of the rice grown on said land shall be treated as rent for the year 1927, and it, or the proceeds derived from the sale of it, shall be delivered to Floyd A. Wingo and A. G. Meehan, and, in the event the plaintiff (appellee herein) becomes the purchaser of this land at said foreclosure sale by the commissioner for debt, interest and costs, or less, then it shall be entitled to the rent above mentioned, and the above Floyd Wingo and A. G. Meehan shall pay over to the said plaintiff (appellee herein) the said amount received as rent for the year 1927; but, in the event some third party shall become the purchaser of said land for a sum in excess of the debt, interest and cost at the time of said sale, then the one-fifth rent from said land for the year 1927 shall be paid into the registry of the court, and distributed according to the priorities declared by the court; that said sale or foreclosure of said land shall not affect the lien of the mortgage in favor of the First National Bank of Stuttgart, Arkansas, upon four-fifths of the rice crop raised during the year 1927, but said mortgage shall be a lien upon said crop to said extent, and shall be superior to the rights of any parties hereto or superior to the rights of any purchaser at the sale hereunder, the mortgage referred to being one executed by George Carlson in favor of the First National Bank." On or about the 14th day of September, 1927, the land was sold under said decree, at which sale the appellee herein made a first bid of $10,000, and the defendant, George Carlson, made a second bid of the debt, interest and costs and one dollar, which became the purchasing bid. Immediately after the purchase the defendant, George Carlson, executed a bond with approved security to pay the amount he bid. The sale was not reported to and approved by the court. Ninety days after the sale the commissioner demanded the purchase money upon the sale from George Carlson,

which he was unable to pay, and from the bondsmen, who refused to pay same. Shortly thereafter said commissioner, at the instance and request of appellee herein, and without the former sale having been set aside, readvertised and again sold said land at public sale, at which the appellee here became the purchaser for its debt, interest and costs, including the costs of the first and prior sale. Defendant, George Carlson, was present at the sale, and made no protest of the resale by the commissioner. Neither Ramona Carlson nor the First National Bank, appellant herein, was present at the sale. The sale was reported to the court on the 5th day of March, 1928, and was approved and confirmed by the court without any objection on the part of the Carlsons or the appellant herein.

Appellant first contends for a reversal of the decree awarding the rents to appellee because the recital in the original foreclosure decree set out in full above was unwarranted by the pleadings, and without consideration. It is true that the complaint made no allegation concerning the rice crop which had been planted a short time before the rendition of the decree. At the time of the rendition of the decree appellant was the holder of a mortgage on the unmatured crop of rice. An immediate foreclosure and sale of the land would have prevented George Carlson from maturing the crop, and appellant from recovering anything on its mortgage. Neither the Carlsons nor appellant herein interposed any defense to the foreclosure proceeding. They were made parties, appeared, and approved a decree which the court rendered on June 6, 1927. It is apparent that the sale was postponed until September 14, 1927, in order that George Carlson might mature the crop, and the appellant receive something out of the crop to apply upon its crop mortgage. The decree, having been approved by all parties to the suit, was necessarily a consent decree, and a postponement of the sale was a sufficient consideration to support the recital in the decree.

Appellant next contends for a reversal of the decree awarding the rents to appellee because the first sale, at which George Carlson purchased, was never set aside, and for that reason the second sale, at which appellee purchased the property, was void. George Carlson and his bondsmen did not carry out the first sale, and he assented to the second sale by failing to enter a protest thereto. The second sale was reported to the court and confirmed without any objection or exception by either of the Carlsons or appellant. All rights of appellant and Carlson were waived by their acquiescence in the second sale.

The next and last contention of appellant for a reversal of the decree awarding the rents to appellee is that, under the bid of appellee at the second sale, its debt, interest and costs were satisfied, and that it had no right to the rents in addition thereto. Under the terms of the original decree, appellant agreed that, in case appellee should buy the property at the sale on bid of its debt, interest and costs, it should have, in addition thereto, one-fifth of the rice crop, designating said one-fifth as rent for same. Appellee became entitled to this by virtue of the extension granted to George Carlson, which enabled him to mature the crop, and which gave him further time to procure money with which to pay off the mortgage in case he should decide to do so. This extension redounded to the benefit of appellant, who was the mortgagee of the crop, because, without the extension, it would have received nothing under its mortgage out of the rice crop.

No error appearing, the decree is affirmed.

LOEWER *v.* ARKANSAS RICE GROWERS' CO-OPERATIVE ASSOCIATION.

Opinion delivered November 25, 1929.

R. J. Williams and *Joseph Morrison,* for appellant.

W. A. Leach and *C. W. Norton,* for appellee.

MEHAFFY, J. The Arkansas Rice Growers' Cooperative Association brought this action against the appellant to recover the sum of $500, basing the suit on the following statute:

"Any person or persons or any corporation whose officers or employees knowingly induces or attempts to induce any member or stockholder of an association organized hereunder to breach his marketing contract with the association, or who maliciously and knowingly spreads false reports about the finances or management thereof, shall be guilty of a misdemeanor and subject to a fine of not less than $100 and not more than $1,000 for such offense, and shall be liable to the association aggrieved in a civil suit in the penal sum of $500 for each such offense." Section 24 of act 116, Acts 1921, p. 153.

The association in this suit seeks to recover the $500, and alleges that Loewer, the appellant, purchased rice from one Melvin, and that said Melvin was the grower of the rice, was a member of the association, and a party to the marketing agreement; and that Loewer and others aided, assisted and induced Melvin to breach his marketing agreement by withholding said rice crop from delivery to plaintiff association, and by the unlawful and wrongful sale and delivery of it to or through the codefendant, Brinneman. It appears that Melvin raised the rice, and had mortgaged it to Brinneman. It is also alleged that Brinneman was a member of the association, and was required by the marketing agreement to deliver rice to the plaintiff. The complaint sets out paragraphs of the marketing agreement, and alleges that Brinneman, Loewer and the Standard Rice Company, knowing of the contract between plaintiff and Melvin, and knowing of his membership, collusively and jointly conspired to induce, and did so induce, Melvin to breach his contract.

Service was quashed as to the rice company and Melvin, and the suit proceeded against Loewer alone.

It could serve no useful purpose to set out the evidence in full or the instructions given by the court. It is sufficient to say, as to the evidence, that Melvin testified positively that he did not sell to Loewer, and he testified also that Loewer would not buy it from him. Brinneman, on the other hand, testified that Melvin sold the rice to Loewer. But all of them testified that Loewer did not induce either Melvin or Brinneman to sell the rice. But whether it was sold by Brinneman or Melvin we think in this case is immaterial. Both of them were members of the association and parties to the marketing agreement. Brinneman, if he got the rice under the mortgage, might have sold it to Loewer, and Loewer would not have been liable for the penalty. But the testimony is conflicting somewhat about the manner in which it was sold, but we think the testimony fails to show that Loewer induced either of them to sell the rice.

The court instructed the jury, in the latter part of instruction No. 1, that: "The inducement may be by offering or agreeing to pay a price which induces the member to sell in violation of his marketing agreement, and the offer or agreement to pay such a price may be without any persuasion upon the part of the purchaser."

This is, in effect, telling the jury that any person who purchases rice from a member of the association, who is also a party to the marketing agreement, is liable for this penalty. The statute evidently does not mean this. If the Legislature had intended that any person should be liable for this penalty who merely offered a price which was accepted by the member, then it would have said, "any person who knowingly purchases or attempts to purchase," etc., instead of saying, "any person who knowingly induces or attempts to induce," etc.

The Illinois court held that the words "inducing" and "persuading" are practically synonymous. *People* v. *DeJoy,* 198 Ill. App. 361.

The Missouri Court of Appeals held: "It is apparent that the word 'influence' is not a stronger word than the word 'induce' or 'procure.' 22 Cyc. 714. Webster's International Dictionary uses the verbs 'to induce' and 'to influence' as synonymous. * * * The addition of the word 'influence' would require no greater finding on the part of the jury for the reason that, if anything, the word 'influence' is weaker than the words 'procure' or 'induce.' If a broker does not influence the sale, he certainly could not be the procuring and inducing cause of it." *Schwabe* v. *Estes,* 202 Mo. App. 372, 218 S. W. 908.

" 'Induce,' as used in a pleading stating that the respondent was induced to withdraw the distress on assurance that the debt was settled, means influenced, persuaded, and not to introduce; to bring into view." *Wollaston* v. *Stafford,* 29 Eng. Law & Eq. 263, 265.

"In an indictment for obtaining goods under false pretenses, alleging that defendant induced prosecutor to

sell certain goods to them, 'induced' means moved, urged, or instigated, but cannot be held to be an averment that prosecutor did sell to defendant. *State* v. *Phelan,* 60 S. W. 71, 159 Mo. 122." Vol. 4 Words & Phrases, p. 3568.

"To 'induce' means to persuade, to coax, to prevail on, to move by persuasion or influence. *Rahke* v. *State,* 81 N. E. 584, 586, 168 Ind. 615." Vol. 2 Words & Phrases, 2d Series, p. 1054.

The word "induce" therefore, we take it, in the statute means the same as "influence"; and "influence" means the use of a party's endeavors; to put some external constraint; to procure.

In order to make a person liable who purchases rice from a member of the association and a party to the marketing agreement, the evidence must show that the party charged did something to influence or induce other than simply purchasing the rice. If purchasing from a member was all that was necessary, then the use of the word "induce" would be meaningless. The Legislature might, and would, have said, if that was its intention, that whoever knowingly purchased should be liable for the penalty.

It is unnecessary to set out the instructions here. Some of them were conflicting, but there will be no difficulty in giving proper instructions at another trial. The only question involved in this case is whether or not the appellant knowingly induced a member of the association and a party to the marketing agreement to sell rice which the association had the right to purchase. Therefore all testimony with reference to the old association, and all testimony about appellant's knowledge, except that which tended to show the knowledge of the party that the seller of the rice was a member of the association and a party to the marketing agreement, is immaterial and improper. It is immaterial whether the appellant knew the terms of the agreement or not. If he knowingly induced a member to sell in violation of the above statute,

he would be liable; if he did not induce the member to sell, he would not be liable, although he purchased the rice. If a member has rice that he is not prohibited from selling under the marketing agreement, it would, of course, not make one liable if he purchased it; and a member might have rice that he was not prohibited by the marketing agreement from selling, and might, at the same time, have rice that he was prohibited from selling; and if the purchaser knew that he was a member of the association and a party to the marketing agreement, and purchased the rice that the member had the right to sell, he would not be liable. If he purchased rice that the member had no right to sell, he would be liable if he knowingly induced the member to sell.

While we have not set out the evidence nor the instructions in this case, we have stated the principles of law governing same, so that there will be no difficulty in the trial court admitting competent testimony only and properly instructing the jury.

From what we have said it follows that the judgment must be reversed, and the cause remanded for a new trial. It is so ordered.

FENCING DISTRICT NO. 6 OF WOODRUFF COUNTY *v.* MISSOURI PACIFIC RAILROAD COMPANY.

Opinion delivered November 25, 1929.

W. J. Dungan, for appellant.

Thomas B. Pryor and *Daggett & Daggett,* for appellee.

MEHAFFY, J. The appellant brought suit in the Woodruff Chancery Court against the St. Louis, Iron Mountain & Southern Railway Company, seeking to enforce a lien on property for delinquent fencing district taxes. The complaint named the St. Louis, Iron Mountain & Southern Railway Company as defendant, and the summons was issued against the St. Louis, Iron Mountain & Southern Railway Company, and the sheriff's return on the summons recited that he had served the summons by delivering a copy to the agent of the St. Louis, Iron Mountain & Southern Railway Company at McCrory, Arkansas.

When court met, the plaintiff, appellant here, asked permission to amend its complaint, stating that there was a misnomer of the party defendant, and that the defendant should be designated as the Missouri Pacific Railroad Company instead of the St. Louis, Iron Mountain & Southern Railway Company, and stated that the property described in the complaint is the property of the Missouri Pacific Railroad Company.

The amendment further stated that the Missouri Pacific Railroad Company was formerly the St. Louis, Iron Mountain & Southern Railway Company, and that the service of summons was actually upon the agent of the Missouri Pacific Railroad Company, and that the designation in the pleadings and summons was merely a misnomer. Thereupon the Missouri Pacific Railroad Company filed a motion to quash the service and dismiss the complaint.

The decree of the chancellor recites that it denies the plaintiff the right to file the amendment and sustains the motion to quash; that the court finds that the complaint was filed and summons issued and service had on Chappis, as agent of the St. Louis, Iron Mountain & Southern Railway Company, on the 13th day of March,

1929; that thereafter, on the 19th day of March, 1929, the Missouri Pacific Railroad Company filed suit against Fencing District No. 6 of Woodruff County, in the United States District Court for the Eastern Division of the Eastern District of Arkansas, at Helena, and that the said United States District Court thereby acquired jurisdiction, and sustained the motion to quash and dismiss.

An appeal was prosecuted by the fencing district, and it now insists upon reversal, and quotes from *Burk* v. *Snell,* 42 Ark. 57, as follows: "The primary object of the Code is the trial of causes upon their merits, and that the rights of suitors shall not be sacrificed to technical mistakes, omissions or inaccuracies. To this end the provisions for amendments are exceedingly broad and liberal." The appellant cites from other authorities with reference to the law permitting amendments.

The Code is very liberal, but it is the well-established rule that courts will not allow amendments to be made which change the parties to the action, unless there is something in the record to authorize the amendment. *Lake* v. *Morse,* 11 Ill. 587; *Biggs* v. *Wilman,* 82 Ala. 391, 2 Sou. 877; *Tuller* v. *Ginsberg,* 99 Mich. 137, 57 N. W. 1099; *Herman* v. *Bailey,* 45 N. Y. Sup. 88; *Railway Co.* v. *Small,* 70 Ala. 499; *Smith* v. *Central Plank Road Co.,* 30 Ala. 650.

"Under a statutory provision permitting the adding or correction of the name of a party, an entire change in parties plaintiff or defendant cannot be permitted. A statute permitting amendments as to form will not permit an amendment making new parties plaintiff in order to sustain an action that was originally brought without authority." 31 Cyc. 475.

"It was determined by the circuit court that Lula M. Coleman was not a party in interest in the matter or proceeding—in effect that she had no cause of action or right to appeal from the judgment of the probate court. The appellants, with different and independent rights, sought to amend the proceeding by displacing Lula M.

Coleman and substituting themselves and their own cause of action. This could not be done. If Lula M. Coleman, the sole party to the appeal, and in effect the sole plaintiff, had no cause of action, then no amendment of the cause of action could be made by substituting other parties who did have a cause of action. * * * The demurrer to the complaint was properly sustained, as it showed that plaintiff was not, and that the State was, the party entitled to prosecute the action. Leave to amend by striking out the sole plaintiff and substituting another could not have been granted. The right of amendment is broad, but it does not warrant the substitution of a stranger for the sole plaintiff in the cause." *Coleman* v. *Floyd,* 105 Ark. 300, 150 S. W. 703.

This court again said in construing the Code: "This provision of the Code assumes that the plaintiff has a cause of action, and does not authorize the court in any case, where the plaintiff has failed to show any cause of action, to amend by adding the name of a party in whose favor a cause of action is shown by the complaint to exist, because such a proceeding would be practically instituting a new action and forcing a party, at the instance of one who has no right to demand it, to commence an action when he does not wish to do so. Broad and liberal as the provisions of the statute of amendments are, we see no authority in them for such a proceeding." *State use Oliver* v. *Rottaken,* 34 Ark. 144.

In the instant case there was nothing to amend. There was no proper party defendant, and, liberal as the court is, it does not permit amendment by entire change of parties. You cannot sue one party and amend by making another party defendant—that is, by striking out the name of the sole defendant and substituting some other defendant. The Missouri Pacific Railroad Company and the St. Louis, Iron Mountain & Southern Railway Company are separate corporations, and in a suit against one of them the pleadings cannot be amended so as to substitute the other.

The lower court was correct, and the decree is affirmed.

KANSAS CITY SOUTHERN RAILWAY COMPANY *v.* FORT SMITH SUBURBAN RAILWAY COMPANY.

Opinion delivered November 25, 1929.

F. H. Moore, James B. McDonough and *George W. Dodd,* for appellants.

Edward J. White and *Thomas B. Pryor,* for appellees.

MEHAFFY, J. The appellants brought suit in the chancery court of Sebastian County against the appellees, praying for a mandatory injunction enjoining the appellees from further refusing to receive and switch cars, as set forth in the complaint, and compelling them to receive, switch and deliver cars within the city of Fort Smith, as the Fort Smith Suburban Railway Company was obligated to do under its franchise and charter. It also asked for the sum of $37.80 damages.

The Kansas City Southern Railway Company is a common carrier, organized under the laws of the State of Missouri, owning and operating a line of railroads extending through several States, and has a station and lines of railroad within the city of Fort Smith, Arkansas. It receives and transports goods, wares and merchandise in intrastate and interstate traffic, and transports from other States and from other parts of Arkansas goods, wares and merchandise for delivery within the city of Fort Smith, Arkansas.

The Missouri Pacific Railroad Company is also engaged in interstate and intrastate traffic and transportation, and it also receives and transports goods, wares and merchandise in intrastate and interstate traffic, and transports from other States and from parts of Arkansas goods, wares and merchandise for delivery in the city of Fort Smith.

The Fort Smith Suburban Railway Company is a corporation organized under the laws of the State of Arkansas, and has its principal place of business within the city of Fort Smith, Arkansas, and owns and operates a railroad approximately six miles in length, and it was organized for the purpose of constructing, maintaining and operating a switch line, generally known as a switching line railroad, extending through the city of

Fort Smith, and the principal purpose was the construction of a switching line railroad to receive and transport carload freight arriving in Fort Smith from the point of its reception in the city of Fort Smith to the point of its destination in said city of Fort Smith. It was organized and constructed for switching purposes. It secured the right-of-way for the purposes named, and was granted the right to lay its track in the city of Fort Smith by an ordinance of said city, § 6 of which reads as follows:

"The city council reserves to itself full power and authority to control and regulate the speed of all cars, engines, trains and other rolling stock, and to pass, enact and enforce such ordinances as they may see fit to protect the property, secure the lives, safety and welfare of its inhabitants; also reserves the right to lay sewer pipes, water mains, etc., and overhead wires under and over their tracks; (provided that said railway company shall receive and deliver all cars that may be offered to it by other railroads, individuals or corporations, and that the charges for such handling, known as switching charges, shall not exceed two dollars per car)."

The Missouri Pacific Railroad Company, through stock ownership, controls and operates the Fort Smith Suburban Railway Company, which receives and switches all cars for the Missouri Pacific Railroad Company in carloads or merchandise and articles moving in interstate commerce, and transports the same to points within the city of Fort Smith, and refuses to receive, switch and deliver the cars handled by the Kansas City Southern Railway Company, and it is alleged in the complaint that the appellees received, switched and delivered cars at Kinkead Spur, on the Fort Smith Suburban Railway Company, for the Missouri Pacific Railroad Company, and refused to receive carloads of merchandise and articles transported to the same points within the city of Fort Smith of the Kansas City Southern Railway Company. It is alleged in the complaint that there are a number of other ordinances of the city of Fort Smith, and other

shipments of the Kansas City Railway Company have been refused at places where they receive, switch and deliver cars for the Missouri Pacific.

The appellees filed a demurrer as follows: (1). That said complaint does not state facts sufficient to constitute a cause of action against the defendants; (2) that said complaint does not state facts sufficient to constitute a cause of action against the defendants within the jurisdiction of this court; (3) that the complaint shows that the shipments involved are interstate, the cars being shipped from Dewey, Oklahoma, to Fort Smith, Arkansas, and therefore are governed by the rules and regulations of the Interstate Commerce Commission under the provisions of the Interstate Commerce Act, as amended; (4) that the Interstate Commerce Commission has exclusive jurisdiction of the matters alleged in the complaint herein.

The court below sustained the demurrer and dismissed the complaint, and, to reverse the decree of the court in sustaining the demurrer and dismissing the complaint, appellants have prosecuted this appeal.

The appellee's first ground of demurrer is that the complaint does not state facts sufficient to constitute a cause of action against the defendants. The demurrer, of course, admits the truth of the allegations in the complaint. Appellee quotes from I. C. C. Reports, vol. 24, 292, as follows:

"There is no industry located upon the track in question at Fort Smith. It is not denied that it is a team track, and therefore the tariff referred to had no application to the service demanded."

The complaint, however, in the instant case states that Kinkead Spur is a spur track on the line of the Fort Smith Suburban Railway Company, at which point the appellees deliver carload freight. The complaint also states that the said Suburban, during that time, received and switched all cars moving over the Missouri Pacific Railroad Company; it performed the service fully for

the Missouri Pacific, but refused to perform it for the Kansas City Southern. The allegations above set out, together with the other allegations in the complaint, are sufficient on general 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." *Driesbach* v. *Beckham,* 178 Ark. 816, 12 S. W. (2d) 408; *Tolbert Bros. & Co.* v. *Molinder,* 178 Ark. 888, 12 S. W. (2d) 780; *Wright* v. *Lake,* 178 Ark. 1184, 13 S. W. (2d) 826; *Choctaw, Okla. & Gulf Ry. Co.* v. *Doughty,* 77 Ark. 1, 91 S. W. 768.

The next ground of demurrer is that the complaint does not state facts sufficient to constitute a cause of action against the defendant within the jurisdiction of this court. The complaint alleges a continuing wrong, and, if the allegations in the complaint are true, there would necessarily be a multiplicity of suits, and therefore the chancery court had jurisdiction. If the suit was improperly brought in equity, the defendant might have filed a motion to transfer to the law court, and, if the court sustained the demurrer because the suit should have been brought in the circuit court, instead of the chancery court, it should have transferred the cause to the proper court, instead of dismissing it. Section 1041, Crawford & Moses' Digest.

"The demurrer should not have been sustained and the complaint dismissed for the error of the complaint as to the kind of action, but the court should have treated the demurrer as a motion to transfer to equity, and the action should have been transferred to the chancery court." *Grooms* v. *Bartlett,* 123 Ark. 255, 185 S. W. 282.

Appellee's grounds for demurrer numbers three and four raise the question that the Interstate Commerce Commission has exclusive jurisdiction of the matters alleged in the complaint, and that these shipments are in-

terstate shipments, and are governed by the rules and regulations of the Interstate Commerce Commission under the provisions of the Interstate Commerce Act as amended.

Appellee first calls attention the case of *Spratlin* v. *St. Louis Southwestern Ry. Co.*, 76 Ark. 82, 88 S. W. 836, to support the contention that a State statute or a municipal ordinance in conflict with the Interstate Commerce act is invalid. There is, however, in this case no question of any conflict. The ordinance of the city of Fort Smith requires the Suburban Railway Company to receive and deliver all cars that may be offered it by other railroads, individuals or corporations. There is not only no conflict between this provision of the ordinance and the Interstate Commerce act, but this is exactly what the interstate act itself requires of the switching railroad company.

There is no contention that the Suburban Railway Company is not a railroad company and a common carrier, but it was organized for the special purpose of receiving, switching and delivering cars in the city of Fort Smith, and this it must do under the Federal statute. And the question is not one for the exercise of administration on the part of the commission, but is a question of law for the courts. The Fort Smith Suburban Railway Company is not an extension of the Missouri Pacific's railroad or a branch of that railroad, nor is it a spur of the Missouri Pacific Railroad Company. It is not an industrial, team or switching track of the Missouri Pacific Railroad Company, but it is an independent corporation organized for the purpose of switching cars, and, being a common carrier and public utility, it must treat all alike. If Kinkead Spur is a place for the delivery of freight, as alleged in the complaint, then freight must be received by the Fort Smith Suburban Railway Company offered from any of the railroads. And, whether the Fort Smith Suburban Railway Company is operated by the Missouri Pacific or not, whoever oper-

ates it is bound to receive shipments of freight from all persons alike.

The question of rates, fares, charges or the value of services rendered is not involved in this case. These questions are, under the Federal statute, questions for the Interstate Commerce Commission. Of course the Fort Smith Suburban Railway Company would not be required to receive cars at a place other than a depot or switch or track provided for the purpose, but the allegations of the complaint are that the Fort Smith Suburban always receives and handles the cars of the Missouri Pacific, and refuses to receive and handle the cars of the Kansas City Southern. Appellee is correct in stating that a railway company has the right to earn a fair return on the value of the property which it devotes to the public service, but, as we have already said, there is no question of remuneration or fares involved in this case.

It would serve no useful purpose to discuss or refer to the many authorities cited and relied on by the parties, for the reason that the cases relied on by appellee are cases where the facts are wholly unlike the facts alleged in the complaint in this case. The Fort Smith Suburban is not a terminal, branch, or a spur of the Missouri Pacific, and is not operated as a part of the Missouri Pacific system. It is an independent corporation, and it is wholly immaterial who owns the stock. As long as it operates as a switching railroad, it must serve all parties alike.

As said by the court in the case of *Missouri Pacific Railroad Company* v. *Larabee Mills*: "Whenever one engages in that business, the obligation of equal service to all arises; and that obligation, irrespective of legislative action or special mandate, can be enforced by the courts. Neither is there any significance in the absence of a special contract between the Missouri Pacific and the mill company. * * * There is no suggestion that the amount of this charge was changed in favor of any other shipper, and, so long as that was so, it was the

charge which the Missouri Pacific was entitled to make for cars transferred at the instance of the mill company. If in the future a change is made in behalf of shippers generally, undoubtedly that change can be made operative in respect to the mill company. Indeed, all these questions are disposed of by one well-established proposition, and that is that a party engaging in the business of a common carrier is bound to treat all shippers alike, and can be compelled to do so by mandamus or other proper writ." *Missouri Pac. Ry. Co.* v. *Larabee Mills,* 211 U. S. 612, 29 S. Ct. 214.

The appellee, however, argues that the case of the *Missouri Pac. Ry. Co.* v. *Larabee Mills* presented a different question; that a different question was involved in that case to that in the case at bar. It says that there is no allegation in the complaint that any industry is located upon what is termed the Kinkead Spur. It is true that the complaint does not allege any industry, but it does allege that the Kinkead Spur is a place where the Suburban receives cars, and that it receives all the Missouri Pacific cars there, and refuses to receive the Kansas City Southern. As we have already said, this is sufficient on demurrer.

It is further contended that the above-mentioned case was decided by the Supreme Court of the United States before the later amendments to the Interstate Commerce Act, and before the passage of the transportation act. But appellee itself calls attention to § 3 of the Interstate Commerce Act, which provides:

"Every common carrier subject to the provisions of this act shall, according to their respective powers, afford all reasonable, proper and equal facilities for the interchange of traffic between their respective lines, and for the receiving, forwarding and delivering of passengers and property to and from their several lines and those connecting therewith, and shall not discriminate in their rates and charges between such connecting lines; but this shall not be construed as requiring any such

common carrier to give the use of its tracks or terminal facilities to another carrier engaged in like business."

The Missouri Pacific and Kansas City Southern are both railroad companies, interstate carriers, and the Suburban line is located in the city of Fort Smith, organized for the purpose of switching. It is a switching railroad, and, while it is a common carrier, it is not engaged in the same business as either of the others, but is engaged in switching exclusively.

The whole question is summed up in the statement in the case of *Missouri Pac. Ry. Co.* v. *Larabee Mills, supra,* and there could be no useful purpose served in extending this opinion or commenting on the authorities relied on by the parties. It follows from what we have said that the decree must be reversed, and the cause will be remanded, with directions to overrule the demurrer. It is so ordered.

FIREMEN'S INSURANCE COMPANY *v.* SIMMONS.

Opinion delivered November 25, 1929.

McMillen & Scott, for appellant.

Marveline Osborne, Robert Bailey and *Hays, Priddy & Rorex,* for appellee.

McHaney, J. On November 13, 1928, appellee, Simmons, applied to the Pope County Real Estate Company, general agents for a large number of fire insurance companies, for a policy of fire insurance on his store building and fixtures, located about fourteen miles north of Russellville. Mr. Luck, acting for the Pope County Real Estate Company, issued and delivered to him on the same date a policy in appellee company, the Bankers' & Shippers' Insurance Company, covering $600 on the building and $200 on the fixtures, for which the premium was paid by Simmons in cash. The issuance of this policy was reported by the agency in Russellville to the company's general agents in Memphis, who directed a cancellation of the risk. Just when this was done is not shown. However, this policy was not immediately canceled by Mr. Luck, who attended to the matter, but on December 20, without the knowledge of the insured, he issued another policy in appellant company covering this same risk. The insured had not directed him in what company to place the risk, and he wrote it, in accordance with his custom, in any company he wished—one he thought would carry the risk. Luck had not notified Simmons that the Bankers' & Shippers' had instructed

him to cancel the policy, or that he had done so, or that he had rewritten it in appellant.

A fire occurred on December 21, 1928, which destroyed the property insured. Notice of loss was given both companies by Simmons, both denied liability, and this suit followed. It was tried before the court sitting as a jury, which resulted in a judgment against appellant for the full amount, with penalty and attorney's fee. The court found for appellee Bankers' & Shippers' and dismissed the complaint as to it. The Firemen's Insurance Company has appealed from the judgment against it, and Simmons has taken a cross-appeal as against the Bankers' & Shippers' Insurance Company.

It is first argued by appellant that the complaint failed to state a cause of action against it, and that its demurrer should therefore have been sustained. The complaint was directed against both companies, a kind of double-barreled action, with the hope that, if one escaped liability, the other might not. And while it is true the complaint, as to appellant, alleged that its policy was issued by the agent "without the knowledge or consent of the plaintiff, who still had charge of the first policy," we do not think this allegation had the effect of negativing a cause of action against appellant. It was alleged that the policy was issued covering the risk, and judgment was prayed against it.

Neither was appellant prejudiced by being sued jointly with the Bankers' & Shippers'. If it is liable for the loss sustained, and the other company is not, as the circuit court held, certainly appellant could not complain because another not liable was jointly made a defendant with it.

The real question in the case is whether appellant is liable at all under the facts and circumstances developed. The policy of the Bankers' & Shippers' contained a clause providing that the company might cancel the policy on five days' notice to the insured. This notice was not given. But we have many times

held that this clause is for the benefit of the insured, and may be waived by him, and that the agent of the company may also be the agent of the insured to accept notice of cancellation, and keep the property insured by writing it in another company. *Phoenix Ins. Co.* v. *State,* 76 Ark. 180, 88 S. W. 917, 6 Ann. Cas. 440; *Allemania Fire Ins. Co.* v. *Zweng,* 127 Ark. 141, 191 S. W. 903; *Insurance Underwriters' Agency* v. *Pride,* 173 Ark. 1016, 294 S. W. 19; *Home Fire Ins. Co.* v. *Parker,* 177 Ark. 678, 7 S. W. (2d) 324. In most of the cases coming before this court, where the rule above stated has been announced and followed, there appears to have been an agreement between the insured and the agent that the agent would keep the property insured, and this agreement may be either express or implied from the circumstances under which the policy was issued, or from continued course of conduct of the parties; as, for instance, where the agent renews on expirations, and accepts notices of cancellations and issues other policies in their stead, which is either known or acquiesced in by the insured. Take, for instance, the case of *Ins. Underwriters' Agency* v. *Pride, supra,* the court said: "Both Pride and Howard conferred authority in the beginning upon Burns to insure their property in any company he represented, leaving the selection or designation of any company to him. Our court is committed to the doctrine that authority of such breadth and scope has the effect of constituting the agent of the insurer the agent of the insured also to accept the policy when written, and to waive the cancellation notice clause, and to accept a new policy in lieu of the old one." Citing cases. Also, in the more recent case of *Home Fire Ins. Co.* v. *Parker,* 177 Ark. 678, 7 S. W. (2d) 324, we said:

"It is first insisted that the court committed error in refusing appellant's request for a peremptory instruction. This contention is based on the ground that the policy of the Home Fire Insurance Company of New York was still in effect on the date of the fire, by reason of the five-day cancellation clause heretofore mentioned, and

that, under the concurrent insurance clause in its policy, same never became effective and binding on it, because of the prior insurance existing in the Home of New York. We do not agree with counsel in this contention, as the letter of Mr. Mixon to appellee shows clearly that he had canceled the policy of the Home of New York, and that he had renewed the risk in appellant company. The five-day clause referred to does not apply to a situation of this kind. It is for the benefit of the policyholder. While the company has the right to cancel it, it cannot do so until the expiration of five days, without the consent of the policyholder, which gives him this time in which to secure additional insurance. Being for the benefit of the policyholder, it is a provision that can be waived by him, and was waived in this case by the acquiescence of appellee in the action of Mr. Mixon, who stated that he had canceled the policy in the Home of New York and had rewritten it in appellant company, to run one year from date, and it makes no difference that the policy was actually countersigned and delivered after the fire, because the appellee rested under the assurance of Mr. Mixon that his risk was covered. Mixon was the general agent for both companies, holding blank policies, with the power to execute and deliver and bind his companies immediately on fire insurance risks. *Milwaukee Mechanics' Ins. Co.* v. *Fuquay,* 120 Ark. 330, 179 S. W. 497."

So, in this case, we think an agreement may be fairly implied between appellee Simmons and the agent to keep his property insured, to accept notice of cancellation, to waive the five-day clause, and to write another policy in a company that would carry the risk. He applied for insurance, and left it to the agent to place it with any company he represented. He paid his premium for a year's insurance, showing conclusively that he wanted insurance continuously for a year. He was willing to accept any company the agent represented, and we think it fair to assume that, if the company canceled its policy, he would expect the agent to write it in another. The agent so un-

derstood his authority, and Simmons acquiesced in the agent's action, for, after the fire, when advised that the first policy had been canceled and a new one written in appellant, he surrendered the one for cancellation and accepted delivery of the other, thereby ratifying the action of the agent. We therefore hold that the trial court did not err in holding appellant liable.

It is finally insisted that appellant is not liable for the reason that the building insured was on ground not owned by Simmons in fee simple, in violation of a clause in the policy providing that it should be void if the building be on ground not so owned by insured. This is not a suit to try title to the land on which the building is located. Appellant and his grantors have been in possession of the land, paying the taxes thereon for many years, more than seven. There does not appear to be any adverse claimant, and, for the purposes of this litigation at least, he is the owner of the property.

We find no error, so the judgment must be affirmed. It is so ordered.

PLUNKETT *v.* HAYS.

Opinion delivered November 25, 1929.

Isaac McClellan and *H. K. Toney,* for appellant.

Coleman & Gantt, for appellee.

BUTLER, J. Suit by J. P. Plunkett against George A. Hays for damages because of negligence resulting in the death of plaintiff's child; verdict directed for defendant; judgment entered in accordance therewith, from which this appeal is prosecuted.

The testimony in this case presents a most unusual and tragic occurrence. The defendant in the court below was and is a practicing physician in charge and control of the Jefferson County Clinic. In October, 1928, the wife and two children of the appellant, having been exposed to typhoid infection, visited the Jefferson County Clinic, where they were administered the preliminary treatment for the prevention of typhoid by having a serum injected hypodermically in the muscular tissues. These injections were made by a Mrs. Ferguson, one of the nurses in attendance at the clinic, and, after an interval of a few days, Mrs. Plunkett and her two children visited the clinic for a second administration of the anti-typhoid serum. They had spent the night before with relatives in Grant County, and, on their return to Pine Bluff, where they lived, went to the clinic, at about 2:30 o'clock in the afternoon, where a nurse gave each of them a treatment for the prevention of typhoid. One of the children was a girl about five years of age, who, within a short time after the injection of the typhoid serum, began to suffer great pain. Her mother conveyed her and the other child in their car to their home, and a physician

was immediately called. Not only was the little girl, Chlorine, very sick by that time, but the mother and the other child also. They all developed a high temperature, Mrs. Plunkett's temperature registering about 104 degrees, the other child being very ill, while Chlorine was suffering from a temperature of about 108 or 109 degrees, accompanied by convulsions, and died about seven o'clock the following morning. After a time Mrs. Plunkett and the other child recovered from their illness.

The testimony of the mother and of the father, the appellant, was to the effect that all these persons were and had been in good health at the time of the administration of the typhoid shots, and that the child, Chlorine, who died, had never before that time been ill at all. The physician arrived at the home of the Plunketts some time in the afternoon, and remained in attendance upon the child during the night. Upon the death of the child the physician certified that the death was caused by protein poison. This, as explained by the physician, would be caused by "some food substance getting into the blood current." A sample of the child's blood was taken by the physician and given to a bacteriologist for examination, whose report showed that it contained no malarial parasites, and the count of the blood cells proved that the white blood cells were in greater amount than normal, which he explained would have been caused, among other things, from infection, but that such infection would not have been caused by typhoid. After the death of the child the appellant visited Dr. Hays' clinic and made inquiries of the doctor in an effort to ascertain the identity of the nurse who administered the typhoid shots. This information was refused by the doctor, the appellant stating in his testimony that the doctor gave as a reason for refusing this information that "I was looking for trouble, and that he (the doctor) did not want to get his nurses into any trouble, and that he was liable for what they did."

Appellant thereupon brought this suit, alleging in his complaint and amendments thereto that the "appellee

(defendant) was negligent by injecting said serum in a vein, or by injecting the wrong serum, or by injecting some poison, the name of which is not known to the plaintiff, or by using a needle which was infected with poison, or by injecting said serum too deep in the arm, or by failing to properly sterilize said arm, or by failing to properly sterilize said needle, or by not exercising ordinary skill practiced by persons giving serum injection;" and further, that the defendant "did not use ordinary care, and was negligent in employing an incompetent nurse or employee, who gave the shots which caused the death of the said Chlorine Plunkett."

On the trial of the cause the testimony above was adduced, and other testimony to the effect that the puncture made by the hypodermic needle showed no signs of inflammation, that it was administered at the proper place, and, from outward appearances, seemed to have been administered in a proper and skillful manner, and that the death of the child might have been occasioned by pernicious malaria.

In testing the action of the court in directing a verdict the testimony must be given its highest probative value in favor of the party against whom the verdict is directed, and must be viewed in the light most favorable to the appellant, and, where there is any evidence tending to establish an issue in favor of the party against whom the verdict is directed, it is error to take the case from the jury. *Cruce* v. *Mo. Pac. Ry. Co.,* 167 Ark. 88, 266 S. W. 981. Applying this rule to the testimony in this case, we think that there was sufficient evidence to submit the question of the appellee's negligence to the jury. It was shown that typhoid shots had been administered to the child by Mrs. Ferguson without any ill effect, and it is a matter of common knowledge that typhoid serum, when properly administered, results in only a temporary inconvenience, and in no serious illness. The fact that the child had been well until the time of the second administration of the serum, and that immediately thereafter

she became violently ill, with a temperature which could not ordinarily be attributed to malaria, that she had convulsions, and in a short time became "profoundly unconscious," that the physician who attended her gave at one time as his opinion that the death was caused by protein poisoning, that no malarial parasites were found in the blood, that the count of blood cells revealed a greater amount of white cells than the normal quantity, and that this might have been because of infection, and that defendant refused to disclose the identity of the nurse who gave the shots, and offered no explanation as to the manner in which the treatment had been given, might have warranted the conclusion that typhoid serum was not in fact administered, but some other and different injection which was destructive to the human organism; or that, due to the negligence of the nurse in not properly sterilizing the instrument used, or because of its improper use, the germ of some malignant infection was intruded into the circulation. At least it cannot be said, under the facts presented in this case, that the minds of reasonable men, without difference of opinion, would have concluded that there was no testimony from which an inference of negligence might be drawn. Negligence cannot be inferred from the mere fact that the child died, yet the fact of the child's death is a circumstance, taken together with the other circumstances in the case, from which the jury might have concluded that the negligence in the treatment complained of was the cause of the child's death.

The appellee cites the cases of *Arkansas Midland Railroad Co.* v. *Pearson,* 98 Ark. 399, 135 S. W. 917, 34 L. R. A. N. S. 17, *Norton* v. *Hefner,* 132 Ark. 18, 198 S. W. 97, L. R. A. 1918C, 132, and *Runyan* v. *Goodrum,* 147 Ark. 481, 228 S. W. 397, 13 A. L. R. 1403, and, under the holding in those cases, asserts that, even though the nurse might have been negligent in making the hypodermic injection, appellee is not liable, because the act could be performed by the nurse as well as by a physician, and

that he was not present and did not designate the nurse to administer the treatment. The cases cited have no application to the present state of this case, for, according to the testimony of the appellant, which is all the evidence on that matter, the appellee not only refused to give the name of the nurse, but expressly avowed his responsibility for her action.

For the reasons given it is apparent that the court erred in directing a verdict for the defendant, for which error the judgment is reversed, and the cause remanded for a new trial.

WILLIAMS *v.* SEWER IMPROVEMENT DISTRICT NO. 86.

Opinion delivered November 25, 1929.

Berry H. Randolph, for appellants.

Murphy & Wood, for appellees.

BUTLER, J. An improvement district was organized in the city of Hot Springs, Garland County, Arkansas, in the year 1926, designated as Sewer Improvement District No. 86, for the purpose of constructing a system of sewers for the use of the inhabitants of said district, which district was perfected and completed in that year. The appellants are the owners of five lots in said district, fronting on Grove Street, along which the sewer was laid. The first installment of improvement assessments became due May 1, 1927, and in September, 1927, the appellants filed this suit, attacking the validity of the organization of the district and praying that the assessments made against their property be canceled and the officers and employees restrained from acting under said assessments.

The appellees filed an answer and cross-complaint, asking judgment against the property for the 1927 and 1928 installments of the assessments, for penalty of 20 per cent. and attorney's fees, and that the property be sold to pay the delinquent assessments, etc. On the hearing the court dismissed the complaint of the appellants for want of equity on the ground that plaintiffs (appellants) "failed to begin legal proceedings within thirty days after the publication of the ordinance fixing the assessments of benefits in the said Sewer Improvement District No. 86, to correct or invalidate said assessments, and the plaintiffs are therefore barred and precluded from questioning said assessments or benefits, and that said Sewer Improvement District No. 86 of the city

of Hot Springs is a duly organized and existing local improvement district under the laws of the State of Arkansas.'' The court further found on defendants' cross-complaint that the assessments for the years 1927 and 1928 were delinquent, and gave judgment against the property for the same, but failed to give judgment for the statutory penalty and attorney's fees. From this decree the plaintiffs (appellants) prosecute their appeal, and the defendants (appellees) prosecute a cross-appeal from that part of the decree eliminating the statutory penalty and attorney's fees.

The appellants, for grounds for reversal, insist, first, that the district had not been properly formed, and that no petition of a majority of the owners of real property in Sewer Improvement District No. 86 was ever filed with the city council, or proof of the same offered or filed in this cause; second, that the district was formed and the improvements made and completed and the assessments levied on the property before any attempt of any kind had been made to establish the grades, as provided by law, and that no street grade was fixed by ordinance before the district was created and the contract was let; and third, that the assessments of benefits are invalid by reason of the fact that the assessments are not made upon the benefits actually received, either present or future, but are based wholly on a foot-frontage basis.

The appellees, on their cross-appeal, insist that, as the court gave judgment against the property for the delinquent installments of assessments, it necessarily should have included in the judgment the twenty per cent. penalty provided by § 5673 of Crawford & Moses' Digest, and attorney's fees, as provided for in § 5678 of Crawford & Moses' Digest, and on their cross-appeal pray that the judgment be corrected so as to include these items.

On the trial of the case it was agreed by the parties ''that the improvement district was organized, perfected and completed in the year 1926; that no ordinance estab-

lishing a grade on Grove Street was ever offered or passed until November 21, 1927, nor was the grade as provided by the statutes of the State of Arkansas ever established until November, 1927, and that the plaintiffs in the case are the owners of the property in controversy herein." Certified copies of the records were introduced in evidence, showing that the first petition for the formation of the district provided for by § 5649 of Crawford & Moses' Digest was filed and acted on by the city council by ordinance No....., entitled, "An ordinance laying off a portion of the city of Hot Springs into a sewer improvement district, to be known as Sewer Improvement District No. 86," and that the petition of a majority of the landowners had been duly published. The council found that the petition contained a majority in value of the owners of real property in said district, and afterward by resolution appointed assessors to assess the estimated benefits, which assessments were duly filed with the city council, and published in a newspaper published in said county for one month next before the date of the first publication of the advertisement. There was no other evidence introduced relative to the filing of the initial petition, the second petition, or the assessments, and publication of notice thereof.

■ With the admissions made by the parties, and on proof of the filing of the initial petition and the record as to the action of the council with reference to the majority petition of the landowners and of the ordinance fixing the assessments and the publication thereof, the burden was on the appellants to prove noncompliance with the requirements of the statute necessary for the creation of the improvement district. In the case of *Board of Improvement Dist.* v. *Carman,* 138 Ark. 339-346, 211 S. W. 170, where it was contended that an improvement district for the construction of waterworks and electric lines were invalid, among other things, because a majority of the property owners had not petitioned for the formation of the district, the court, in passing upon that question, said:

"It is very earnestly insisted that neither the initial nor the majority petition contained the requisite number of signers, and in support of this contention it is asserted that 'it does not affirmatively appear that all the testimony offered at the trial is included in the transcript, and that we must therefore indulge the presumption that omitted testimony would support a finding that the petitions did not contain the requisite number of signers.' * * * The court below made no finding on the question of majorities, and it may be true, as counsel contends, that such a finding cannot be made from the record before us. But the districts are not to be defeated on that account. No burden rested upon the districts to show affirmatively that they had been established upon majority petitions. Under the statute the assessments of benefits could not have been levied as liens upon the lands within the districts until the precedent finding had been made by the town or city council that the improvements had been petitioned for by a majority of the property owners in the districts; and, while this finding was not conclusive, it was *prima facie* correct, and imposed the burden of showing that the districts had not been petitioned for by a majority of the property owners upon him who attacked the districts on that ground."

Having failed to discharge this burden, it follows that the presumption must be indulged that the district was legally established. Moreover, the record of the ordinance and resolutions kept by the city clerk under the direction of the city council, and the by-laws and rules of the city, disclose the fact that the council found, on the 19th day of March, 1926, that a majority in value of the owners of real property in the district had signed a petition praying that the improvement be made, etc., and that the notice of said petition had been duly given. Section 5652, Crawford & Moses' Digest, relative to the petition of a majority of landowners, after providing for what should be stated in the petition and for its publication, contains the following language: "At the meeting

named in the notice the owners of real property within such district shall be heard before the council, which shall determine whether the signers of said petition constitute a majority in value, *and the finding of the council shall be conclusive, unless, within thirty days thereafter, suit is brought* to review its action in the chancery court of the county where such city or town lies." No suit was filed questioning the action of the city council in this particular until September 3, 1927, when plaintiffs (appellants) filed this action. Therefore, the suit not having been brought within thirty days, plaintiffs are precluded from questioning the correctness of the finding of the city council in determining whether those signing the petition constitute a majority in value of the owners of property within the district.

■ The appellants argue that the proceedings are void because no street grade was fixed by ordinance before the district was created and the contract was let. Appellants mistake the effect of the language of § 5656 of Crawford & Moses' Digest, upon which they rely for support of this contention. That section is as follows: "Immediately after their qualification the board shall form plans for the improvement within their district as prayed in the petition, and shall procure estimates for the cost thereof; but all such improvements shall be made with reference to the grades of streets and alleys as fixed, *or may be fixed,* by the ordinance of said city. For this purpose said board may employ such engineers and other agents as may be needful, and may provide for their compensation, which, with all other necessary expenditures, shall be taken as a part cost of the improvement. If, for any cause, the improvement shall not be made, said cost shall be a charge on the real property in the district, and shall be raised and paid by assessment in the manner hereinafter prescribed."

This section was construed by this court in the case of *McDonnell* v. *Improvement District,* 97 Ark. 334, 133 S. W. 1126, where the court said:

"Another contention is that the proceedings are void because no street grade was fixed by ordinance before the district was created and the contract was let. The statute merely provides that 'all such improvements shall be made with reference to the grades of streets and alleys as fixed or may be fixed by the ordinances of said city.' It does not require that the grade shall be established before the district is formed or the plans made. On the contrary, it clearly contemplates that the grades may be established at any time when the improvement may be made in conformity therewith.

■ The assessments were filed on August 7, 1926, and on August 18, 1926, the city council passed an ordinance approving and fixing the assessments, which ordinance was published, the first insertion being on the 20th day of August following. Section 5668 of Crawford & Moses' Digest provides as follows: "Within thirty days after the passage of the ordinance mentioned above (ordinance approving and fixing the assessments, § 5667), the recorder or city clerk shall publish a copy of it in some newspaper published in such town or city for one time. And all persons who shall fail to begin legal proceedings within thirty days after such publication, for the purpose of correcting or invalidating such assessment, shall be forever barred and precluded." Not having brought their action within the thirty days, appellants are barred from questioning the validity of the assessments, and their contention that the assessments were not made upon the benefits actually received, but on a foot-frontage basis, cannot be asserted now because of the provisions of the section above quoted, and their failure to bring their action within the time specified. See *Ingram* v. *Thames,* 150 Ark. 443-447, 234 S. W. 629, and cases cited.

A careful examination of the record in this case and a consideration of the briefs filed convince us that the action of the court in upholding the validity of the improvement district must be sustained. The court found that the assessments for the years 1927 and 1928 were

delinquent, and that the cross-complainant district was entitled to judgment and decree for sale of the property involved to satisfy same, but failed to give judgment for the statutory penalty and attorney's fee. In this we think the learned chancellor erred. Section 5673 of Crawford & Moses' Digest provides as follows: "If any assessment, made under this act, shall not be paid within the time mentioned in the notice published by the collector, the collector shall add thereto a penalty of twenty per centum, and shall at once return a list of the property on which the assessments have not been paid to the board of improvement as delinquent." Section 5678 of Crawford & Moses' Digest provides: "Summons shall be issued, and the defendant shall be required to appear and respond within five days after service; and upon default a decree shall be rendered against such property for the amount of such assessment, penalty and cost, and an attorney's fee."

We think by these sections the clear legal right to have a judgment for the penalty and attorneys' fees is conferred, and that, wherever it is found that the assessments have been delinquent on suit filed, the penalty and costs must be assessed, together with a reasonable attorney's fee.

It follows from what we have said that the cause as to the appellants will be affirmed and, on the cross-appeal of the appellees, will be remanded for further proceedings in conformity with the views herein expressed. It is so ordered.

RUST *v.* KELLEY BROTHERS' LUMBER COMPANY.

Opinion delivered December 2, 1929.

[redacted]

George A. Hurst and *C. D. Atkinson,* for appellant.

John Mayes, for appellee.

HART, C. J., (after stating the facts). We will first consider the relation that the state of the record shows that appellee bore to W. L. Elam, as owner of the property now in controversy, for the enforcement of its lien. The amount of the materials furnished by the Kelley Brothers' Lumber Company was in the aggregate $6,944.69. Although the itemized account attached to the complaint was not sworn to, the amount of materials furnished and the dates thereof were established by the evidence of appellee, and were not attempted to be contradicted. The record also shows that suit was commenced by appellee to establish its lien within ninety days after the materials were furnished, but it is insisted that appellee was not entitled to a lien because it failed to verify its account as required by § 6922 of Crawford & Moses' Digest. This does not make any difference. This court has uniformly held that, in an issue between mechanics or materialmen and the owner of the property, that a substantial compliance with the statute is all that is necessary. The result is that the bringing of a suit by the lien-claimant against the owner gives the latter all the notice that could be required as to the claim for a lien against his property. The neglect to comply fully with the requirement of the statute was intended for the protection of third persons who might acquire rights in or liens upon the same property. *Murray* v. *Rapley,* 30

Ark. 568; *Anderson* v. *Seamans,* 49 Ark. 475, 5 S. W. 799; *McFadden* v. *Stark,* 58 Ark. 7, 22 S. W. 884; and *Standard Lumber Co.* v. *Wilson,* 173 Ark. 1024, 296 S. W. 27.

In the last case the court said that the statute was wholly remedial in its nature, and that, when the controversy is between the holder of the lien and the owner of the land, an exact compliance with the statute at all points is not indispensable. So it will be seen, in so far as rights between appellee as the material furnisher and Elam as owner of the land are concerned, the bringing of the suit by the former against the latter for the purpose of asserting a lien for materials furnished and used in the construction of the houses within the period required by statute was all that was necessary to fix the lien of appellee.

Now, Rust purchased from Elam after the materials were furnished by appellee and used in the construction of the houses. His deed is dated July 18, 1928, and expressly recites that it is made subject to all material and labor liens for the construction of the seven houses now located on the above-described lots. This was notice to Rust that appellee was entitled to a lien on the lands for materials furnished and used in the construction of the houses. Hence Rust was not a *bona fide* purchaser for value, and acquired no greater rights than those possessed by the owner of the property. The last item of materials was furnished by appellee less than ninety days before appellee instituted this suit against Elam to establish its lien. Elam conveyed the lots to Rust after the materials were furnished, and within the time allowed by statute to appellee to bring suit to enforce its lien for material. Hence Rust was not an innocent purchaser for value, and acquired the title to the lots subject to appellee's lien for material. *Bell* v. *Koontz,* 172 Ark. 870, 290 S. W. 597.

Montgomery purchased from Rust, and was affected with notice in the title deeds of his vendor, so the notice recited in the deed that the conveyance was made subject to the liens of materialmen and laborers affected him

equally with Rust. *Union & Planters' B. & T. Co.* v. *Simmons,* 166 Ark. 285, 265 S. W. 963. Therefore we hold that Rust and Montgomery stand in the shoes of Elam, their grantor, and that appellee has a lien for materials furnished by it in so far as they are concerned.

This brings us to a consideration of the question as to whether there was any priority between the lien-claimants. It will be remembered that Ona Hudson and others had liens for labor performed on the seven houses, some of the laborers working on one house and some on another. Appellee furnished the lumber and other materials for all seven of the houses. It furnished the lumber under an oral contract for all the houses, and asserted its lien against all the lots. This contract was an entire contract, and appellee might assert and establish its liens in one suit against all of the lots for the material furnished in the erection of all of the houses. *Burel* v. *East Arkansas Lumber Co.,* 129 Ark. 58, 195 S. W. 378, 10 A. L. R. 1017, and cases cited.

But it is urged upon us that the rule would not apply to the laborers, for they performed labor upon the houses separately. This does not make any difference. Section 6920 of Crawford & Moses' Digest provides that the lien for work and labor done or things furnished as specified in the act shall be on an equal footing, without reference to the date of filing the account or lien, and that, in cases where the property is sold, the proceeds of the sale, when not sufficient to discharge in full all the liens against the same, without reference to the date of filing the account or lien, shall be paid *pro rata* on the respective liens; provided such account or lien shall have been filed and suit brought as provided by the act. It was the evident intention of the framers of the statute to establish the equality of liens as between claimants for work and labor done and those furnishing material for the construction of the building.

In the application of the statute in the present action the court properly determined that the proceeds of the sale of the property should be distributed *pro rata* among

the various lien claimants. Therefore the decree will be affirmed.

BOGERT *v.* WADE.

Opinion delivered December 2, 1929.

C. D. Atkinson, for appellant.

W. N. Ivie and *John Mayes,* for appellees.

HART, C. J., (after stating the facts). It is first sought to uphold the decree upon the theory of *Dierks Special School District* v. *Van Dyke,* 152 Ark. 27, 237 S. W. 428, where the court held that, while parties to a written contract may prove that, after its execution, they substituted a new agreement for it, they cannot prove that, at the time the contract was entered into, they had an understanding not expressed in the written contract nor reduced to writing.

Again counsel seek to uphold the decree upon the theory of *Barfield Mercantile Co.* v. *Connery,* 150 Ark. 428, 234 S. W. 481, where the court held that the rule that parol evidence is inadmissible to contradict or vary a written instrument is confined to the parties to the instrument or to those claiming some right or interest under it.

Counsel insist that the first case is applicable, because the oral agreement testified to by the Fallins and Martin was entered into at the time the written contract was executed between Wade and Wood, and for that reason they cannot vary the terms of the written contract, because the oral contract was necessarily a part of the written one executed on the same date. We do not agree with counsel in this contention. The written contract was entered into between Wade and Wood for the purpose of enabling Wood to purchase back the property which had been foreclosed under the mortgage, within a certain and fixed time. It is true that it recites, as additional security for the performance of the contract, the assignment of the two notes executed by R. T. McClinton to Wood, but the Fallins and Martin were not interested in this contract at all. It was not made for their benefit, and it did not concern them whether Wood purchased the mortgaged property back or not. They were only concerned in being released from the deficiency judgment. They performed their part of the contract to secure their release from the deficiency judgment by procuring Wood to transfer the two McClinton notes to Wade. The two contracts, while executed at the same time, were between different parties and were for different purposes. In any event it cannot be said that the oral contract testified to by the Fallins and Martin in any wise tended to contradict or to vary the written contract between Wade and Wood.

In the second place, it is claimed that the Fallins and Martin claimed some right or interest under the written contract executed between Wade and Wood. We cannot perceive how the Fallins and Martin were in any wise interested in the contract between Wade and Wood.

They did not claim any rights under it, and it did not concern them in the least whether or not that contract was carried out. Their rights became vested under the oral contract which they made with Wade for a release from the deficiency judgment against them upon procuring Wood to assign to Wade the two McClinton notes for $500 each. They carried out their part of the contract by procuring Wood to indorse the notes to Wade, and it did not make any difference to them that Wood did this in order to secure the right to purchase back the property within a limited time.

This brings us to a consideration of the case upon the merits. On the one hand, the two Fallins and Martin and Wood all testified that Wade agreed to release the Fallins and Martin from the deficiency judgment if they would procure Wood to assign to Wade the two McClinton notes for $500 each as collateral security for his part of the deficiency judgment. All four of these parties testified in positive terms that this was the agreement. It is true that Wade in equally positive terms testified that this was not the agreement, but, so far as the record discloses, the parties were all credible persons, so that there is no reason why the testimony of one of them should equal or outweigh the testimony of the other four. We are of the opinion that the chancellor erred in finding the facts on this branch of the case in favor of appellees, and that a preponderance of the evidence was in favor of appellant upon this branch of the case.

The case seems to have been fully developed upon this point. It follows that the decree will be reversed, and the cause will be remanded, with directions to grant the prayer of the complaint for a permanent injunction restraining appellees from proceeding further in the levy and sale of the property under the execution against the grantors of appellant, and for further proceedings in accordance with the principles of equity. It is so ordered.

PIONEER RESERVE LIFE INSURANCE COMPANY *v.* SMITH.

Opinion delivered December 2, 1929.

[redacted]

Taylor Roberts and *H. B. Stubblefield,* for appellant.

Marveline Osborne and *Robert Bailey,* for appellee.

SMITH, J. L. G. Morgan, the authorized agent of the Pioneer Reserve Life Insurance Company, took the application of A. M. Reed for a $5,000 life insurance policy, and issued what is called an advance premium receipt, which recited that, if the policy was not issued pursuant to the application, the premium would be returned by the insurance company. Reed obtained the money to make the payment from Smith, and gave Smith, at the time, a check payable ninety days later, and indorsed thereon the words, "with interest." Morgan did not forward the application, and made no report of the collection to the insurance company. Failing to receive the policy applied for, Reed notified the company, and received from it a letter acknowledging Morgan's agency and expressing surprise and regret at his conduct. This letter directed Reed to report for the physical examination to a physician who was named, and stated that the policy applied for would be issued upon receipt of a favorable report from the physician. In his testimony at the trial from which this appeal comes Reed stated that he was disgusted, and decided that he did not want to proceed with his application, and that he did not apply for the examination as he had been directed to do. Reed stopped payment of his check, and it was not paid when presented. Smith died, and his administrator brought

suit upon the check at law against both Reed and the insurance company, and recovered judgment against both defendants for the amount of the check, with interest, and the insurance company alone has appealed from this judgment.

Reed testified, as a witness on behalf of the plaintiff, that when he gave Smith the check, Smith paid Morgan the money, and Morgan gave witness a receipt, and that he would have permitted the check to be paid upon its maturity, had the policy as originally applied for been issued. After the controversy arose, Reed turned the receipt over to Smith.

Certain preliminary questions have been raised, which we find it unnecessary to discuss, as, in our opinion, no right to recover against the insurance company was shown.

It is conceded that Morgan was the agent of the insurance company, with authority to receive the money paid him, and to issue the receipt which was delivered to Reed, and the right of Reed to recover the premium, had he paid it, cannot be questioned; but there was no privity of contract between Smith and the insurance company. He was not a party to the contract for the issuance of the policy. He merely loaned Reed a sum of money, and the fact that he paid this money to the company's agent did not alter his relation to the transaction. Smith was Reed's creditor, and nothing more, and in paying the money to the company's agent he himself acted as the agent of his debtor in so doing, and did not thereby enter into any personal contractual relation with the insurance company. Had he paid and delivered the money to Reed, instead of to Morgan, his attitude would not have been different, for this, in effect, is what he did.

The right of Smith to recover from Reed is not questioned, and no appeal was prosecuted from the judgment in Smith's favor against Reed. The plaintiff does not seek by this suit to impound any sum of money which may be due from the insurance company to Reed, resulting from the failure to deliver the policy, as might have

been done by garnishment proceedings; but the suit was brought upon the theory that Smith had an original cause of action against the insurance company, because the money loaned to Reed was paid to the insurance company's agent. This right does not exist, because there was and is no contractual relation or privity of any kind between Smith and the insurance company.

In the case of *Donaghey* v. *Williams,* 123 Ark. 411, 185 S. W. 778, the facts were that Williams sued Donaghey to recover money paid by Williams at Donaghey's request, and we said that: "to sustain a cause of action for money thus paid, the previous request must be proved, or else it must be shown that the party for whose benefit the money was paid ratified such payment after it was made."

Here the testimony does show that Smith paid the money at Reed's request, and this proof entitled him to a judgment against Reed, and this he had, but such a request conferred no right to sue the insurance company upon the misappropriation of the money by the insurance company's agent.

The transaction was a mere loan of money by Smith to Reed, which was made to Reed for his accommodation, and upon the faith of Reed's credit, and upon Reed's promise—implied, if not expressed—to repay the loan.

At § 24 of the chapter on "Money Received," in 41 C. J., page 42, it is said: "One in whose behalf money is borrowed without authority, but to whose use it is applied by the borrower, is not liable to the lender as for money had and received." This statement of the law is copied from a syllabus in the case of *Kelley* v. *Lindsey,* 73 Mass. 287.

A syllabus in the case of *Stephens* v. *Board of Education,* 79 N. Y. 183, 35 Am. Rep. 511, reads as follows:

"One G, who was a member of the board, defendant herein, as attorney for it received $3,600.84 of its money, which he wrongfully appropriated to his own use; he subsequently procured from plaintiff on a forged mortgage $4,129.34, which he deposited in a bank to his credit,

and on the same day drew his check on said bank to defendant's order for the amount so appropriated, and delivered the same to defendant, who received it, without notice or knowledge of the fraud perpetrated upon plaintiff, and gave G credit therefor; the check was paid, and the money received thereon used by defendant. In an action to recover the amount so received by defendant from G, *held* that defendant, having received the money in good faith, and in the ordinary course of business, for a valuable consideration, was not liable. The possession of money vests the title in the holder, as to third persons dealing with him and receiving it in due course of business and in good faith, upon a consideration good as between the parties."

In the case of *Di Orio* v. *Venditti,* 39 R. I. 101, 97 Atl. 599, a syllabus reads as follows: "Where a wife participated in borrowing money with her husband, and the credit was given to both, both are liable for the debt; but, if she did not so participate, and the loan was made to her husband, the wife is not liable, even if she obtained the money from her husband after he borrowed it."

In the case of *Combest* v. *Glenn,* 142 S. W. 112, the facts were that Grisham was the agent of Combest in the location and development of a townsite, and borrowed from Glenn $15, which he spent in buying material to be used in the construction of one of Combest's buildings. In reversing a judgment which Glenn had recovered for the money so loaned, it was said: "The bare fact that the money loaned was used to obtain door shutters for the commissary on defendant's land would not render him liable to plaintiff therefor."

If we should hold that Smith could recover against the insurance company because he had made a loan to Reed of the amount of money necessary to pay Reed's premium, which Reed had the right to recover in the event the policy was not issued as applied for, a principle would be announced which would be endless and uncertain in its ramifications and applications.

The judgment against the insurance company will therefore be reversed, and the cause of action as to it will be dismissed. It is so ordered.

HART, C. J., (dissenting). Morgan, the agent of the insurance company, gave Reed an advance premium receipt for the $242.40. The receipt provides that, if for any reason the application is denied, the company will notify the applicant, and return the premium upon the surrender of the receipt. When Reed failed to get his policy, and got into a wrangle, as he terms it, about the non-delivery of it, he turned the receipt over to Smith. This practically amounted to an assignment to Smith by Reed of his claim against the insurance company for a return of the advance premium, although it is not so called in express words. Reed admits that Smith is entitled to recover $242.40 from either the company or himself. This amounts to an admission that he, Reed, is not entitled to recover against the company. He is a party to the present suit and is bound by the judgment, so that the insurance company cannot again be compelled to pay the claim in a suit by Reed. If it be conceded that the court should not have rendered judgment against Reed, that error would not result in any prejudice to the insurance company, and would not call for a reversal of the judgment, because Reed has not appealed.

MEYERS STORES, INC., *v.* WURZBURG BROTHERS.

Opinion delivered December 2, 1929.

Smith & Blackford, for appellant.

Cooley & Adams, for appellee.

SMITH, J. Appellant, a corporation engaged in the business of selling shoe polish to jobbers, committed a breach of a contract to purchase a large quantity of bottles from appellees, and a controversy arose as to the amount of damage it should pay on that account.

Appellees brought this suit to recover the damages, and in support of their claim Reginald Wurzburg, a member of their firm, testified that a settlement was effected whereby appellant agreed to pay the sum of $177.96 on account of the bottles on hand, and the additional sum of $161.83 for freight on the shipment from the factory where the bottles had been made.

The correspondence between the parties which appears in the record was ineffectual in settling the controversy, and a telephone conversation occurred in regard to a settlement, and the member of the appellee firm above mentioned testified that appellant agreed, in this conversation, to pay both items. Appellant denied this, and testified that it was agreed that the entire controversy might be settled by paying the sum of $177.96. After the telephone conversation, appellant remitted to appellees a check for $177.96, and attached to the check as a part thereof was an invoice showing items aggregating the amount of the check, and accompanying the check was the following letter:

"We are inclosing check for $177.96 as per our conversation over the telephone. I agreed to pay 36c per gross, or stand a loss of 36c per gross on all bottles that you had on hand and those that you claim were made up at the factory, which we did. There was nothing said about freight. Consequently we are not going to stand any loss whatever on these freight items."

Immediately upon receipt of the letter, appellees wrote a reply, which was registered, in which it was stated that the check was not sufficient, and would not be accepted in full settlement of the demand, as it did not cover the item of freight, which appellant had agreed in the telephone conversation to pay as a part of the settlement. The letter further advised that the check had been deposited for collection, and that appellees would sue for the balance unless it was remitted promptly.

The cause was submitted to the jury under instructions which are not abstracted, and it will therefore be conclusively presumed that the instructions contained correct declarations of the law; but it is earnestly insisted that an accord and satisfaction was shown by the undisputed testimony on the payment of $177.96, and that a verdict should have been directed in appellant's favor, whereas the verdict of the jury was against it. The correctness of this contention is the only question presented by this appeal, which has been duly prosecuted to reverse the verdict and judgment of the court below.

It may be first said that these two items do not arise out of separate transactions, but are both elements of damage arising out of the breach of the contract to purchase the bottles. The items may have been equally meritorious, and both may have been valid as elements of damage which might have been recovered; but the question here presented is whether there has been an accord and satisfaction whereby both were settled.

It is apparent from what we have said that there was a controversy, not only as to the merit of appellees' claim, but also as to the telephone conversation concerning it, and the writer begins the letter copied above by stating his understanding of the telephone conversation in which the settlement was arrived at, and concludes the letter with the statement that appellant will not pay the freight item, and does not understand that it is expected to do so. The letter appears to us to be an unambiguous tender of $177.96 in full settlement of the controversy,

with the condition plainly and necessarily implied that, if accepted, the controversy would be thereby settled.

Counsel for appellees cite a number of our cases which discuss the essentials of a valid accord and satisfaction, but we do not review them, as the law on the subject is well settled. The difficulty is in the application of these settled principles to the facts of particular cases. The case chiefly relied upon by appellees to sustain the action of the court in submitting the question to the jury is that of *Knight* v. *Wolpert,* 172 Ark. 937, 290 S. W. 933. There the parties dealt with each other face-to-face, and, while the opinion reflects the facts that the debtor tendered the sum paid in full settlement of the controversy, it also reflects the fact that the creditor declined to receive it as such at the time the money was paid him. The debtor in that case had therefore the opportunity and the option to refuse to make the payment only after the acceptance of the condition which he sought to impose, yet he paid the money, knowing at the time that the creditor did not accede to his condition. The jury was warranted in that case in finding—as it did find—that there had been no accord and satisfaction; but, although we held that the facts of that case presented a question for the jury as to whether there had been an accord and satisfaction, we quoted with approval from the chapter on "Accord and Satisfaction," 1 R. C. L., page 194, the following statement of the law: "To constitute an accord and satisfaction in law, dependent upon the offer of the payment of money, it is necessary that the offer of money be made in full satisfaction of the demand or claim of the creditor, and be accompanied by such acts or declarations as amount to a condition that, if the money is accepted, it is to be in full satisfaction, and be of such a character that the creditor is bound to so understand the offer."

Here the letter was written by appellant at Walnut Ridge to appellees in Memphis, and we think its tenor was such that appellees must have known that the tender of payment was made on condition that it be accepted in

full satisfaction of the controversy, and, when appellees indorsed and deposited the check in their bank at Memphis for collection for their account, their acceptance of the condition will be conclusively presumed.

The verdict should therefore have been directed in appellant's favor, and for this error the judgment must be reversed, and, as the case appears to have been fully developed, it will be dismissed.

FORE *v.* NEW YORK LIFE INSURANCE COMPANY.

Opinion delivered December 2, 1929.

Carmichael & Hendricks, for appellant.

Louis H. Cooke and *Rose, Hemingway, Cantrell & Loughborough,* for appellee.

HUMPHREYS, J. Appellant instituted this suit against appellee on April 5, 1929, in the circuit court of Pulaski County, Third Division, to recover $2,999 (waiving statutory penalties) as beneficiary in a life insurance policy issued by appellee to her husband, Peter J. Fore, on the 7th day of July, 1926, which provides that, in consideration of the payment of an annual premium, it would pay her $5,000 in the event her husband should die a natural death, and double indemnity under certain conditions. The policy of insurance was made the basis of the suit, and contained self-destruction and incontestable clauses. The self-destruction clause is as follows:

"In case of self-destruction during the first two insurance years, whether the insured be sane or insane, the insurance under this policy shall be a sum equal to the premiums thereon which have been paid to and received by the company, and no more."

The incontestable clause is as follows: "This policy shall be incontestable after two years from its date of issue, except for nonpayment of premium and except as to provisions and conditions relating to disability and double indemnity benefits."

It was alleged in the complaint that the insured died on March 15, 1928, at which time the policy was in force, and that notice and proof of death had been furnished appellee in accordance with the terms of the policy.

On the 15th day of April, 1929, appellee filed an answer to the complaint, alleging that Peter J. Fore, the insured, came to his death on the 15th day of March, 1928, by suicide, and tendering the amount of premiums paid by the insured, with interest thereon, into the registry of the court, and interposing the self-destruction clause contained in the policy as a defense to a recovery of any additional amount.

Appellant filed a demurrer to the answer, upon the alleged ground that the policy sued upon was incontestable for any purpose after two years, except as to provisions and conditions relating to disability and double indemnity benefits, and for that reason failed to state a defense. The court overruled the demurrer, over the objection and exception of appellant. Appellant stood on her demurrer, and refused to plead further, whereupon the court rendered judgment against appellee for $818.14, the amount tendered and deposited in the registry of the court, in full of its liability under said policy, from which is this appeal.

Appellant contends for a reversal of the judgment and the entry of a judgment here for the amount sued for, with interest and attorney's fee, upon the ground that the incontestable clause in the policy relates to the self-destruction clause, and the suicide of Fore within two

years from the date of the policy could not be pleaded after the expiration of two years from the date thereof as a defense to a recovery of the amount specified in the face of the policy. Appellant cites the case of *Standard Life Ins. Co.* v. *Robbs,* 177 Ark. 275, 6 S. W. (2d) 520, in support of her contention. In that case it was ruled that the incontestable clause, in substance the same as the incontestable clause in the instant case, had reference to the self-destruction clause, and was a short statute of limitations which precluded the insurance company after one year from pleading the suicide of the insured, which occurred within one year from the date of the policy, as a defense. The Robbs case was decided upon authority of the case of *Missouri State Life Ins. Co.* v. *Cranford,* 161 Ark. 602, 257 S. W. 66, and the cases cited in support of the rule announced in the Cranford case, to the effect that:

"The modern rule is that a life insurance policy, containing a provision that it shall be incontestable after a specified time, cannot be contested by the insurer on any ground not excepted in that provision. It is said that the practical and intended effect of such a stipulation is to create a short statute of limitations. By the stipulation the insurance company agreed that it would take a year to investigate and determine whether it would contest the policies of insurance, and that, if it failed within that time to discover any grounds for contesting the same, it would make no further investigation, and would not thereafter contest the validity of the policies."

In overruling the motion for a rehearing in the Robbs case, this court approved and reannounced the rule laid down in the Cranford case in the following language:

"The fact of suicide or not could only be established by proof, and this would bring on a contest, which is the very thing the insurance company has agreed not to do after a certain time. As Mr. Justice Holmes so aptly expressed it, after the period of time expressed in the incontestable clause has expired there can be no dispute of fact, except the fact of death, unless other conditions

are imposed in the incontestable clause itself. The cause of death has, by the agreement of the parties, ceased to be an issue of fact. In short, after the period of time prescribed in the incontestable clause has expired, the insurance company cannot contest the fact of suicide. While there are authorities to the contrary, we think the better reasoning is in accordance with the decisions of the courts above cited. The incontestable clause constitutes, as the courts generally put it, not an assurance against the results of crime, but an assurance against the hazards of litigation; and we are of the opinion that the insurance company could not contest the policy before or after the death of the insured, after the period of time prescribed in the incontestable clause had expired, except for the conditions set out in the incontestable clause itself."

Appellee argues that the instant case is not ruled by the Robbs case, because the self-destruction clause in the policy in the Robbs case was different from the self-destruction clause in the policy issued by appellee to Fore, in that under the former the act of suicide by the insured within a specified time avoided or annulled the policy *in toto* as to a recovery by the beneficiary, whereas under the latter the policy remained in full force and effect in favor of the beneficiary for a recovery of premiums paid by the insured. In other words, the contention is that, in tendering the premiums and interest, appellee was carrying out the terms of the policy and not attempting to contest it, and for that reason the incontestable clause is not applicable to the self-destruction clause contained in the policy involved in the case at bar. This conclusion is reached by appellee on the theory that the contract of insurance contemplates two separate and distinct risks. This exact theory was advanced as a defense in the case of *Mareck* v. *Mutual Reserve Fund Life Assn.*, 62 Minn. 39, 64 N. W. 68, 54 Am. St. Rep. 613, in which the self-destruction and incontestable clauses in the policy involved are in substance the same clauses contained in the policy in the case at bar, and the court in the Mareck case said:

"The only question in this case is whether the company is bound to pay the $5,000 or only a 'sum equal to the amount of the assessment paid by said member, with six per cent. interest.' Defendant's contention is that the contract contemplates two separate and distinct risks—death by suicide, and death from any other cause; that in the latter case it promised to pay $5,000, and in the former only the amount of premiums paid, with interest; that the 'incontestable clause' is inapplicable because the company is not contesting the policy, but only proposing to pay according to its terms; that death by suicide was not a risk which they assumed, except to the extent of the premiums, with interest. While the literal language of the contract lends an air of plausibility to this argument, yet we do not think it is sound. There is nothing in the policy contemplating two distinct and separate risks. The assured applied for an insurance on his life of only one sum, viz., $5,000. The amount for which the policy was issued was $5,000, payable at his death, but coupled with numerous conditions, the breach of any one of which, if not waived, relieved the insurer from liability. Counsel for defendant admits, correctly, and no doubt advisedly, that, if death had occurred from any of the causes enumerated in the eleventh paragraph, the 'incontestable clause' would have applied. But these risks were no more assumed by the company than was death by suicide."

What the court said in the Mareck case, quoted above, is a complete answer to the assertion that the invocation of the self-destruction clause as a defense to a suit on the policy is not a contest. The Mareck case, which holds that there is no real difference or distinction between the self-destruction clauses, was cited in and made a basis for the court's decision in the Cranford and Robbs cases. We are unable to see why the incontestable clause would not apply to both alike when interposed as a defense to a suit upon the policy for the full amount thereof.

Appellee contends that the instant case is ruled by the case of *Interstate Business Men's Association* v. *Adams*, 178 Ark. 856, 13 S. W. (2d) 591, instead of the Robbs case. The incontestable clause and its effect on the self-destruction clause or other conditional clauses, which might relieve the insurer from liability, in whole or in part, was not an issue or involved in the case referred to, so it does not control or govern the case at bar.

On account of the error indicated the judgment is reversed, and judgment is directed to be entered here for $2,999, with interest, and $300 as an attorney's fee.

SMITH, J., (dissenting). Although it is my opinion that the Robbs case, cited and relied upon by the majority for the reversal of the judgment of the circuit court, is unsound in logic and contrary to the overwhelming weight of authority, I do not write this dissenting opinion to criticise that case. I accept it as declaring the law, and it is my purpose only to attempt to show that it does not apply to the policy here sued on.

Upon the authority of the Robbs case, it may be assumed that, as the provision against suicide does not appear in the incontestable clause in the policy sued upon, and more than two years have expired since the issuance of the policy before the institution of this suit, the policy is now an unalterable contract to discharge the obligation which the insurer contracted against. But is it a contest of the policy to inquire what these obligations are, or to resist the enforcement of a liability which the insurer says the policy does not impose?

Stripped of all superfluities, this is the question in the case. What are the facts? For a fixed annual premium the insurance company, hereinafter referred to as the company, issued a policy on the life of Peter J. Fore, for the sum of five thousand dollars. The policy provided that if the insured died a natural death, the sum payable should be five thousand dollars; but if death resulted from an accident, there should be paid twice that amount. There was also a provision that, in case of the

disability of the insured, there should be paid ten dollars per month for each thousand dollars of the policy. The policy also provided that in the event of death by suicide during the first two years the policy was in force, the insurance should be for a sum equal to the premiums which had been paid to and received by the company, and no more.

It appears, therefore, that the liability assumed by the company (except as to disability benefits) depended entirely upon the manner of the insured's death. It might have been ten thousand; or five thousand dollars; or the amount of the premiums paid. Did the company not have the right to stipulate what amount should be payable in any of these contingencies? It would appear that it has the right to do so, provided it be conceded that the right exists to contract as to what obligations the company will assume in a given contingency.

We cannot make a contract for parties. We may, and properly do, resolve all doubts as to the meaning and construction of an insurance contract against the insurer; but when this has been done and the meaning of the contract has been thus ascertained, we should enforce the contract, whatever the result may be.

Suppose during the period of contestability or after its expiration, the insured had asserted his disability and had claimed the disability benefits, would a denial of the existence of disability by the company be a contest of the policy? Suppose further, that when the proof of the death of Mr. Fore had been presented, the claim had been made that death had resulted from an accident, and that the sum payable was not the face of the policy, but twice that amount, would a denial that the insured's death was the result of an accident be a contest of the policy? We apprehend that no one would be so bold as to make this contention.

If, therefore, the insurer may contract to pay a certain sum upon the death of the insured from a natural cause, or a larger sum if the death be accidental, why is

it not permissible to contract that upon death from suicide a less sum shall be payable? The amount to be paid in any event is of no controlling importance. The principle that is vital and important is the right to contract, because, if the right to contract is conceded, the parties thereto may stipulate in the contract what sum of money shall be paid in one contingency, and what sum shall be paid in another.

Just here, let us compare and distinguish the suicide clause in the Robbs case from that in the instant case. In the former it reads as follows: "Suicide. Self-destruction, sane or insane, within one year from the date of this policy, *is a risk not assumed by the company under this policy.* In such event the company will return the premiums actually received." In the instant case it provides: "Self-destruction. In the case of self-destruction during the first two insurance years, whether the insured be sane or insane, the insurance under this policy shall be a sum equal to the premiums thereon which have been paid to and received by the company, and no more."

It thus appears that in the one case it is provided that death by suicide is a risk not assumed by the company under the policy; whereas in the other case the liability upon death from suicide is expressly recognized and a sum named which shall be payable in that event.

It will also be observed that in the Robbs case the policy provided that in the event of suicide the company will return the premiums actually received, and nothing more. The beneficiary gets nothing. The contract is rescinded, and the premiums are returned, and these return premiums would be payable to the administrator of the estate and become a part of the estate.

Under the suicide clause in the instant case the policy is not rescinded, and the beneficiary named in the policy, and not the administrator, is entitled to the sum payable upon the happening of the event insured against. The policy is in force, and not rescinded, and there becomes payable the agreed amount. It is true the

sum payable is the amount of the premiums received, but what of that? It could have been for a larger or a smaller amount, and the validity of the contract does not depend upon the sum to be paid, if the company has the right to contract as to the amount it will pay upon the occurrence of the contingency insured against.

Is it a contest of the policy for the company to insist that under the terms of the policy a given amount, and that only, should be payable in a particular circumstance? Suppose the policy had provided that in the event of death by suicide the sum payable should be one hundred dollars, or one thousand dollars, would it be insisted that a denial of a greater liability than that provided by the policy was a contest of the policy? Does the insistence of the company that the obligations of the contract be enforced according to what it insists is the plain letter thereof constitute a contest? Would a denial of double liability upon the ground that the insured had not died from an accident be a contest of the policy? We think these questions answer themselves, and that it is not a contest of the policy to insist that only that liability be enforced which under the contract the company assumed.

We do not concur in the view of the majority that the case of *Interstate Business Mens' Accident Assn.* v. *Adams,* 178 Ark. 856, 13 S. W. (2d) 591, has no application here. We think it has. That case was a suit upon a two-thousand dollar policy, and the application of that case to this is that the recovery of one hundred dollars only was there permitted because the policy provided that in the named contingency only that amount should be payable. The incontestable clause would have no more relevancy to that case than it has to this, because the controlling question in both cases would be, and is, what was the amount of insurance to be paid upon the happening of the contingency insured against?

In the case of *Myers* v. *Liberty Life Ins. Co.,* 124 Kan. 191, 257 Pac. 933, 55 A. L. R. 542, was a case iden-

tical in all essential respects with the instant case. The headnotes in that case read as follows:

"A life insurance company issued a policy on September 10, 1923, in which it agreed to pay to the insured's wife, as beneficiary, the sum of $3,000, immediately on receipt of proof of death of the insured, provided premiums had been paid and the policy was in force. The policy contained these provisions:

" 'This policy shall be incontestable after one year from the date of issue, if premiums have been duly paid.'

" 'In case of suicide of the insured, whether sane or insane, within two years from the date of this policy, the liability of the company shall be limited to the amount of the premium actually paid.'

"The insured committed suicide by hanging, on August 27, 1924. The policy was in force, the premium had been paid, and proof of death was made. *Held,* the entire policy considered, liability of the company is limited to the amount of premium actually paid."

The case just quoted from was decided by the Supreme Court of Kansas in an opinion which was unanimous, and the reasoning of the court is so logical and convincing and the conclusions of the court so fortified by authority that we think it should be followed here.

Another very similar case is that of *Steam* v. *Occidental Life Ins. Co.,* 24 N. M. 346, 171 Pac. 786, 24 N. M. 346. The headnotes in that case read as follows:

"The word 'incontestable,' as used in life insurance policies providing that the policy shall be incontestable, means indisputable and amounts to a guaranty that no objection shall be taken to defeat the policy on the death of the person whose life is insured.

"An incontestable clause in a policy of insurance does not preclude the defense of suicide, where the suicide clause in the policy is a part of the contract to pay, providing how much shall be due and payable in the event of death by self-destruction."

The brief of counsel for the company cites the following additional cases to the same effect: *Childress* v. *Fraternal Union of America,* 113 Tenn. 252, 82 S. W. 832, 3 Ann. Cas. 236; *Howard* v. *Missouri State Life Ins. Co.,* (Tex. Civ. App.) 289 S. W. 114; *Scarborough* v. *Am. Nat. Ins. Co.,* 171 N. C. 353, 88 S. E. 482, L. R. A. 1918A, 896, Ann. Cas. 1917D, 1181.

We are of the opinion, therefore, that the circuit judge was correct in holding that this was not a contest of the validity of the policy, in violation of the incontestable clause, but was an endeavor on its part to limit its liability under the policy to the amount which it agreed to pay in the event the insured died by his own hand, as it is admitted he did, and we think the judgment of the circuit court below so holding was correct and should be affirmed.

In this connection, it may be said that the case of *Hearin* v. *Standard Life Ins. Co.,* 8 Fed. (2d) 202, reviews the law of this case in an opinion written by the late Judge Trieber. The reasoning in that case, upon the numerous authorities therein cited, is so clear and forcible as to demonstrate, not only the error in the majority opinion in the instant case, but the unsoundness of the Robbs case as decided by this court as well. The Robbs case was, in fact, as appears from the opinion of Judge Trieber and that of this court (177 Ark. 275, 6 S. W. (2d) 520), the same case.

I am authorized to say that Justices KIRBY and MCHANEY concur in the views herein expressed.

COOK *v.* HARRISON.

Opinion delivered December 2, 1929.

V. D. Willis, for appellant.

Woody Murray, for appellee.

HUMPHREYS, J. This is an appeal from the judgment of the circuit court in Boone County, finding appellants guilty of violating ordinance No. 108 of the city of Harrison, and imposing a fine upon each of them for the violation. Appellants were convicted and fined under §§ 13 and 31 of said ordinance. The title, enacting clause and the sections referred to are as follows:

"Ordinance No. 108—An ordinance to better regulate licenses in the city of Harrison. Be it ordained by the council of the city of Harrison: That it shall be unlawful for any person or persons to engage in, exercise or pursue any of the following avocations or businesses without first having obtained and paid for a license therefor from the proper city officials, the amount of which license is hereby fixed as follows, to-wit. * * * Section 13. For each book, picture or picture frame peddler, five dollars per month, or twenty-five dollars per year. * * *

"Section 31. Whoever shall engage in any business for which a license is required by this ordinance, without first obtaining and paying for same as above required, shall be deemed guilty of misdemeanor, and upon conviction shall be fined in any sum not exceeding $300."

The record reflects that appellants traveled from house to house within the corporate limits of Harrison, immediately before their arrest, carrying, selling and delivering books in sets of five each, published by the International Bible Students' Association. The books were shipped to appellants by said Bible Students' Associa-

tion in cartons, containing twelve sets, at a cost to appellants of fifty-six cents a set. They sold the books for $1.98 a set. The names of the several books are "Deliverance," "Reconciliation," "Recreation," "Government," and the "Harp of God." Each book contains 368 pages, and is bound substantially. They are interpretations of the Scriptures according to the beliefs of said association. Those selling or distributing the books were and are regarded and treated by said association as ministers of the Gospel. Appellants traveled over the territory assigned to them in an automobile, slept in a tent which they carried with them, and did their own cooking. The profit they derived from the sales of the books did not entirely cover their living expenses. They had been engaged in selling these books for about five years, and supplemented the deficiency in their living expenses with money derived from other sources. They testified that their purpose was, not to realize a financial remuneration, but to disseminate the teachings of the association purely and solely from religious motives; that their hope for reward was the salvation that comes from endurance to the end.

Appellants contend for a reversal of the judgment upon the ground that the facts detailed did not constitute them peddlers and hawkers within the meaning of the ordinance, but reflected that they were colporteurs at the time they sold and delivered the books in the city of Harrison. It is argued that the words, "peddlers and hawkers," as used in § 5 of article 16 of the Constitution of the State, § 7618, C. & M. Digest, and the ordinance under which they were convicted, have relation to an avocation or business. Even so, appellants were engaged in the business of selling and delivering books of a religious character when arrested. It is true, as argued, that the business in which they were engaged did not produce enough for them to live upon, but many vocations are followed and businesses prosecuted at a loss, and they are no less businesses or vocations on that account. It is also true, as argued, that appellants were prompted to

sell and deliver the books on account of religious convictions or from religious motives, but the convictions or motives inspiring their acts are not controlling in determining whether the acts constituted them peddlers or hawkers. The purpose of the ordinance was to require all parties engaged in the business of peddling or hawking to pay a license. It is true, perhaps, as argued, that appellants were colporteurs, but this did not exempt them from the penalties of the ordinance. A "colporteur," as defined by Webster, is a hawker; specifically, one who distributes or sells religious tracts or books.

"Peddlers and hawkers," as used in our Constitution and statutes, have been defined by § 9793 of C. & M. Digest as follows: "Whoever shall engage in the business of selling goods, wares or merchandise of any description, other than articles grown, produced or manufactured by the seller himself or by those in his employ, by going from house to house or place to place, either by land or water, to sell the same, is declared to be a peddler or hawker."

This court, in the case of *Conway* v. *Waddell*, 90 Ark. 127, 118 S. W. 398, followed the statutory definition, and defined a peddler as one "who goes from place to place and from house to house carrying for sale and exposing for sale the goods, wares and merchandise he carries."

The gist of appellants' contention for a reversal of the judgment is that the ordinance does not forbid the hawking or peddling of religious tracts or books, especially if the parties distributing them are prompted by religious motives. We find no such exception in the ordinance. No distinction appears in the ordinance between the character of books distributed or the motives prompting the distribution thereof. The Constitution of the State authorizes the imposition of a tax or license on hawkers or peddlers, irrespective of the kind of goods, wares or merchandise distributed by them, and there is no inhibition in the Constitution of the United States against the imposition of a tax or license upon them. The imposition of such a tax is not an abridgment of religious

freedom or an infringement upon the constitutional guaranty of religious liberty.

No error appearing, the judgment is affirmed.

HENDRICK *v.* HENDRICK.

Opinion delivered December 2, 1929.

James R. Campbell, for appellant.
Steel & Edwards, for appellee.

KIRBY, J. Appellee, an old man 82 years of age, and virtually blind, brought this suit against appellant, his son, for an accounting of goods, merchandise and fixtures sold by appellant, as his agent, and for moneys alleged to have been collected by him on notes and accounts belonging to appellee. The case was heard on oral testimony, and judgment rendered against appellant for $748, with interest at 6 per cent. from June 30, 1928, from which he prosecutes this appeal.

Appellant contends that the decree is contrary to the great weight of the testimony. The testimony is in conflict to some extent, but it was undisputed that appellee,

who lived with his son, appellant, who was in business in the city of DeQueen, had loaned him about $4,000 to the time he failed in his business, and went into bankruptcy on October 11, 1927. This debt to appellee was scheduled as a part of his liabilities, and he received his discharge on February 21, 1928. At the sale of the stock of groceries, merchandise and fixtures of the bankrupt, appellee became the purchaser for $1,050, the business was reopened, and conducted for appellee by appellant for several months until closed out.

It was alleged that this stock so purchased was of the value of $1,800, and that appellee also purchased the notes and accounts of the bankrupt at such sale, of the value of $750.65. Appellant admitted that he had received, after his discharge in bankruptcy, checks exhibited in evidence from E. A. Bennett, payable to appellee's order, indorsed and cashed them, amounting to $448, and also that he had collected $300 or $400 on the Listenbee notes belonging to appellee, and the chancellor only rendered judgment against him for $300 collected on the Listenbee notes, $748 in all, awarding interest from June 30, 1928. Appellant testified that appellee gave him this money, and claimed credit for boarding and caring for him, although he admits that there was no contract or agreement for appellee to pay board, and appellee stated that he was not to pay appellant any board or charge him any interest on the money loaned, and that he sued for no interest, and the interest awarded was only from June 30, 1928, long after appellee had ceased to live with appellant. Appellant stated that he had never kept any written account, but just went ahead and sold the stock, and had accounted for all the money received by him, according to his best recollection and belief.

A careful examination of the record discloses not only that the decree of the chancellor is not against the preponderance of the evidence, but is supported by it.

There is no merit in appellant's contention that the collections on the notes cannot be considered, since there was no specific allegation made in the complaint relative

thereto. It was alleged, however, that plaintiff had no knowledge of or means of ascertaining the amount that had been collected by defendant, J. E. Hendrick, on the notes and accounts belonging to him, but believes and states upon information and belief that he has collected more than $700 on said notes and accounts. This allegation warranted the admission of the testimony, and, it being unobjected to, the pleading would be considered amended to conform to the proof, anyway. *Bennett* v. *Snyder,* 147 Ark. 206, 227 S. W. 402; *Henson* v. *Strickland,* 152 Ark. 203, 238 S. W. 5, 21 A. L. R. 328; *Jenkins* v. *International Life Ins. Co.,* 149 Ark. 257, 232 S. W. 3.

The decree is accordingly affirmed.

[redacted]

UNION TRUST COMPANY *v.* ROSSI.

Opinion delivered December 2, 1929.

[redacted]

[redacted]

[redacted]

Clayton & Cohn, for appellant.

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

KIRBY, J., (after stating the facts). Appellant insists for reversal, first, that the court erred in holding that the election of the widow to renounce the provisions of the will and take her share of the estate as dower, etc., under the intestate laws instead, caused in legal contemplation a termination of her life estate and acceleration of the other estates dependent thereon, equivalent to its termination by the death of the life tenant.

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 court placing itself as near as may be in the position of the testator when making the will. *Booe* v. *Vinson,* 104 Ark. 439, 149 S. W. 524; *LeFlore* v. *Hamlin,* 153 Ark. 421, 240 S. W. 712.

Our statute provides (§ 3528, C. & M. Digest) that jointures, devises and pecuniary provisions in lieu of dower may be forfeited by the woman for whose benefit they are made in such cases as would forfeit dower, and, upon such forfeiture, the estate conveyed for jointure and every pecuniary provision so made shall immediately vest in the persons or his legal representative in whom they would have vested on the determination of her interest therein by the death of such woman.

In 28 R. C. L. 333, it is said: "Ordinarily the election of the widow to take against the will has the effect of accelerating any remainder limited to take effect after a life estate given to her. The election of a widow to take against her deceased husband's will is equivalent to her death as respects the payment of legacies and the distribution of that part of the estate which is to be distributed under the will upon the happening of that event."

In the note to *Young* v. *Harris,* 5 A. L. R. 477, it is said: "The doctrine of acceleration proceeds upon the supposition that, though the remainder is, in terms, not to take effect in possession until the decease of the tenant for life, it is, in point of fact, to be read as a limitation of a remainder to take effect in every event which removes the prior estate out of the way. When, therefore, it appears that possession of the remainderman is postponed solely for the purpose of letting in the life estate, it is presumably the intention of the testator that a renunciation of the life estate shall be considered as equivalent to its termination by the death of the life tenant, and that the beneficiaries entitled in remainder

shall enter into its enjoyment at once. * * * In other words, where the purpose of the testator in postponing distribution is merely to let in the precedent estate, the premature determination of such estate will have the effect of also terminating the contingency to which the gift over is subject, which, though nominally contingent upon surviving the life tenant, is to be read as contingent upon surviving the termination of the precedent estate." See also *Sherman* v. *Flack,* and note, 5 A. L. R. 456, 283 Ill. 457, 119 N. E. 293; *American National Bank* v. *Chapin,* and note, 17 A. L. R. 305, 130 Va. 1, 107 L. E. 636.

The will devises a life estate, in clause 3, in the enjoyment of the home occupied by the wife and the testator at the time of his death, and directs that she shall have the use and enjoyment thereof, without any cost or expense to her, in addition to the $250 per month net directed to be paid her. It is true it also provides, in the last clause, that it is the testator's desire that no part of his real estate be disposed of until after the death of his wife, Emma Rossi, and then only subject to the approval and direction of his adult male legatees or a majority of them, but that no such election shall operate to delay the payment of or defeat any gift made in the will. The testator knew, however, that an election by the widow against the will and a renunciation by her of its provisions would terminate the life estate he was creating in her by the will, and upon which the enjoyment of the remainders depended, and he made no provision to meet such contingency. The provision of the life estate was necessarily for the benefit of the widow, rather than for any independent purpose of postponing the disposition of the estates dependent upon her death, and, although he expressed a desire that no part of his real estate should be disposed of until after the death of his wife, and then only subject to the approval and direction of his adult male legatees or a majority of them, he also said: "But no such election shall operate to delay the payment of or defeat any gift heretofore made herein."

It thus appears from the construction of the whole instrument that the enjoyment of the estates by the remaindermen was postponed solely for the benefit of the widow, and, she having elected against the will and renounced its provisions made for her life, it must be held presumably the intention of the testator that such renunciation of the life estate is equivalent to its termination by the death of the life tenant, and that the beneficiaries entitled in remainder should enter into its enjoyment at once. It follows that no error was committed in the holding of the court in that regard.

Neither was error committed in holding the provision of the will creating a trust fund for the perpetual maintenance of the graves of the testator and his wife void, notwithstanding the court gave as reasons for such holding that this was a provision for the benefit of the widow, who, having renounced the provisions of the will, was entitled to no benefit or enjoyment of it. Such provision was void as offending against the rule against perpetuities. Section 178, Sizer's Pritchard, Law of Wills, etc; *Read* v. *Williams,* 125 N. Y. 560, 26 N. E. 730, 21 Am. St. Reports 748; *Bates* v. *Bates,* 134 Mass. 110, 45 Am. Rep. 305; *Fite* v. *Beasley,* 12 Lea 328. It is doubtless true, however, that the testator could have provided for the burial of his own and the body of his wife in a cemetery established for taking perpetual care of the graves of those interred therein, since that would not have involved an unlawful suspension of the ownership of personal property.

No complaint is made of the decree of the chancellor ordering the disposition of the share devised to Maria Menna in the estate of the testator, which also appears to be correct.

The court, however, erred in attempting to lift the estate out of the probate court, the debts of the estate not being shown to have been paid or the administration dispensed with under the statute (sec. 1, C. & M. Digest), and proceed to the administration and disposition of it

after the special matter which called into exercise its peculiar power was disposed of, and it should have ordered the remainder of the proceeds of the land sold, after the payment of the widow's dower, paid over to the executor, and left the cause in the probate court for further necessary proceedings in the regular course of the administration, in accordance with the law and decree construing the will. *Robinson* v. *Black,* 84 Ark. 92, 104 S. W. 554; *Hawkins* v. *Lane,* 48 Ark. 544, 3 S. W. 821; *Laws* v. *Wheeler,* 171 Ark. 514, 284 S. W. 775.

For the error designated the cause will be reversed, and remanded with directions to enter a decree not inconsistent with this opinion. It is so ordered.

ST. LOUIS SOUTHWESTERN RAILWAY COMPANY *v.* VAUGHAN.

Opinion delivered December 2, 1929.

Carter, Jones & Turney and *Gaughan, Sifford, Godwin & Gaughan,* for appellant.

Saxon & Warren and *H. G. Wade,* for appellee.

MEHAFFY, J. This suit was begun by the appellee in the justice of the peace court for damages in the sum of $45 for the killing of three hogs by the operation of one of appellant's trains. An appeal was taken to the circuit court, where appellant filed answer, denying the material allegations of plaintiff's complaint. In the circuit court there was a verdict and judgment for appellee for forty dollars. Appellant filed motion for new trial, which was overruled, exceptions saved, and appellant prosecutes this appeal to reverse the judgment of the circuit court.

The undisputed evidence shows that the hogs were killed by the operation of appellant's train. It is the established doctrine of this State, under § 8562 of C. & M. Digest, that, where an injury is caused by the operation of a railway train, a *prima facie* case of negligence is made against the company operating such train. *Barringer* v. *St. L. I. M. & Sou. Ry. Co.,* 73 Ark. 548, 85 S. W. 94, 87 S. W. 814; *L. R. & Ft. S. R. R. Co.* v. *Payne,* 33 Ark. 816; *St. L. I. M. & S. R. Co.* v. *Hendricks,* 53 Ark. 201, 13 S. W. 699; *K. C. Sou. Ry. Co.* v. *Drew,* 103 Ark. 347, 147 S. W. 50; *M. & L. R. Ry. Co.* v. *Jones,* 36 Ark. 87; *St. L. I. M. & S. R. Co.* v. *Tomlinson,* 78 Ark. 251, 95 S. W. 470.

When the evidence shows that an injury was caused by the operation of a train, the presumption is that the company operating the train was guilty of negligence, and the burden is upon such company to prove that it was not guilty of negligence. Appellant is correct in its statement that this presumption can be rebutted and overcome by testimony on the part of the defendant. The only question in this case is, did the appellant overcome this presumption by evidence? The Supreme Court of the United States recently said, in construing a statute similar to the Arkansas statute: "The only legal effect of this inference is to cast upon the railroad company the duty of producing some evidence to the contrary. When that is done, the inference is at an end, and the question of

negligence is one for jury upon all the evidence." *Western & A. R. R. Co.* v. *Henderson,* 279 U. S. 639, 49 S. Ct. 445.

Appellant's engineer testified that he was engineer on extra 760 south on the day the hogs were killed, and killed two hogs at the place where appellee's hogs were killed. He said as he was approaching the crossing at Onalaska, he noticed some objects about six or seven feet from the track; that he did not know what they were till they started toward the track. He was about 500 feet from them when he first saw them, and was running about thirty or thirty-five miles an hour. When he got within 250 feet of them, they started toward the track. He then saw they were hogs, and sounded the whistle and applied air in emergency, and this was all he could do. According to his testimony, he saw the hogs when 500 feet from them, and they were at that time six or seven feet from the track, and he did nothing to avoid the injury until he got within 250 feet of them. He says he was approaching a crossing, but he does not say that he rang the bell or sounded the whistle, as required by § 8559 of C. & M. Digest. If he had done this, or if he had made any effort to avoid the injury when he first saw the animals within six or seven feet of the track, he might have avoided killing them. The engineer's testimony is not sufficient to overcome the presumption arising from the killing by the operation of the train. The fireman testified, but he knew nothing about the matter.

There was however sufficient evidence to sustain the verdict in this case on the ground that the hogs were killed by a train going north. The engineer who testified was going south when he says his engine struck the hogs. No one saw appellee's hogs killed, unless the engineer who testified was operating the engine which struck them. The evidence of other witnesses is to the effect that two or three trains went north after extra 760 south had passed, and that the hogs were struck and knocked north. There is also evidence tending to show that the hogs were

seen after extra 760 south had passed. The jury might have believed that a northbound train killed these hogs after extra 760 had passed. The track was straight for at least a mile on each side of the place where the animals were killed, and, while the engineer testified that the hogs were along the edge of the grass, neither he nor any one else testifies that the grass was such as to obstruct the view.

There is substantial evidence to sustain the verdict, and the judgment is affirmed.

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

Opinion delivered December 2, 1929.

E. T. Miller and *King, Mahaffey & Wheeler,* for appellant.

E. F. McFaddin, for appellees.

MEHAFFY, J. This suit was brought by appellees against the appellant to recover the sum of $699.49, claimed as damages to a shipment of cotton from Idabel, Oklahoma, to Houston, Texas. The facts, so far as necessary to state them, are as follows:

The appellees were the owners of 208 bales of cotton purchased by them at Idabel, Oklahoma, in the fall of 1925. The cotton was purchased for the appellees at Idabel by L. L. Ruggles, and was bought the latter part

or about the second week of October. Appellee Burford went to Idabel on Saturday night, and saw this cotton on Sunday morning, and classed it for grade and staple, and on Monday following appellee got out the invoices and gave shipping orders to Ruggles, his buyer, and Ruggles gave them to the weigher on Monday morning. The weigher transported the cotton from his platform to the railroad platform, about two or three blocks, and got bills of lading, which he took to the bank. The cotton had been sold to Alexander Sprunt & Sons, in Houston, Texas, and at the time that appellee examined the cotton on Sunday morning it was perfectly dry, and the bales of cotton were on end, but Sunday night it rained, and again on Monday it rained, and the bill of lading showed that the cotton was wet when received by the railroad company. It was shipped by way of Hope to Houston, Texas. The distance from Idabel to Hope is 77 miles, and the usual time of shipping cotton from Idabel to Hope was one day, twenty-four hours. This shipment was about three days getting from Idabel to Hope. The cotton was put in the compress at Hope, remained there about 16 days, was compressed, and shipped to Houston, Texas, and was in transit from Hope to Houston, Texas, considerably longer that the usual time required. It was an interstate shipment.

The undisputed proof shows that the cotton was not damaged at the time it left Idabel, and the undisputed proof also shows that it could have been shipped from Idabel to Houston, without compressing, in three days, and that in that time it would not have been damaged, although it was wet. The appellee testified that it was not damaged when it got to Hope. The testimony also showed that to compress cotton when wet would damage it. There is no dispute about the cotton having been damaged when it reached Houston, Texas. There is a conflict in the testimony about what took place and about the manner of handling the cotton at Hope, the appellees' testimony tending to show that it was so handled that it could not dry out, and was therefore compressed

while wet, and that this caused the damage. Appellees also testified that a proper handling of it would have been to take the hoops off and leave space so that it could get the air, and that neither of these things were done. The testimony of the appellant, however, was to the effect that the hoops were taken off, and that there was ample provision made for it to dry out.

The court submitted the question to the jury, and the jury found against the appellant for the amount sued for; motion for new trial was filed and overruled, exceptions saved, and appeal prosecuted to this court.

The appellant raises several questions in its motion for a new trial, but the only questions argued are, first, that the evidence was insufficient to show negligence on the part of the carrier, and, even if it showed negligence, that it does not show that this negligence was the proximate cause of the injury. We deem it unnecessary to set out the testimony more fully, because these are the only questions argued by the appellant. It is insisted that, because the evidence was not sufficient to justify the verdict, the peremptory instruction requested by the appellant should have been given. Appellant contends correctly that, this being an interstate shipment, the law as declared by the Federal courts must govern the liability and rights of the parties. This court, however, has recently decided three or four cases involving this question, and has followed the law as announced by the Federal courts.

The United States Supreme Court has said, in construing the statute:

"Chapter 176 requires any common carrier receiving property for transportation in interstate commerce to issue a receipt or bill of lading therefor, and makes it liable to the lawful holder thereof for any loss, damage or injury to such property, and contains certain provisos, the last two of which are: 'Provided further, that it shall be unlawful for any such common carrier to provide by rule, contract, regulation, or otherwise, a shorter

period for giving notice of claims than ninety days, and for the filing of claims for a shorter period than four months, and for the institution of suits than two years: provided, however, that if the loss, damage or injury complained of was due to delay or damage while being loaded or unloaded, or damaged in transit by carelessness or negligence, then no notice of claim nor filing of claim shall be required as a condition precedent to recovery.' '' *Barrett* v. *Van Pelt,* 268 U. S. 69, 69 L. ed. 857, 45 S. Ct. 437.

In the instant case no claim was made or filed within the time provided by the carrier, and, as no notice of claim was given as required, it was incumbent upon the appellee to show loss, damage or injury due to the delay, or damage by carelessness or negligence of the company. The contract in the instant case provided, among other things: "Claims for loss, damage or injury to property must be made in writing to the originating or delivering carrier or carriers issuing this bill of lading within six months after delivery of the property, * * * provided that, if such loss, damage or injury was due to delay or damage while being loaded or unloaded, or damaged in transit by carelessness or negligence, then no notice of claim nor filing of claim shall be required as a condition precedent to recovery."

We think the evidence in this case shows that a claim for the damage or injury was not made, as contemplated by the law and by the contract, within the six months, and that therefore the burden was on appellee to show the damages, and to show that the damages claimed were caused by the negligence of the carrier.

In the instant case the undisputed proof shows that there was unreasonable delay in the shipment, and that the carriers knew when it received the cotton that it was wet, and the evidence also shows that cotton compressed wet will damage; that this cotton was not damaged at the time it was received by the carrier; that the delay was unreasonable; and the testimony is conflicting as to

whether the cotton was properly handled at the compress in Hope. The jury had a right to believe appellees' testimony that it was not properly handled, and that this improper handling or negligent handling caused the injury to the cotton.

This court has several times held that the law as declared by the Supreme Court of the United States must govern. *C. R. I. & P. Ry. Co.* v. *Robinson & Co.*, 175 Ark. 35, 298 S. W. 873; *St. L. S. F. R. Co.* v. *Rouw Company*, 174 Ark. 1, 294 S. W. 414; *St. L. S. F. R. Co.* v. *Cole*, 174 Ark. 10, 294 S. W. 357.

While we have not set out the evidence, we have carefully considered the entire testimony, and have reached the conclusion that there was sufficient evidence to submit the question of negligence to the jury, and sufficient evidence to support the finding, not only that the negligence of the carrier caused the injury, but that it was the proximate cause of the injury. It would therefore serve no useful purpose to set out the evidence in full, and it is unnecessary to call attention to any other questions argued by counsel, because the appellant relies solely on the ground that the court erred in refusing to give its instruction No. 1, which was a peremptory instruction.

The evidence shows that the cotton was wet when received; that an unreasonable time was taken to transport it; and there is also evidence tending to show that it was negligently handled at Hope, and that this caused the damage. The undisputed proof shows that cotton compressed while wet will damage. There is no other damage claimed, and we therefore think that the evidence that the cotton was not damaged when received, was not damaged when it arrived at Hope, was improperly handled at Hope, and compressed while wet, is sufficient to show that the damage was caused by the negligence of the carrier, and that the carelessness and negligence was the proximate cause of the injury. At any rate there was sufficient evidence to submit these questions to the jury.

This court does not pass on the credibility of the witnesses nor the weight to be given to their testimony. This is the province of the jury.

In this case there is substantial evidence to support the verdict of the jury, and the judgment is therefore affirmed.

SOUTHWEST POWER COMPANY *v.* PRICE.

Opinion delivered December 2, 1929.

Evans & Evans, James B. McDonough and *Frank L. Wolf,* for appellants.

Fuller, Porter & Fuller, Warner & Warner and *G. C. Hardin,* for appellee.

McHaney, J. Appellee is the widow and administratrix of the estate of Henry Clay Price, deceased. She brought this action in her representative capacity to recover damages from appellants for the death of her husband, for the benefit of herself and minor child. The Southwest Power Company and O. B. Hanks will hereafter be referred to as the power company and Hanks.

Henry Clay Price was a lineman in the employ of the power company. In January, 1928, he was engaged with Hanks and other employees of the power company in rebuilding or repairing its high-powered transmission lines extending along the highway between Mansfield and

Booneville. On January 26, 1928, while engaged in putting in a new pole in the place of an old one, and while removing the three wires, carrying 33,000 volts of electricity, from the insulators on the old pole, so that it could be removed, and the wires attached to insulators on the cross-arm of the new pole, he was electrocuted in the following manner: Price climbed up the old pole, and Hanks had climbed the new pole. They had detached the outside wires from the old cross-arm, attached jew-claws to them, and caused them to be pulled out of the way by ropes attached to the lower ends of the jew-claws, and fastened to some object on the ground, and were engaged in removing the middle or third wire from the old pole and elevating it so as to get it in the clear. This was done by Hanks passing a jew-claw up the new pole through a rope loop held open by Price, hooking the jew-claw on to the wire, pushing the wire up, then tying the rope in that jew-claw around the pole so as to hold it in the clear of the poles and the work to be done on them. This particular jew-claw is an instrument nine feet long, with a hook at one end, with a wooden handle attached to the hook, and with a threaded bolt that closes the hook by turning the wooden handle. The hook or claw is "U" shaped, and when the handle is turned to the right the threaded bolt is forced up into the hook or claw, and, when securely fastened on the wire, prevents the wire from falling out of the hook.

The evidence is in dispute as to whether Hanks or Price placed the jew-claw on the middle wire, and counsel for appellant concede that, since there is a conflict in this regard, the finding of the jury is against it. After the jew-claw had been placed on the wire, Hanks and Price pushed it up in the clear, and Price was in the act of tying the rope in the bottom end of the jew-claw to the pole to hold it in its then position, and, while holding to one of the braces on the cross-arm, the wire, heavily charged as aforesaid, fell out of the jew-claw and down on to the metal cross-arm, creating a short circuit,

which communicated the whole force of the electric current into the body of appellant, killing him immediately.

The charge of negligence relied upon, and the only one submitted to the jury in this case, was that Hanks, after attaching the jew-claw to the wire, negligently failed to close up the opening in the "U" shaped hook or claw on the jew-claw by turning the handle until the threaded bolt pressed tightly against the wire. The case was tried to a jury, which resulted in a verdict and judgment against both appellants for $30,000.

Many errors of the trial court are assigned and urged for a reversal of this case. The first is that the court erred in denying the petition of the power company for the removal of this case to the United States District Court. The power company, a corporation, is a non-resident of this State, incorporated under the laws of Delaware. Hanks is a citizen and resident of the State of Arkansas, and the appellee is a citizen and resident of the State of Oklahoma. The suit was filed in the circuit court for the Greenwood District of Sebastian County, on August 21, 1928, and service was had on Hanks on August 24, and on the power company on August 29, 1928. The regular terms of the circuit court, as fixed by law, are held in the Greenwood District on the first Mondays of January and July of each year. On July 16, 1928, while the court was in regular session, it entered an adjourning order, adjourning court until September 27, 1928. On that date court was in special session, and, after completing the business before the court, it adjourned until court in course.

The petition and bond for removal were filed by the power company December 28, 1928, three months after the adjourned session of the circuit court in the Greenwood District. Section 29 of the Judicial Code of the United States provides that, where a party entitled to remove a suit from the State court to the District Court of the United States, and desires to do so, "he may make and file a petition, duly verified, in such suit in such State

court, at the time, or any time before the defendant is required by the law of the State or the rules of the State court in which such suit is brought, to answer or plead to the declaration or complaint of the plaintiff, for the removal of such suit into the District Court to be held in the district where such suit is pending."

The power company was therefore required to file its petition and bond for removal in the State court within the time it was required by the laws of Arkansas to plead, and it makes no difference that a default has not been taken. *K. C. Ft. S. & M. R. R. Co.* v. *Daughtry,* 138 U. S. 298, 11 S. Ct. 306; *Southern Pacific Ry Co.* v. *Stewart,* 245 U. S. 359, 38 S. Ct. 303; *K. C. S. Ry. Co.* v. *McGinty,* 76 Ark. 356, 88 S. W. 1001; *Midland Valley R. R. Co.* v. *Hoffman Coal Co.,* 91 Ark. 180, 120 S. W. 380.

In the Daughtry case, *supra,* the court said: "The statute is imperative that the application for removal must be made when the answer is due, and, because a plaintiff in error does not take advantage of his right to take judgment by default, it cannot be properly held that he thereby extends the time for removal."

In the Midland Valley Railroad Company case, *supra,* this court said: "Assuming that the case was removable, the petition was not filed in time. 'A petition for removal of a cause to a Federal court, which is filed after the time allowed by the statutes of this State for filing of answers to complaints, is too late.' *K. C. S. R. Co.* v. *McGinty,* 76 Ark. 356, 88 S. W. 1001, and cases cited."

The question then to be determined is, when was the power company required by the statutes of Arkansas to plead? Section 1139, C. & M. Digest, provides: "In all civil actions the time fixed in the summons for the defendant to answer shall be within twenty days after service, when the summons is directed within the State, and thirty days when it is directed outside the State."

Section 1208, C. & M. Digest, provides: "The defense to any complaint or cross-complaint must be filed

before noon of the first day the court meets in regular or adjourned session after service. First. Where the summons has been served twenty days in any county in the State * * *."

In *Tuggle* v. *Holman Real Estate Co.*, 126 Ark. 25, 189 S. W. 169, this court said, speaking of the above sections of the statute: "The effect of these amendments is to require the defense to any complaint or cross-complaint to be filed before noon of the first day the court meets in regular or adjourned session, where the summons has been served twenty days in any county in this State; and judgment by default may be rendered on any day of any regular or adjourned session when the defense has not been filed on or before noon of the first day of court twenty days after the service of summons."

The statute is clear. There is no room for construction. The language of the court in the above case is merely a repetition of the provisions of the statute. The power company contends that, because it is alleged in the petition for removal that the time had not expired in which to plead, answer or demur to the complaint, the circuit court had to pass on a question of fact to determine the question of whether the petition was filed in time, and that the circuit court could not determine such question of fact. We do not think this allegation in the petition for removal created any issue of fact, but was purely a conclusion of law. The circuit court, in determining, which it did, that the petition and bond were not filed in time, did not determine any issue of fact, but a question of law only was presented and determined by the court. The trial court was required to take judicial knowledge of its terms, both regular and adjourned, the dates when it was in session, and of its own records, regardless of the allegations in the petition for removal. *Riley* v. *First Trust Co.*, 65 Ind. App. 577, 117 N. E. 675. Therefore the court was required to take judicial notice of the fact that it was in session on September 27, 1928. It required no proof. The court knew that it

was in session on that date, and, under the statutes above mentioned, the power company was required to plead on or before noon of that date, and the fact that no judgment by default was taken against it cannot be held to extend the time to file the petition and bond for removal. *K. C. & Ft. S. & M. Ry. Co.* v. *Daughtry, supra.*

It can make no difference, so far as the power company is concerned, that the court was in session only one day, or the character of business transacted, if any, or that it had no actual knowledge that it would meet in adjourned session on said date. It is sufficient that the court was in adjourned session on that day, and the petition and bond for removal were not filed by noon of that day. More than twenty days had expired after service on September 27, and we therefore hold that the petition and bond were filed out of time, and that the circuit court correctly so held.

This view of the matter makes it unnecessary to discuss the other ground alleged in the petition for removal, that is, that Hanks was fraudulently joined as a party defendant with the power company for the purpose of preventing a removal. But we may say, in passing, that, even though the petition and bond for removal had been filed in time, the petition was insufficient to present a removable case on the ground of fraudulent joinder.

A second ground urged for a reversal, discussed under many headings, is that the verdict is not supported by substantial evidence. We cannot agree with appellants in this regard. As heretofore stated, the only allegation of negligence submitted to the jury was the failure of appellant Hanks to securely fasten the jew-claw on the wire at the time he placed it thereon. Paul Price, foreman in charge of this work, and a brother of appellee's intestate, testified that he saw Hanks place the jew-claw on the middle wire and tighten it. The witness could see, from his position on the ground, that the jew-claw was placed on the wire by Hanks, and that he tightened it by turning the handle, but just how much he tightened it

he could not tell. And counsel for appellant urge that, since Paul Price testified that he saw Hanks tighten the jew-claw, this concludes appellee on any question of negligence, as the only question of negligence relied upon was his failure to tighten, and, having testified that he did tighten, this had the effect of destroying appellee's allegation of negligence. We do not think so. The word "tighten" expresses a relative idea. By turning the jew-claw one turn to the right it might be said to have been tightened. In other words, what the witness Paul Price meant by saying that he saw Hanks tighten the jew-claw, but he did not know how much, was that he saw him turn the handle of the jew-claw, but he did not know whether it had been securely fastened on the wire. We think this is the way the jury accepted this testimony, and we think the jury were justified in so accepting it.

Without setting out all of the evidence touching on this question, and after a careful reading and examination of the testimony given by all of the witnesses, we are of the opinion that there was sufficient testimony to submit this question to the jury. Appellants concede the rule of this court, that the jury are the judges of the credibility of the witnesses and the weight to be given their testimony, and that this court will not reverse for insufficiency of evidence merely because we may think the preponderance of the evidence is against the finding and judgment, but, if there is any substantial testimony to support the verdict, this court will not disturb it for insufficiency of evidence.

It is next contended by appellants that the deceased was guilty of contributory negligence, and that he assumed the risk. This court has many times held, so often that it is settled beyond all controversy, that an employee assumes the risks and hazards usually incident to the employment in which he is engaged, but that he does not assume the risk of the negligence of the master, nor that of a fellow-servant, unless they are obvious and patent. *C. R. I. & P. Ry. Co.* v. *Allison,* 171 Ark. 983, 287

S. W. 197. He has the right to assume that the employer will perform his duty and that each of his fellow-servants will perform his duty, and, if he is injured or killed while in the exercise of ordinary care for his own safety, either by the negligence of the master or any of his fellow-servants, he has a right to recover. *Western Coal & Mining Co.* v. *Burns,* 168 Ark. 976, 272 S. W. 357. Moreover, at the request of appellants the court instructed the jury fully on the question of assumed risk, in instructions 12 and 16. There is no evidence that the deceased was guilty of contributory negligence.

Numerous other errors are argued, including the alleged errors of the court in giving and refusing instructions, and improper remarks of counsel. To take them up and discuss them in detail would unduly extend this opinion. Suffice it to say that we have examined carefully all the assignments of error made, and find them without merit. The improper remarks of counsel charged arise in connection with the alleged excessiveness of the verdict and judgment. No objection was made at the time to the remarks of counsel in his closing argument, but they were presented to the trial court for the first time in the motion for a new trial. We do not think these remarks, which were made in the heat of argument, were so improper in themselves as to call for the interference of the trial court, when counsel for appellants did not think them of sufficient importance at the time they were made to object to them, or ask the court to exclude them. If counsel had deemed them prejudicial or improper, they should have objected at the time. Having failed to do so, they must be held to have waived any prejudicial effect they might have had.

It is said that the verdict is excessive; and, while it is a very substantial sum, a question that has given us some concern, we have reached the conclusion that we cannot say as a matter of law that it is excessive. Deceased was a young man about 23 years of age, making $165 per month. He had a wife and one small child.

The proof showed that he was contributing to their support from his wages $115 per month, and that he had an expectancy of 40 years. It is a simple matter in arithmetic to determine that the present value of an annuity of $1,380 a year for a period of 40 years would be a sum in excess of $27,000, depending upon the rate of interest. And in addition to the pecuniary loss sustained by the widow and child, the child is entitled to a reasonable sum for the loss of parental love, care and training. The verdict was for a gross sum, and we cannot tell how much was awarded for pecuniary loss and how much for parental care, but it certainly could not be said that a judgment of from $3,000 to $5,000 for this purpose would be excessive. *Mo. Pac. R. R. Co.* v. *Bushey, ante* p. 19. Nor do we think there is anything in the record to show that the verdict was the result of passion and prejudice, as argued by appellants.

The court fully and, as we view it, fairly instructed the jury, and since, as we have found, no error was committed, the judgment must be affirmed. It is so ordered.

T. M. Dover Mercantile Company *v.* Myers.

Opinion delivered December 2, 1929.

Alley & Olney, for appellant.

McHaney, J. Appellant sued appellee on a mutual open account current for a balance of $1,020.71 and interest, beginning in November, 1922, and running through the years to November, 1927, with items of debit and credit in nearly every month during that time. There is little dispute about the correctness of the account, except appellee claims some items of credit not shown on the itemized statement. This case was submitted to the jury on an instruction from the court to the effect that, since appellee had pleaded the statute of limitations, they could not find for appellant for any of the items on the account which were purchased more than three years before the filing of the suit. This instruction was given over appellant's objections and exceptions. There was a verdict and judgment for $63.05 in appellant's favor.

We think the court was clearly in error in giving the above-mentioned instruction limiting the recovery to sales within three years prior to suit. The evidence, as well as the account, shows that appellant sold appellee sundry merchandise from its store, and that appellee sold appellant various articles of farm products, ties, gravel, etc., and paid appellant various sums in cash from time to time during the entire period. This constituted mutual accounts, mutual demands. See *St. Francis Valley Lbr. Co.* v. *Orcutt*, 174 Ark. 282, 295 S. W. 713. Our statute, § 6964, fixing a limitation on "mutual account," provides: "In actions of debt, account or assumpsit, brought to recover any balance due upon a mutual open account current, the cause of action shall be deemed to have accrued from the time of the last item proved in such account."

Therefore appellant was not limited to a recovery for items sold within three years prior to suit, but is entitled to recover any balance found to be due after allowing all just credits due the appellee.

Reversed, and remanded for a new trial.

EVANS *v.* UNITED STATES ANTHRACITE COAL COMPANY.

Opinion delivered December 2, 1929.

[redacted]

Pryor, Miles & Pryor and *Patterson, Patterson & Patterson,* for appellants.

Paul McKennon and *Jesse Reynolds,* for appellees.

BUTLER, J. On the 14th day of May, 1927, the appellees brought suit in the Johnson Chancery Court for an order enjoining and restraining the appellants from entering into and upon certain lands described in the complaint, alleging that they held a lease executed, by which they were given the right to mine the coal from the de-

mised premises, and that the appellants (defendants in that suit) were claiming to be the owners of the tract of land leased, and that they had served notice upon the plaintiffs that the lease had been canceled, and they alleged that the defendants were trespassing upon the leased premises.

The defendants, Evans and Dowdy, answered, setting up that they were the owners of the land, and that the lease under which the plaintiffs were claiming had been executed by their predecessor in title. They exhibited the lease, and alleged that the lease had been forfeited and terminated by reason of the plaintiffs' non-user and failure to open and operate the coal mine in the manner provided for in the lease, setting up in detail the conduct of the plaintiffs (appellees) which they claimed had worked a forfeiture of the same.

Much testimony was taken, and practically all of it was directed to the question of whether or not the defendants, appellees here, had complied with the terms of the lease. At the conclusion of the testimony the case was submitted to the court upon the pleadings and the testimony, and a decree was made and entered, which, after reciting the appearance of the persons, the submission on the pleadings and evidence, concluded as follows: "It is therefore considered, ordered and decreed that the injunction and restraining order heretofore issued herein be and the same is hereby dissolved, and the complaint of plaintiffs is dismissed for want of equity. It is further considered, ordered and decreed that the plaintiffs pay all the costs of this suit, and the plaintiffs praying an appeal to the Supreme Court, which is granted. Ninety days is given in which to file a bill of exceptions herein."

Subsequent to the trial in the chancery court the appellees in this proceeding brought suit in the Johnson Circuit Court against the appellants here, alleging trespass on the property involved in the chancery court proceeding, and praying for damage in certain sums by

the taking of coal therefrom. To this suit the defendants answered, setting up that the rights of the plaintiffs in that action had been adjudicated by the proceeding in the chancery court, and pleaded that proceeding and decree therein in bar. Thereafter, and after the lapse of the term, the appellees filed a motion and petition in the chancery court for an order *nunc pro tunc* to correct the record of the decree, alleging that the only issue before the court, and the one upon which the court rendered its decree, was that the plaintiffs had an adequate remedy at law. Testimony was taken on the petition and response thereto, and the court granted the prayer of the petition, and entered an order correcting the record *nunc pro tunc,* making it read as follows: "It is therefore considered, ordered and decreed that the injunction and restraining order heretofore issued herein be and the same is hereby dissolved, and the complaint of plaintiffs is dismissed for want of equity, *and the parties to this suit are left to their legal remedy in the court of law in the determination of the title to the land, the validity of the lease, or the damages sustained by them, or either of them.* It is adjudged that the plaintiffs pay the costs, plaintiffs praying an appeal to the Supreme Court, which is granted. Ninety days is given in which to file bill of exception herein."

From the judgment and order correcting the record of the decree, and from the decree as corrected the respondents have prosecuted this appeal.

The question presented for our determination is in what regard and to what extent can a court correct or amend its judgment after the expiration of the term at which the judgment was entered.

We do not think it necessary to recite or discuss the testimony taken on the hearing for the order *nunc pro tunc,* for it is our opinion that the record made by the pleadings and testimony taken on the trial of the case settles the question presented. The court made no finding of fact or declaration of law, other than that con-

tained in the decree, that the complaint was dismissed for want of equity. An inspection of the record discloses that the issues were within the jurisdiction of the chancery court, and that the rights of the plaintiffs and defendants were adjudicated on the question as to whether the plaintiffs in that case (appellees here) had the right to operate under the terms of their lease, or whether the lease was forfeited by nonuser or misuser, and whether the defendants there (appellants here) had a right to declare the same canceled, and to take possession of the property.

Any omission from the decree of a part thereof made by the court, and within the issues presented by the pleadings and testimony, might have been remedied by amending the decree, but the court had no power to change the decree after lapse of the term, except to make the record show what it should have spoken, but what in fact it did not speak. *Tucker* v. *Hawkins*, 72 Ark. 21, 77 S. W. 902; *Lourance* v. *Lankford,* 106 Ark. 470, 153 S. W. 592, 35 Ann. Cas., note p. 522; *Bradley Lumber Co.* v. *Langford,* 109 Ark. 594, 160 S. W. 866. It could not incorporate into the decree at any time a matter not within the issues raised by the pleadings and proof. 33 C. J. Judgments, § 87.

The amendment to the decree at the hearing on the petition for order *nunc pro tunc,* "and the parties to this suit are left to their legal remedy at law in the determination of the title to the land, the validity of the lease or the damages sustained by them, or either of them," was a substantial alteration both in substance and merit, which the court was without authority to make.

This court, in the case of *Bouldin* v. *Jennings,* 92 Ark. at page 305, 122 S. W. 639, quoted with approval the rule laid down in 17 Am. & Eng. Enc. of Law, 2 ed., p. 816: "A court rendering a final judgment, as a general rule, is absolutely without authority to alter it in substance or merit after the expiration of the term at which it was rendered."

"Amendments by order *nunc pro tunc* are not proper means of changing or revising a judgment. The power of the court to order the entry of a judgment *nunc pro tunc* is not to be used for the purpose of correcting errors, omissions or mistakes of the court, * * * nor to supply an order which it might or ought to have made, but wholly omitted to make." Black on Judgments, vol. 1, § 132.

It is obvious that, were courts clothed with authority to make such alterations, this would impair that absolute verity and sanctity with which, of necessity, judgments and decrees of courts are clothed, and render uncertain and indeterminate all litigation. Under the facts in this case it is our opinion that the court erred in amending its decree, and its order and amended decree is reversed, and the cause remanded with directions to deny the prayer of the appellees' petition for order *nunc pro tunc.*

[redacted]

BRAGG *v.* ADAMS.

Opinion delivered December 2, 1929.

[redacted]

Berry, Berry & Berry, for appellants.

R. V. Wheeler, for appellees.

BUTLER, J. The appellees, plaintiffs, residents of the incorporated town of West Memphis, brought suit in the chancery court to enjoin the mayor and marshal from collecting a license on their hotel buildings, under the provisions of an ordinance passed some time previous to the filing of their complaint, on the ground that the ordinance was void because its purpose was to raise

revenue, and because the town had no authority to pass an ordinance licensing hotels.

The appellants, defendants, defended on the ground that the ordinance was not a revenue measure, and that it was a valid exercise of the police power of the town. There was a decree perpetually enjoining the appellants from enforcing or attempting to enforce the provisions of the ordinance, from which this appeal is prosecuted, the appellants relying for the authority to pass the ordinance on the general grant of police powers to municipal corporations, now found at §§ 7974 and 7529 of Crawford & Moses' Digest.

The appellees contend, for an affirmance of the decree, that the ordinance which was exhibited with their complaint in the court below showed on its face that it was a measure for raising revenue, and further, that there was no authority given to municipal corporations to regulate hotels, but that such authority was taken away from municipal corporations and invested in the State Board of Health by the provisions of act No. 210 of the Acts of the General Assembly of 1917, creating a Bureau of Sanitation. The appellants contend that the language of § 7529, *supra,* gave the right to regulate hotels and other places of entertainment, and implies the power of restraining and regulating as to the manner of conducting that particular business, and also as to the building or erection in or upon which the business is to be conducted, and that this right is further given by § 7494 of C. & M. Digest. These two sections are as follows:

"Section 7529. They (municipal corporations) shall have the power to prevent injury or annoyance within the limits of the corporation from anything dangerous, offensive or unhealthy, * * * to establish and regulate markets, * * * to prevent any riots, noise, disturbance, or disorderly assemblages, * * * and to regulate or suppress bawdy or disorderly houses, houses of ill-fame or assignation."

Section 7494. "It is made the duty of the municipal corporation to publish such by-laws and ordinances as

shall be necessary to secure such corporations and their inhabitants against injuries by fire, etc., * * *; for the suppression of riots, and gambling, and indecent and disorderly conduct; for the punishment of all lewd and lascivious behavior in the streets and other public places; and they shall have power to make and publish such by-laws and ordinances, not inconsistent with the laws of this State, as to them shall seem necessary to provide for the safety, preserve the health, promote the prosperity and improve the morals, order, comfort and convenience of such corporations and the inhabitants thereof."

The appellants say that the purpose of § 5454 of Kirby's Digest, in which the right to regulate hotels and places of entertainment was given, meant something more than a provision authorizing an inspection to see that the place was run in an orderly manner. Section 5454 Kirby's Digest is as follows:

"Section 5454. They shall have power to license, regulate or prohibit all theatrical exhibitions and public shows, and all exhibitions of whatever name or nature. Provided, lectures on science, historical or literary subjects shall not be included within the provisions of this section; to regulate or prohibit the sale of all horses or other domestic animals at auction in the streets, alleys or highways; to regulate all carts, wagons, drays, hackney coaches, omnibuses and ferries, and every description of carriages which may be kept for hire, and all livery stables; to regulate hotels and other houses for public entertainment, and to regulate or to prohibit ale and porter shops or houses, and public places of habitual resort for tippling and intemperance, and to declare what are such."

These various sections were all parts of an act of the General Assembly, approved March 9, 1875, entitled, "An act for the incorporation, organization and government of municipal corporations." Section 7529 of Crawford & Moses' Digest was § 12, § 7494, Crawford & Moses' Digest, was § 22, and § 5454, Kirby's Digest, was § 17 of that act. Section 22 (§ 7494, C. & M.)

provided for the enactment of ordinances to carry into effect the powers conferred by the provisions of the act, and did not enlarge the powers conferred by the special provisions of § 12 (§ 7529, C. & M.), *Tuck* v. *Town of Waldron,* 31 Ark. 462, or of § 17 (§ 5454, Kirby's Digest), so that the power of municipal corporations to regulate hotels must be found in the provisions of § 12 and § 17, *supra.* By § 17, which gave municipal corporations the power to regulate hotels and other houses of public entertainment, the Legislature clearly recognized the fact that such power had not been given by § 12, *ante;* by § 12 it was only those occupations or conduct that were "dangerous, offensive or unhealthy, to establish and regulate markets, * * * to prevent any riots, noise, disturbances or disorderly assemblages; * * * and to regulate or suppress bawdy or disorderly houses, houses of ill-fame or assignation," that were included within the general powers of municipal corporations to regulate or suppress; and, as by § 17 the Legislature gave municipal corporations the power to regulate hotels, it is clear that such did not come within the meaning or intention of the language used in § 12.

The appellants contend, however, that the case of *Carpenter* v. *Little Rock,* 101 Ark. 238, 142 S. W. 162, is authority for the contention that the ordinance in the case at bar comes within the scope and is authorized by §§ 7529 and 7494 of C. & M. Digest. In that case the court decided that an act of the General Assembly making it unlawful for any city council to impose a license or to hinder or interfere in any manner with those selling products of the farm, including meats from domestic animals and live stock, did not prohibit the city of Little Rock, a city of the first class, from providing by ordinance for the proper inspection of milk and meats before they were sold, nor for a reasonable fee to be exacted to cover cost of inspection; that the act of the Legislature then under consideration did not cover the whole subject of powers of cities to prevent and regulate the carrying on of any trade of a tendency dangerous to morals, health or safety

of its inhabitants, and held that, by § 5461 of Kirby's Digest (§ 7494, C. & M.), the city had the right to enact an ordinance for the preservation of the health of its citizens under subdivision 4 of § 5648 of Kirby's Digest (§ 7684, C. & M. Dig.), which provided that cities of the first and second class might "prevent or regulate the carrying on of any trade, business or vocation of a tendency dangerous to morals, health or safety," and that the inspection of milk and meat might well be said to be necessary for the public health, in that by that means the community was secured pure and wholesome food. As cities of the first class have enlarged powers over incorporated towns given by § 7684, C. & M. Digest, and as the case of *Carpenter* v. *Little Rock, supra,* was controlled by that provision of law, its decision can have no application to the case at bar.

We think the cases of *Trigg* v. *Dixon,* 96 Ark. 199, 131 S. W. 695, Ann. Cas. 1912B, 509; *Fort Smith* v. *Gunter,* 106 Ark. 371, 154 S. W. 181; and *Kirby* v. *Paragould,* 159 Ark. 29, 251 S. W. 374, cited by the appellants, have no application to the issues presented in the instant case. In *Trigg* v. *Dixon* the right to license butchers was upheld under the grant by the Legislature to towns "to establish and regulate markets;" in the case of *Fort Smith* v. *Gunter* the authority upheld by the court for the city to regulate restaurants was shown to exist under § 5454 of Kirby's Digest; and in *Kirby* v. *Paragould,* an ordinance licensing soda fountains was held to be within the power of cities of the first class, which power is given under subdivision 4 of § 7684 of Crawford & Moses' Digest. It is clear that the authority of the incorporated town of West Memphis to license hotels, and to regulate same was not conferred by § 7529 or 7494 of Crawford & Moses' Digest, commonly called the general welfare statute, and that it did not have authority to pass the ordinance regulating hotels. That right was given to incorporated towns by § 17 of the act approved March 9, 1875 (§ 5454, Kirby's Digest), but that provision was repealed by the General

Assembly in 1917 by act No. 376, by which § 5454, Kirby's Digest was amended by reenacting the same as follows:

"Section 1. That § 5454 of Kirby's Digest be amended to read as follows: 'Section 5454. They shall have power to license, regulate or prohibit all theatrical exhibitions and public shows, and all exhibitions of whatever name or nature. Provided, lectures on science, historical or literary subjects shall not be included within the provisions of this section; to regulate or prohibit the sale of all horses, * * * and every description of carriages which may be kept for hire, and all livery stables; provided, further, that all municipalities shall have power to define, license, regulate or tax transient and itinerant vendors or transient dealers in merchandise or transient dealers in horses and mules, but no one who conducts the same business in the same municipalities for six consecutive months shall be classed as a transient. Section 2. All laws and parts of laws in conflict with this act are hereby repealed," etc.

It will be seen that by the act as amended the authority to regulate hotels was divested from municipal corporations. This is made more apparent by the Legislature at the same session by act 210, providing that the hotels should come within the jurisdiction of the State Board of Health, that they should be licensed by the State, and conducted under such rules and regulations as the State Board of Health might from time to time promulgate.

Since we have concluded that the ordinance is invalid in so far as it undertakes to license or regulate hotels, it is unnecessary for us to discuss or pass upon the question first raised by the appellees, *i. e.*, that an inspection of the entire ordinance would show that it was adopted for the purpose of raising revenue.

It is our opinion that the decree of the chancery court was in all things correct, and it is therefore affirmed.

STATE *v.* TAYLOR.

Opinion delivered December 9, 1929.

[redacted]

Hal L. Norwood, Attorney General, and *Guy E. Williams,* Prosecuting Attorney, for appellant.

HART, C. J. Charley Taylor was indicted for the crime of murder in the second degree, charged to have been committed by killing George Lewis by striking him with a blunt instrument. According to the testimony of the two principal witnesses for the State, Charley Taylor struck George Lewis over the head with a pistol, in Lonoke County, Arkansas, and knocked him down and killed him. They were at a dance, and George Lewis was standing near the fire-place. Charley Taylor was standing near him, and the witnesses saw him hit Lewis over the head with a pistol, which he was holding by the barrel. George Lewis had not said anything to Charley Taylor at all, and there was no provocation for the killing. On cross-examination the witnesses admitted that they had testified differently, but stated they did not tell the truth at the coroner's inquest. Both of them admitted that the

testimony given by them at the coroner's inquest was false, but stated that the testimony that they were giving at the trial was true.

At the conclusion of the testimony for the State, the court instructed the jury as follows:

"The two negroes that testified at the coroner's inquest swore on the witness stand here that they swore falsely at the inquest. I don't believe you gentlemen of the jury believe their testimony. I don't believe it, and I don't believe you do. The mother of the dead boy testified that she was an eye-witness to the killing, and she testified that she didn't see the death blow, nor she didn't know who struck the death blow. I will instruct you to return a verdict in favor of the defendant."

The jury returned a verdict of not guilty, as directed by the court, and an order was entered of record discharging the defendant from custody.

Under the evidence adduced by the State, if believed by the jury, the defendant was at least guilty of manslaughter, which is a felony, and is punishable by imprisonment in the State Penitentiary. Under article 2, § 8, of the Constitution, which provides that no person for the same offense shall be twice put in jeopardy of life or liberty, the judgment discharging the defendant operated as a bar to a future prosecution, and cannot be reversed by this court.

This appeal has been taken under the provisions of §§ 3410 and 3411 of Crawford & Moses' Digest, which provide that the Attorney General may appeal, if satisfied from an inspection of the record that error has been committed to the prejudice of the State, and upon which it is important to the courts and for the uniform administration of the criminal law that the Supreme Court should decide. This court has held that the object of this provision of the statute is to obtain the decision of the court upon questions of the criminal law, so that it may serve to secure the correct and uniform administration thereof. So it has been held that the question of the legal suffi-

ciency of the evidence in a given case constitutes a question of law for the decision of the court, and it cannot become a precedent for application in another case because of the varying state of facts in different cases, and is not important in the uniform administration of the criminal law. The reason is that it is hardly probable that the testimony that is adduced in any two cases will be so much alike that a decision upon the facts in one case would serve as an authority in the other. *State* v. *Smith,* 94 Ark. 368, 126 S. W. 1057; *State* v. *Speer and Boyce,* 123 Ark. 449, 185 S. W. 788; and *State* v. *Gray,* 160 Ark. 580, 255 S. W. 304.

No such question is presented here, however. There can be no doubt but that the evidence adduced in favor of the State would be legally sufficient to warrant at least a verdict of manslaughter in any homicide case. The question presented for review in the case at bar is whether or not the circuit court has the power to direct a verdict of acquittal, not because the judge thinks the evidence is not legally sufficient to warrant a conviction, but because he believes the testimony of the witnesses is false, and that the jury should not give any credence to it.

This he has no right to do. Article 7, § 23, of our Constitution prohibits judges from charging juries with regard to matters of fact, and he has no power to express to the jury any opinion whatever as to the innocence of the defendant, where the evidence adduced in favor of the State would warrant a conviction if believed by the jury. The reason is that, under our Constitution, it is within the peculiar province of the jury to determine the facts, and the court shall only declare the law applicable to the facts.

In *State* v. *Wardlaw,* 43 Ark. 73, the court held that the circuit court committed error in advising the attorney for the State, in the presence of the jury, to drop the prosecution for want of evidence. The reason was that the provision of the Constitution just referred to forbids judges to charge juries with regard to matters of fact.

It is true that was a misdemeanor case, but the principle would apply equally as well in a felony case.

The defendant is not without remedy where the jury finds against him contrary to the evidence. Under § 3219 of Crawford & Moses' Digest, which is a part of the Code of Criminal Procedure, when a verdict is entered against a defendant by which his substantial rights have been prejudiced, it is made the duty of the trial court to grant him a new trial. One of the grounds provided in the statute is where the verdict is against the evidence.

In *State* v. *Young,* 119 Mo. 495, 24 S. W. 1038, the Supreme Court of Missouri, construing a similar provision of the statutes of that State, said that the statute made it the duty of the circuit court to grant a new trial to the defendant if, in the opinion of the trial judge, the verdict was against the evidence, and that the practice was as old as the common law itself. In that case the court pointed out that the appellate court had no power to grant a new trial, in opposition to the opinion of the trial court, on the ground that the verdict was against the evidence, when there was evidence from which the jury might have found the defendant guilty. That rule is founded upon the consideration that the circuit court judge saw the witnesses, observed their character, capacity and demeanor, and has found the correctness of their verdict by overruling a motion for a new trial.

This court has held that it is within the discretion of the circuit court to grant a new trial in a felony case. *State* v. *Walker,* 122 Ark. 574, 184 S. W. 38. Hence the circuit court erred in acting in the matter in advance of the verdict of the jury. He had no right to assume that the jury would return a verdict of guilty where the testimony of the witnesses was not worthy of belief. It was within the peculiar province of the jury to judge of the credibility of the witnesses. It will also be within the province of the court to grant a new trial, upon the motion of the defendant, if, in its opinion, the verdict was against the evidence. This course is necessary for or-

derly procedure in the administration of justice. Neither the court nor the jury has the right to assume in advance that the other will not properly discharge its duty.

We can only declare that the circuit court erred in its ruling, as above stated. The acquittal of the defendant in this case operates as a bar to his further prosecution for the same offense, and therefore the judgment cannot be reversed.

CLIFFORD *v.* WALKER.

Opinion delivered December 9, 1929.

Carmichael & Hendricks, for appellant.

Cockrill & Armistead, for appellee.

HART, C. J., (after stating the facts). Where the president or other officer of a corporation performs services not within the scope of his duties as an officer, for instance, that of general manager, under circumstances authorizing an inference that he is to be paid therefor, he is entitled to compensation on an implied contract. *Mt. Nebo Anthracite Coal Co.* v. *Martin,* 86 Ark. 608, 111 S. W. 1002, 112 S. W. 882; *Red Bud Realty Co.* v. *South,* 96 Ark. 281, 131 S. W. 340; *Corning Custom Gin Co.* v. *Oliver,* 171 Ark. 175, 283 S. W. 977; and *Fitzgerald & Mallory Construction Co.* v. *Fitzgerald,* 137 U. S. 98, 11 S. Ct. 36; *Corinne Mill, Canal & Stock Co.* v. *Toponce,* 152 U. S. 405, 14 S. Ct. 632.

In the Red Bud Realty Company case the court said that, in considering whether or not there was an implied contract to pay the president of a corporation, the nature of the corporation and its business, the character and extent of the services, the value thereof, and all other attendant circumstances, must be considered. The court further stated that, in determining the matter, it would consider whether or not the services were rendered under circumstances tending to show that it was understood or that it was intended that the services were to be paid for.

It is conceded that the services were outside of Clifford's duties as president and director, and that the services of a general manager of the corporation were worth $400 per month.

This brings us to a consideration of whether the services for the first eighteen months of the business were

rendered under such circumstances as to raise an implied promise on the part of the corporation to pay Clifford a salary as general manager. With reference to this question of fact, it may be said that Clifford organized the corporation, and owned substantially all its stock. The shares were of the par value of $25 each. There was a paid-up capital of about $44,000. Clifford owned all of it except $2,500, sold to Burns, to be paid out monthly, and one share which was owned by Whitten to enable him to qualify as a director. Burns and Whitten were employed by Clifford to help in running the business. Clifford had entire charge of the business, and told Burns that he did not mean to charge the corporation with any salary for himself until he got the business on a paying basis. Clifford said he had other means out of which to live until the corporation was placed on a paying basis. The fact that Clifford, who had charge of the books, did not charge the corporation with any salary for himself for the first eighteen months, and during that time sent out financial statements to the creditors of the corporation which did not contain any salary charge for himself, tends strongly to show that the claim for back salary was an afterthought.

Under all the circumstances, we cannot say that the chancery court erred in finding that there was no implied contract to pay Clifford for his services as general manager for the first eighteen months; and in this connection it may be stated that no express contract is claimed. We also think that the chancery court properly denied the assignee of the corporation the right to recover on his cross-complaint. Clifford denied that he was indebted to the corporation, and the chancery court was justified in finding that his testimony in this respect was not overcome by that of appellee.

Therefore the decree of the chancery court will be affirmed.

GILBERT *v.* GILBERT.

Opinion delivered December 9, 1929.

C. M. Wofford and *Daily & Woods,* for appellant.

A. A. McDonald and *Cravens & Cravens,* for appellee.

SMITH, J. The parties to this litigation were formerly husband and wife, and the subject-matter of the litigation is the amount of dividends for two years now due and payable on forty-five shares of the capital stock of the Arkansas Coffin Company, an Arkansas corporation.

Guy Gilbert, the plaintiff, brought this suit in the circuit court against the corporation to recover the dividends, each amounting to ten per cent. of the shares of

stock, the certificates for which stood in his own name. Dividend checks had been tendered to him payable to the joint order of himself and Lillie Gilbert, but he refused to accept these checks because they were not payable to him alone. The coffin company filed an affidavit under § 1103, C. & M. Digest, in which it alleged that Mrs. Gilbert, without collusion on its part, claimed an interest in the subject-matter of the litigation, and by appropriate action she was made a party defendant. Thereupon the corporation paid the amount of the dividends into court and was discharged, and the litigation proceeded between Mr. and Mrs. Gilbert.

Mrs. Gilbert alleged that she and her husband had bought jointly ten shares of the stock under an agreement between themselves whereby they were to acquire equal interests, and that later they purchasd five additional shares under a similar agreement. A few years later there was a stock dividend of 200 per cent., amounting to thirty shares, and she alleged that this dividend stock was also owned by them jointly and equally. Upon these allegations she prayed that the cause be transferred to equity, where a trust in her favor might be declared and partition made of the stock, all of which had been issued to, and was outstanding in the name of, her husband.

The court overruled this motion, and proceeded to try the case before a jury. This was error, as the answer set up facts which, if true, would have entitled Mrs. Gilbert to relief which only a court of equity could grant.

In the case of *Spradling* v. *Spradling,* 101 Ark. 451, 142 S. W. 848, it was said: "Courts of equity have inherent and exclusive jurisdiction over all kinds of trusts and trustees. They have full and complete jurisdiction of trusts independently of statute, whether the same arise by express declaration and agreement, or result by implication of law" (Citing authorities).

Under the allegations of the answer Mr. Gilbert, although the apparent owner of the stock in his own right, was, in fact, the owner of a half interest thereof as trus-

tee for Mrs. Gilbert, who sought to have a trust declared and enforced, and for this reason the cause should have been transferred to equity.

The cause was submitted to a jury, and a nine-to-three verdict was rendered in Mr. Gilbert's favor, and from the judgment thereon is this appeal.

For the reversal of this judgment it is insisted that the court erred in not transferring the cause to equity, and in giving instructions numbered 7 and 10 to the jury. But appellee insists that, although error may have been committed in both respects, neither error was prejudicial, as the verdict returned was right, and the chancery court could not have decreed otherwise under the testimony.

Without reviewing the testimony, which we find it unnecessary to do, it may be stated that the testimony is legally sufficient to support the finding that Mr. Gilbert paid for the stock with his own money, except a part thereof, which he borrowed from his wife upon the promise to repay—which promise does not appear to have been kept. But the testimony of Mrs. Gilbert and that of other witnesses who testified in her behalf is to the opposite effect. According to this testimony, the stock was purchased and issued in Mr. Gilbert's name under an agreement that it should be jointly and equally owned, and that Mrs. Gilbert not only paid for all of her half, but that she actually loaned her husband a portion of the money which he used in paying for his own interest.

Instructions numbered 7 and 10, given over Mrs. Gilbert's objections and exceptions, read as follows:

"7. You are instructed that, if a wife or husband advances money or property to the other and permits them to use it as his or her own, the presumption is that it was a gift, unless the contrary is shown." * * *

"10. You are instructed that, before you can find Lillie Gilbert a part owner of the stock in the Arkansas Coffin Company, held in the name of the plaintiff, by reason of the fact that she advanced part of the money for the purchase of the same, you must further find that

there was a definite understanding between the plaintiff and Lillie Gilbert at the time that said money, if any, advanced by her to plaintiff was to be used for the purchase of stock for her."

It may be stated that the rights of no creditors of either Mr. or Mrs. Gilbert are involved in this litigation, and we have no question of credit extended on the faith of apparent ownership. The sole question for decision is whether a trust arose in favor of Mrs. Gilbert on account of advances made by her to buy the stock.

We are of opinion that the instructions set out above are erroneous, and, in view of the conflict in the testimony, it cannot be said that they were not prejudicial. These instructions placed upon Mrs. Gilbert a burden of proof which, under the law, did not rest upon her, and this fact may have been responsible for the divided verdict of the jury which was returned.

The law of this case was declared by Chief Justice COCKRILL in the case of *Kline* v. *Ragland,* 47 Ark. 111, 14 S. W. 474, where he said:

"And so, when the husband pays the purchase money and takes the conveyance in the name of his wife, the presumption that he *intended* it as a gift is raised from his obligation to provide for her, and there is therefore no presumption of a trust (Citing authorities). On the other hand, where the deed is taken in the name of the husband, the purchase money being paid by the wife, no presumption of an intention to make a gift arises, but there is a resulting trust in favor of the wife, and the husband holds the propery thus acquired as trustee for her benefit, unless he is able to overcome the presumption by establishing a different intention (Citing authorities). When it is shown that she intended the purchase for herself, and made the cash payment of the purchase money from her separate means, the fact that the husband takes the conveyance to himself and executes his individual notes for the unpaid purchase money does not defeat the trust that arises in her favor to the extent of the payment made by

her (Citing authorities). The burden is still upon the husband to repel the presumption" (Citing authorities).

The case of *Spradling* v. *Spradling, supra,* quoted and approved this language which declares the settled law of this State. See also § 5594, C. & M. Digest; *Wood* v. *Wood,* 116 Ark. 142, 172 S. W. 860; *Keith* v. *Wheeler,* 105 Ark. 318, 151 S. W. 284; *Wyatt* v. *Scott,* 84 Ark. 355, 105 S. W. 871; *Brown* v. *Wright,* 58 Ark. 20, 22 S. W. 1022, 21 L. R. A. 467.

For the errors indicated the judgment will be reversed, and the cause remanded with directions to transfer it to the chancery court. It is so ordered.

Moss *v.* Chitwood.

Opinion delivered December 9, 1929.

Starbird & Starbird, for appellant.

Dave Partain, for appellee.

SMITH, J. Appellant Moss brought suit on a note executed by C. C. Fine to the order of the Bank of Dyer, and indorsed by Chitwood and Bushmaier, which he alleged he had purchased from the bank. The note was for the sum of $1,603.42, and was dated June 4, 1922, and was payable four months after date, but certain credits were admitted, which reduced the amount to $1,508.96, and judgment was prayed for this amount.

An answer was filed by the defendants, Chitwood and Bushmaier, which alleged that, on the day of the execution of the note, plaintiff Moss was the president of the Bank of Dyer, and one Morse was its cashier, and that Morse requested them to indorse the note as sureties and accommodation makers for Fine, who was engaged in the mercantile business at Dyer, and had been permitted to overdraw his account at the bank in the sum of $1,603.42, and the State Banking Department had required that the overdraft be secured, and they were urged to sign the note on behalf of the bank, and as an inducement so to do they were assured by Morse that the bank would retain the note in its possession, and would under no circumstances permit it to get beyond its control, and that the bank and its officers would see that they (the defendants) did not lose anything, and would not have the note to pay, and, relying upon this assurance, they signed the note. Defendants, as witnesses, gave testimony in support of these allegations.

Defendants alleged that Fine had made payments on the note while it was in the possession of the bank which are not credited thereon, and that in December, 1925, the Bank of Dyer failed, and was succeeded by the Farmers' State Bank, which assumed all the liabilities and took over all the assets of its predecessors, including the Fine note, and that the Farmers' State Bank later failed, at which time Fine had on deposit the sum of $646.43, and it was prayed that the amount of this deposit be credited upon the note. Defendants further alleged that Moss had obtained possession of the note by fraud, and the answer denied that Moss was an innocent holder thereof, wherefore it was prayed that plaintiff take nothing by his suit.

The cause was transferred to the chancery court, where it was tried, and upon a general finding in favor of the defendants the suit was dismissed.

The undisputed testimony shows that Fine was not overdrawn at the Bank of Dyer at the time of the execution of the note, and that the purpose of its execution was not to take care of an overdraft, as the answer alleged, but that it was executed for the purpose of enabling Fine to purchase a stock of goods; and there is no question but that the bank advanced in cash the face of the note at the time of its execution.

Moss testified that he purchased the note from the Bank of Dyer on June 9, 1922, which was, of course, before its maturity, and that he paid its face value, less the credit indorsed thereon, and he was corroborated by Morse, the cashier, and the books of the bank show that Moss' account was charged on that day with the face of the note. It appears certain therefore that Moss was the actual purchaser of the note before its maturity, and that he paid full value therefor, and we think the testimony also shows that he was an innocent purchaser thereof.

Moss testified, in effect, that the bank was overloaded with paper, and that he regarded the note as good, made

so by the indorsements of the defendants, and that he bought it for full value, and paid his own money for it, and the records of the bank, made at the time, corroborate this last statement, and that he was not advised that there was any agreement between the cashier and Chitwood and Bushmaier whereby the note should not have the binding obligation which upon its face it appeared to have.

If this testimony is true, the plaintiff's right to recover on the note is not, and cannot be, questioned, for Morse, the cashier, had the right to sell the note. *Arrington* v. *King,* 179 Ark. 584, 17 S. W. (2d) 302; *Winer* v. *Bank of Blytheville,* 89 Ark. 435, 117 S. W. 232, 131 Am. St. Rep. 102.

It is true that Chitwood and Bushmaier gave testimony tending to sustain the allegations of their answer that they signed the note for the accommodation of the bank, and were induced to do so only upon the assurance of the cashier of the bank that they would not be called upon to pay it, and that they were thereby enabling the bank to cover up a transaction which was entered into to deceive the State Banking Department. In this connection they testified that Morse represented that he would take a chattel mortgage upon the stock of goods which Fine proposed to buy, and which he did buy, with the proceeds of the note, and that this mortgage was taken by Morse and filed by him with the circuit clerk and recorder, and that it was done to indemnify them against their indorsement.

It appears now to be conceded by both parties that this mortgage, taken, as it was, upon an open stock of goods, which was being sold and replenished, was void, and, although it may be said that the State Banking Department would not have approved a loan made upon a security of that kind, the parties themselves regarded the security as valid. This is evidenced by the fact that Chitwood and Bushmaier later took charge of the stock of goods under the mortgage and disposed of it, and it

is not made clear what disposition was made of the proceeds. Their liability to account to Fine for the stock of goods appears to be clear, but this feature of the case was not developed.

The assistant Bank Commissioner testified that, when the Bank of Dyer went into liquidation and was succeeded by the Farmers' State Bank, which was organized for that purpose, and of which institution Moss and Morse became president and cashier, respectively, a list of all the assets of the Bank of Dyer was prepared, and the note in suit was not included, and it was never at any time carried as an asset of the Farmers' State Bank.

Upon a consideration of all the testimony we have concluded that Moss was an innocent purchaser of the note for value and before maturity, and, having made this finding, it is unnecessary to determine whether defendants were induced to indorse the note upon Morse's representations that they would not be held liable thereon, or the effect of that representation, if made. *Coffman* v. *Bottoms,* 179 Ark. 264, 15 S. W. (2d) 404; *Blanks* v. *American Southern Trust Co.,* 177 Ark. 832, 9 S. W. (2d) 310.

Appellees have cited cases from this court to the effect that parol testimony is admissible to show that a note or other contract was signed upon condition that no delivery of it should be made as a valid and subsisting contract until certain precedent conditions had been performed, and, when this fact is established, the contract, even though it were a promissory note, is not enforceable, where it is not also shown that the conditions upon which it was to be delivered had been performed. Among these cases the latest is that of *Taylor, Bank Commissioner,* v. *Deese,* 179 Ark. 39, 14 S. W. (2d) 255. But the opinion in that case makes plain the law that this defense would not be available against an innocent purchaser of such a note for value and before maturity. Moreover, there was no attempt here to show that there were any

unperformed conditions which should have preceded the delivery of the note. On the contrary, the defense is that it was understood that the note should not have the obligations ordinarily incident to a writing of that character after its delivery to the payee.

The decree of the court dismissing the cause as being without equity is therefore reversed; but there remains to be determined the number and amount of the credits to be applied upon the note.

Upon this question we have first to say that the Farmers' State Bank had no authority, as appellees insist, to credit the amount of Fine's deposit on the note, for the reason that the Farmers' State Bank never owned this note.

It appears, however, that Moss kept this note and other valuable papers in the vault of the bank, and that Morse had access to them, and had authority from Moss to make collections upon paper held by Moss, and that, while the note in suit was so owned and held, payments were made upon it, one of which, at least, is not disputed. Any payments so made should be credited upon the note, although Moss was the owner thereof. It is true, of course, that the maker of a note must make payments thereon to the holder thereof, and payments otherwise made are made at his peril, but the testimony shows that the maker and indorsers of the note did not know that Moss had become the owner thereof, and the note was payable at and to the order of the Bank of Dyer, and if, when the payments were made, the note was in the possession of the cashier of the Farmers' State Bank, which had taken over the assets of the Bank of Dyer, they had the right to assume, in the absence of knowledge to the contrary, that Morse had authority to receive payments thereon. This is true because Morse was the holder of the note, and, while defendants knew that Morse held the note as agent, and not as owner, they had the right to presume that Morse held it as the agent of the true owner, and that he was authorized to receive the payments made.

The decree is therefore reversed, and judgment will be rendered upon the remand for the amount of the note and interest, less such sums as may be shown upon the new trial to have been paid Morse.

MEEHAN *v.* ROAD IMPROVEMENT DISTRICT NO. 7 OF WOODRUFF COUNTY.

Opinion delivered December 9, 1929.

Roy D. Campbell, for appellant.

Ross Mathis, for appellee.

HUMPHREYS, J. On the 15th day of January, 1926, appellee instituted suit in the chancery court of Woodruff County, Southern District, to enforce a lien for delinquent taxes for the years 1921 to 1925, inclusive, against certain lands in Road Improvement District No. 7, describing the lands owned by the estate of Charles Meehan, deceased.

Appellant, John R. Meehan, executor of said estate, filed an intervention, controverting the right of appellee to enforce a lien against said lands for the alleged reasons: That the taxes for the year 1921 on the land of the estate were barred; that suit for the taxes of 1925 was prematurely brought; that the required statutory notice was not given of the filing of the original assessment of benefits in 1920; that the required statutory notice was not given of the new assessment of benefits made in 1921; that the county court failed to make an order levying an annual tax upon said lands under the new assessment of benefits made in 1921; and that the reduction and extension of taxes against said lands after the reassessment of benefits in 1921 were not made by the commissioners of the district, but upon the letter of the attorney, an acting secretary thereof.

Appellee filed an answer to the intervention of appellant, denying the several allegations therein.

The cause was submitted to the court upon the pleadings and testimony, which resulted in a lien being declared upon the lands for the taxes of the various years as follows: "1921, $1,331.66; 1922 and 1923, the sum of $1,174.16 for each year; 1924 the sum of $1,038.39, and 1925 in the sum of $992.92."

Appellant contends for a reversal of the decree upon the several grounds set out in his intervention, attacking the validity of the taxes and appellee's right to enforce a lien against said lands for the collection thereof. We will review and determine the alleged grounds in the order mentioned above.

1. We agree with appellant that the action for the taxes of 1921 was barred by § 4 of act No. 534 of the General Acts of 1921. The section referred to is in part as follows: "No suit for the collection of such delinquent taxes shall be brought after three years from date same became delinquent."

This court ruled in the case of *Western Clay Drainage District* v. *Wynn,* 179 Ark. 988, 18 S. W. (2d) 1035, that the act quoted barred the collection of special improvement district taxes after the expiration of three years in a district which had been created by special act. The trial court erred in adjudging a lien against the lands for the taxes of 1921.

2. Appellant is in error in the contention that the action was prematurely brought for the enforcement of taxes of 1925. Act No. 194 of 1920, creating the district, provided for the collection in each year of a certain percentage of the assessed benefits. The necessary implication is that the taxes levied for each year became due and payable in that year. The taxes levied for the year 1925 were payable between the first Monday in January, 1925, and the 10th day of April, 1925. The taxes for 1925 were delinquent therefore when the action was commenced on January 15, 1926.

3. Appellant is also in error in the contention that the required statutory notice was not given of the filing of the original assessment of benefits in 1920. This contention is based upon the erroneous assumption that notice to the landowners was issued on June 15, 1920, when, as a matter of fact, that was the date provided in the notice when the complaint of landowners against the assessment should be heard. Act No. 194 of 1920, creating the district, required two weeks' notice by publication to landowners wishing to be heard on the assessment. The notice stated that the assessment of benefits had been filed in the office of the county clerk of Woodruff County, at Cotton Plant, Arkansas, and that the commissioners of the district would meet in the county

court room in Cotton Plant, Arkansas, to hear all persons wishing to be heard on the assessment, on the 15th day of June, 1920. The proof of publication of the notice shows that it was published on May 27 and again on June 3, 1920, so the fact is that the assessment was filed on or before May 27, 1920, for more than two weeks before the commissioners met to hear complaints of landowners against the assessment.

4. Appellant is also in error in the contention that the required statutory notice was not given of the new assessment of benefits made in 1921. This contention is based upon the erroneous assumption that the assessment was filed on November 5, 1921, whereas that was the time specified in the notice for a meeting of the assessors to hear any complaint of landowners against the assessment. When the notice and proof of publication are read together, it is apparent that the notice was filed on or before October 21, 1921, and was published for two consecutive weeks in accordance with act No. 454 of 1921, providing for the assessment.

5. Appellant is also in error in the contention that it was necessary for the county court to make an order levying an annual tax upon said lands under the new assessment of 1921. There is nothing in act No. 454 of 1921, providing for the reassessment, requiring the county court to make another levying order, and act No. 194 of 1920, creating the district, only provided for one order levying the taxes. The rate fixed in the levying order became a judgment which could not be changed except to raise it, if necessary, to pay the bondholders. According to the amended record, the county court was properly in session on September 8, 1920, when the levying order was made.

6. Appellant is also in error in the contention that it was necessary for the commissioners themselves to notify the clerk of the reduction of the taxes against said lands after the reassessment of benefits in 1921. The reduction is authorized by act No. 5 of the extraordinary

[redacted]

session of 1923, commonly known as the Harrelson Act, and that act provided that the commissioners should take appropriate action to reduce the taxes. It did not provide that the commissioners should notify the county clerk themselves of their action. We think it was perfectly proper for the attorney of the district to give this notice to the county clerk, which he did by letter on the 20th of December, 1923, as acting secretary of the commissioners. The reduction of the taxes was for the benefit of appellant and other landowners in the district, and they cannot be heard to complain. The act did not provide for a further levying order by the county court.

On account of the error indicated, the judgment will be modified to the extent of eliminating the amount of taxes adjudged against the land for 1921, affirmed in other particulars, and, as modified, remanded to the trial court for further proceedings not inconsistent with this opinion.

[redacted]

UNITED ORDER OF GOOD SAMARITANS *v.* GRIGSBY.

Opinion delivered December 9, 1929.

[redacted]

A. D. Whitehead, for appellant.

W. G. Dinning, for appellee.

HUMPHREYS, J. This is an appeal from a judgment for $300 rendered by the circuit court of Phillips County against appellant upon an insurance policy issued by it upon the life of Annie Grigsby, in which appellees were the beneficiaries.

Appellant filed an answer to the complaint, denying liability under the policy upon the ground that the insured, Annie Grigsby, died during the time that she was automatically suspended from the order for failure to pay her July, 1927, dues, on or before the 10th day of said month, or within the time prescribed by the constitution and by-laws of the order.

The cause was heard upon the pleadings and testimony introduced by the respective parties, at the conclusion of which each party requested an instructed verdict, and made no request for additional instructions. The court refused appellant's request, and instructed a verdict for appellee. The only question therefore presented by the appeal is whether there is any substantial evidence to support the verdict and consequent judgment.

The insured died on August 1, 1927. She did not pay her July dues until July 11, 1927. The policy provided that the constitution and by-laws of appellant's order should be read together as a part of the contract. Appellant introduced §§ 7 and 10 of article 9 of the by-laws and constitution of the order to fix the status of the insured as a delinquent and a suspended member of the order at the time of her death. The sections are as follows:

"Section 7. If the dues are not received at the home office by the tenth of each month, policy is automatically lapsed and becomes null and void; should the member fail or refuse to pay any taxes or fines levied by the supreme, grand or subordinate colony, should sickness or

death occur after thirty days from the date said taxes were due, neither the supreme, grand or subordinate colony shall be liable for any benefits, and the certificate shall become absolutely null and void, although the endowments have been paid."

"Section 10. If the dues are not paid by the 10th of the month due, the insured shall be automatically suspended, and in case of sickness or death neither the supreme, grand or subordinate colony shall be liable for any sum under the contract. Should the dues be paid, neither the insured nor the beneficiaries shall be entitled to any benefit, if sickness or death occurs before the expiration of thirty days; also the subsequent payment of such arrears shall not entitle the insured or beneficiaries to any benefits for sickness or death occurring during the period of such suspension."

The section quoted, standing alone, under the construction placed upon similar provisions in fraternal insurance policies in the cases of *United Order of Good Samaritans* v. *Thompson,* 172 Ark. 884, 290 S. W. 965, and *United Order of Good Samaritans* v. *Betts,* 179 Ark. 203, 14 S. W. (2d) 1108, would relieve appellant of liability in this case; but the sections do not stand alone in the policy in the case at bar. Appellee introduced in evidence the second paragraph of § 6, article 9, of the constitution and by-laws of the order, not called to our attention in the cases cited, if there was such a rule, which is as follows:

"The dues are payable in advance, and must be paid on or before the first of the month, with ten days grace."

This section applies to policies upon which monthly dues are payable, and means that the insured had ten full days after the first day of the month within which to pay her July dues. She paid the dues on July 11, within the period of the ten days grace allowed her under the clause last quoted. If there is a conflict between this provision and the sections first quoted, which there seems to be, the provisions most favorable to the insured should be

applied and the beneficiaries allowed to recover. Under our construction of the latter provision, the trial court's peremptory instruction in favor of appellee was correctly given.

No error appearing, the judgment is affirmed.

KIRBY, J., dissents.

HUNTER *v.* STATE.

Opinion delivered December 9, 1929.

White & White, for appellant.

Hal L. Norwood, Attorney General, and *Robert F. Smith,* Assistant, for appellee.

KIRBY, J. Appellant prosecutes this appeal from a judgment of conviction for the crime of manufacturing intoxicating liquors, and contends that the evidence is insufficient to support the verdict, and that the court erred in refusing to grant his motion for a continuance.

It appears from the testimony that the sheriff of Logan County, with one of his deputies, went to the home of appellant with a search warrant. Finding the house locked, he asked another man whom they saw there with

a bucket where Dick Hunter was. He replied that he was in town, and he would go and get him. This man not returning, the sheriff left his deputy at the house and went to town, where he found Dick Hunter, who said he would be home shortly. The sheriff returned, and, Hunter not appearing, he and his deputy found a key, and searched the house, finding a ten-gallon jar of "home brew" in process of fermentation. It was sitting behind the kitchen stove, on a lard can, with a lighted lamp under it. They found several bottles of "home brew" in the house and about a gallon of liquor in the barn. Witnesses stated that, from experience as officers and examinations made of various intoxicating liquors, that "home brew" was an intoxicating and alcoholic liquor, and that the "home brew" in the bottles was intoxicating liquor, although he admitted that he did not drink any of it.

No evidence was offered on behalf of appellant. The officers, experienced in such matters, testified that the liquor found fermenting in the container, in process of manufacture, was "home brew," and intoxicating when manufactured, and the testimony was sufficient to support the verdict. *Burns* v. *State,* 179 Ark. 1, 13 S. W. (2d) 820; *West* v. *State,* 179 Ark. 28, 13 S. W. (2d) 821; *Mahan* v. *State,* 179 Ark. 189, 14 S. W. (2d) 1113; *Fuller* v. *State,* 179 Ark. 93, 18 S. W. (2d) 913; *Kindle* v. *State,* 174 Ark. 1179, 297 S. W. 827.

Neither was error committed in denying the motion for a continuance. The motion states that the absent witnesses, Jim Snelling and his wife, who were absent from the State temporarily, would testify that they were living in the house of the defendant, using and occupying a part of it with him, and knew of the circumstances of the case, and would swear that the liquor found in the house was not in the custody of the defendant, nor in any manner intoxicating and alcoholic, and that the defendant was not in any manner connected with the said substance in its manufacture; that the witnesses were residents of the Northern District of Logan County, Jim Snelling in

the regular employ of one of the coal companies, and that, if the continuance be granted, the witnesses would be present and testify as alleged at the next trial; that it was useless to have subpoenas issued for them, as they were in Kansas City, Mo.

The indictment against appellant was returned on the 6th of August, and his trial had on the 15th day of August, 1929. No subpoenas were issued for the absent witnesses, and the motion shows only that they were absent from the county on the day the case was set for trial, not stating that they were not in the county at any time after the indictment was found. No evidence was taken or showing made that the testimony of witnesses who were out of the jurisdiction of the court could be had if the continuance was granted to the next term, except the opinion of the appellant, stated in the motion, that they would return and could be served with process before the next term of court. Appellant knew of the search of his dwelling on the day it was made and the purpose of it, although he failed to accompany the officers in making the search, after invitation to do so, and necessarily knew that he would need the testimony of the witnesses who lived in the house with him, and certainly after the indictment was returned, but made no effort to procure their attendance by legal process. It thus appears that no abuse of discretion by the trial court in overruling the motion was shown. *James* v. *State,* 125 Ark. 269, 188 S. W. 806; *Eddy* v. *State,* 165 Ark. 289, 264 S. W. 832; *Lewis* v. *State,* 169 Ark. 340, 275 S. W. 663; *Harris* v. *State,* 169 Ark. 627, 276 S. W. 361; *Adams* v. *State,* 176 Ark. 927, 5 S. W. (2d) 946; *Edwards* v. *State, ante* p. 363.

Appellant only requested one instruction on reasonable doubt, and made no objection to any of the instructions given by the court. The instruction given by the court on reasonable doubt was a correct one, and fully covered the question, and no error was committed in re-

fusing to give the instruction requested by appellant on the same point.

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

JONES *v.* MODEL LAUNDRY.

Opinion delivered December 9, 1929.

[redacted]

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C. A. Holland, for appellant.

R. W. Robins, for appellee.

KIRBY, J., (after stating the facts). It is first contended for appellant that the court erred in overruling its demurrer to the answer of appellee challenging its sufficiency, it being contended that the law does not warrant the set-off. The statute, § 477, C. & M. Digest, provides: "Nothing contained in this act shall change the nature of the defense, or prevent the allowance of discounts or set-offs, either in law or equity, that any defendant may have against the original assignor previous to the assignment, or against the plaintiff or assignee after the assignment." Also § 1197, C. & M. Digest, provides: "A set-off may be pleaded in any action for the recovery of money, and may be a cause of action arising either upon contract or tort." The general rule is stated in 24 R. C. L. 819, as follows: "The general rule is that the assignee of a chose in action, for the assignment of which no protection is especially provided by law, takes subject to all rights of set-off then held by the debtor against the assignor. Likewise the right of recoupment is attached to a contract and goes with it into whosoever hands the right may come to sue on the contract." See also 23 Enc. of Proc. 742, 744. In a suit between the assignee on a note against the maker, where it does not appear affirmatively that the assignment was made before the maturity of the note, the maker is entitled to all the defenses which he could have made against the note in the hands of the original owner. *Robinson* v. *Swigart*, 13 Ark. 71; *Ruddell* v. *Landers,* 25 Ark. 238. No error was committed therefore in overruling the demurrer.

There is no merit in appellant's contention that the warranty as set out in the memorandum of sale only re-

lated to the new padding and other new appliances, in stating, after mentioning them, "to carry guaranty same as new machine," the first part of the description being "1 used 24 watts flat work ironer," the obvious meaning being to guarantee the machine with the new equipment on it, "to carry guaranty same as new machine," and as though there had been no period after the word "ironer," and the whole of it had been one sentence. It is true the testimony does not show what guaranty was given with new machines, but the law implies in the purchase of a new machine a warranty that it is reasonably fit for the purpose for which it was to be used and for which it was sold. *Dyke* v. *Magdalena,* 171 Ark. 225, 283 S. W. 374; *Bixler Co.* v. *Hall,* 134 Ark. 96, 203 S. W. 257; *Indiana Silo Co.* v. *Harris,* 134 Ark. 218, 203 S. W. 581.

The undisputed testimony shows that the written guaranty was made in the memorandum contract of sale, and also the defective condition of the machine as delivered and installed, rendering it unfit for the purpose for which it was intended, in violation of the warranty, and that the damages suffered because of such condition were more in amount than the balance due on the account to the selling company purchased by appellants. The issue was fairly submitted to the jury on the instructions given, and the instructions requested by appellants were more in the nature of peremptory instructions and not clear statements of the law, and no error was committed in refusing to give them.

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

HARRELL *v.* SOUTHWEST MORTGAGE COMPANY.

Opinion delivered December 9, 1929.

[redacted]

Ward & Ward, for appellants.

Arthur Sneed, for appellee.

MEHAFFY, J. Appellants had borrowed money from the Missouri State Life Insurance Company, upon which they were paying 6 per cent. interest. The Clay County Abstract Company advertised that it had money to lend at a low rate of interest, a long time to repay, and no commission. Appellants saw this ad, and applied to the Clay County Abstract Company for a loan on their farm. They desired to increase the loan; that is, to borrow more money than enough to take up their loan with the Missouri Life Insurance Company, and they also wished to get it at a lower rate of interest.

The Clay County Abstract Company was operated by Ira C. Langley and O. R. Winton. The Missouri State Life Insurance Company at first refused to permit payment of the loan to it because it was not due, but finally, through the efforts of Ira C. Langley, it agreed to accept payment of its loan.

The appellee, through the Clay County Abstract Company, agreed to lend appellants $5,000, and they exe-

cuted note and mortgage to secure the payment of the $5,000, together with ten interest notes, the loan being for ten years.

The appellants went to the office of the Clay County Abstract Company to execute the necessary papers to complete the loan. The papers were signed and acknowledged before O. R. Winton. At the same time that the mortgage for $5,000 and notes were executed, it is alleged that a second mortgage for $500 was executed to secure four notes of $125 each for commissions. This suit was brought to foreclose the second mortgage.

There is no controversy about the first mortgage for $5,000, and no controversy about the interest notes, but appellants contend that they did not sign the second mortgage and the notes which it secured, and did not agree to pay any commission.

Copies of the notes and mortgage sued on were filed with the complaint. Defendants answered, denying the execution of the second mortgage and notes which it secured, and their answer was verified, and later appellants filed an affidavit denying the genuineness of the four promissory notes and mortgages involved in this suit.

O. R. Winton, who took the acknowledgment of plaintiffs to the mortgages, and in whose presence it is alleged that the notes were signed, was dead at the time the testimony was taken, and, of course, his testimony could not be had.

The evidence shows conclusively that the attorney, Arthur Sneed, had in his possession the original mortgage and notes in court, but they disappeared, and could not be found during the trial. The clerk testified from the mortgage record, and introduced a certified copy of the mortgage.

The appellants testified that they did not sign the four notes sued on as commission for securing the loan, and that they knew nothing about the second mortgage or the notes which it secured, and did not agree to pay any commission. The commission was not payable to

the Clay County Abstract Company or to Langley or Winton.

On cross-examination appellant, Frank A. Harrell, was handed a photostatic copy of the second mortgage, and asked whether the signature resembled his, and he said it did a little bit; that it looked something like it, but that he did not sign it, even if it did look like his signature.

Witness had written, requesting the mortgage to be sent to the Bank of Piggott, but, instead of sending the original, they sent copies. They admitted that they signed the $5,000 mortgage and the notes which it secured, and this mortgage was introduced for the purpose of showing the signature, and for no other purpose. They contended that they did not sign the second mortgage and notes, but that, if they did sign, it was a fraud, and that they had been tricked into signing it; that, if the signature was theirs, it was obtained by some kind of a scheme; by fraud. Both of them could read and write, and testified that Winton handed them the mortgage, and Harrell read it, and then Winton picked up ten papers which he called coupons. They represented interest on the loan, and he told them to sign them, and after Harrell had signed they were passed over to his wife, and she signed them.

Harrell testified that the signature on the copies looked very much like his, but, if it was, it was obtained by error, and he did not mean to sign them; testified that what he really meant was that his signature was obtained through fraud. Witness does not know whether he read all the papers that he signed or not. He said Winton was in a hurry, and that he sat at one table and signed the papers and his wife sat at a different table in the same room.

Mrs. Harrell, the wife of Frank A. Harrell, testified substantially the same as her husband, but she said she did not know whether it was her signature or not, and she did not know whether it was her husband's signature, but that they resembled her signature all right, but she

did not sign them. She just signed what was handed to her after Mr. Harrell had signed them, and did not pay close attention.

The only question involved is a question of fact. If the appellants signed the notes and mortgage without being induced to do so by fraud, they are liable. If they did not sign them, or if their signatures were obtained by fraud, and they did not agree to pay any commission, then they are not liable.

It is appellants' contention that the proof is not sufficient, because they filed an affidavit denying the genuineness of the second mortgage and notes, and that when they filed this affidavit the burden was upon the appellee to show that the signatures were genuine. The fact that the answer was sworn to by the parties makes no difference, because Harrell simply swore that he verily believed that he had a good and valid defense, and that the facts stated in the answer were true to the best of his knowledge and belief. But there was an additional affidavit denying the genuineness of the mortgage and notes, and a proper affidavit denying the genuineness, either in the answer or a separate affidavit, would be sufficient. This affidavit was made in compliance with § 4114 of C. & M. Digest, which provides: "Where a writing purporting to have been executed by one of the parties is referred to in and filed with a pleading, it may be read as genuine against such party, unless he denies its genuineness by affidavit before the trial is begun."

The purpose of the statute is to permit the party who files a written instrument with his pleadings to introduce it in evidence as genuine, unless its genuineness is first denied under oath. When this affidavit is made and its genuineness is denied, then the party, without some other evidence, could not introduce the instrument as genuine.

This court said, in discussing this statute: "It means only that, in the absence of such an affidavit, the party offering the instrument may introduce it without proof of its execution, and that it is taken *prima facie*

as genuine, but its genuineness may be contested. In other words, the statute merely establishes a rule of evidence, and does not bar the opposite party absolutely of his right to contest its genuineness, nor does the failure to deny its genuineness by affidavit give it the force of absolute verity. Where such an instrument is pleaded in a complaint, its genuineness is not in issue unless denied in the answer; but the pleading of such an instrument in the answer by way of defense does not call for a reply from the plaintiff. He may, by failing to file the necessary affidavit, permit it to be read as *prima facie* genuine, and then introduce evidence contesting its genuineness." *St. L. I. M. & S. R. Co.* v. *Smith,* 82 Ark. 105, 100 S. W. 884; *J. R. Watkins Medical Co.* v. *Montgomery,* 140 Ark. 487, 215 S. W. 638; *Mo. Pac. Ry. Co.* v. *Yarnell,* 65 Ark. 320, 46 S. W. 943; *Weaver* v. *Carnall,* 35 Ark. 198, 37 Am. Rep. 22; *Hall* v. *Rea,* 85 Ark. 269, 107 S. W. 1176.

Where the affidavit is filed in compliance with the statute, it is then necessary for the plaintiff to prove the execution of the instrument. If the affidavit is not filed, the instrument may be introduced in evidence without other proof of its execution.

The Supreme Court of New Mexico, in construing a similar statute, said: "The genuineness of an instrument evidently goes to the question of its having been the act of the party just as represented; or, in other words, that the signature is not spurious, and that nothing has been added to it or taken away from it which would lay the party changing the instrument or signing the name of the person liable to forgery. The due execution of an instrument goes to the manner and form of its execution, according to the laws and customs of the country, by persons competent to execute it." *Puritan Mfg. Co.* v. *Toti & Gradi,* 14 N. M. 425, 94 Pac. 1022; *Moore* v. *Copp,* 119 Cal. 429, 51 Pac. 630; *Baldwin* v. *Van Deusen,* 37 N. Y. 487.

The Idaho Supreme Court said, in discussing a question similar to the one in this case: "Could it be con-

tended that setting up those facts of fraud and deceit was denying the genuineness and due execution of the note? Clearly not. We think that the law in the case at bar set up for plaintiff every defense against this release that the company set up in their answer in our supposed case, unless it should be contended that their defense of fraud and misrepresentation was a denial of the genuineness and due execution of the instrument, which we do not think could be maintained, even if their answer was verified." *Cox* v. *Northwestern Stage Co.*, 1 Idaho 376.

It is clear, from all the decisions that we have found construing this statute, that the only purpose and effect of the statute is to require proof of the execution of the instrument before its introduction. Or, in other words, to require proof other than merely the certificate of the officer or the alleged signatures of the parties. And, even if the affidavit is not filed, still the alleged maker of the instrument may show that it was procured by fraud, and that it is void. Even where the signature is genuine, the party may prove that the instrument is void because obtained by fraud. Therefore the only question involved is whether the evidence in this case shows that this second mortgage and notes which it secured were genuine. That is, whether the appellants executed the mortgage and notes. If the affidavit had not been filed, they would have been admitted as genuine. That is, that they, in fact, executed the instrument. It would, however, not prevent the makers from showing that they were obtained by fraud. As to whether the appellant signed the notes and mortgage was, as we have already said, a question of fact, and the finding of the chancellor is sustained by the evidence.

It is contended, however, by appellant that some of the evidence introduced on the part of the appellee was incompetent, and that for that reason the case ought to be reversed. We try chancery cases here *de novo,* and if there was incompetent testimony before the chancellor it was his duty to disregard it. But when it is here on appeal this court, no matter what the chancellor may

have considered, disregards all incompetent testimony, and not only tries the case *de novo,* but tries it on the competent testimony in the case. *Lasker-Morris Bank & Trust Co.* v. *Gans,* 132 Ark. 402, 200 S. W. 1029.

The evidence in this case shows that the mortgage for $5,000, and the notes which it secured were signed by the appellants. They both admit signing these notes and mortgage. There is evidence tending to show that the signature on the $5,000 mortgage and notes which it was given to secure was the same as the signature on the second mortgage and notes sued on. The parties themselves admit that the signature is very much like their signature, but contend that, if they had signed, they were induced to do so by the fraud of the other party. These were questions of fact, and this court has many times held that a chancellor's finding on a question of fact will be permitted to stand unless it is clearly against the preponderance of the evidence.

This court recently said: "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." *Turner* v. *Adams,* 178 Ark. 67, 10 S. W. (2d) 41; *Fort Smith* v. *Norris,* 178 Ark. 399, 10 S. W. (2d) 861; *Barton* v. *Hardin,* 178 Ark. 1150, 13 S. W. (2d) 624.

The chancellor found in favor of the appellees, and he therefore must have found that the second mortgage and notes which it was given to secure were executed by the appellants, and they were not induced to sign the same, because of any fraud practiced by the other party. And, since the chancellor's findings on these facts are not against the preponderance of the evidence, it becomes unnecessary to discuss other questions discussed by learned counsel.

The chancellor's finding being supported by the evidence, it is binding upon this court, and the decree is therefore affirmed.

WALLACE *v.* STATE.

Opinion delivered December 9, 1929.

Elmo CarlLee, for appellant.

Hal L. Norwood, Attorney General, and *Pat Mehaffy,* Assistant, for appellee.

MEHAFFY, J. The indictment in this case charged the appellant with grand larceny, alleged to have been committed on the 15th day of December, 1928, by unlawfully and feloniously stealing, taking and carrying away 171 pounds of seed cotton, of the value of $15, and two cotton-pick sacks of the value of $1.50, the property of Roger Williams.

Appellant was convicted and sentenced to one year in the penitentiary, and he prosecutes this appeal to reverse said judgment. Appellant, in his motion for a new trial, urges a reversal of the case because one of the jurors left the other eleven of his fellow-jurors, and ap-

peared before the court and asked the court if he would suspend the sentence during good behavior, if they found him guilty and fixed his punishment at one year in prison.

In support of his motion for new trial, appellant filed the affidavit of W. R. Mayer, one of the jurors, who testified, in substance, that, after they had deliberated quite a while, and the jury were divided, they agreed to send one juror, Sanford Davis, to the court to ascertain if he would suspend the sentence on good behavior if the jury would return the verdict of guilty, and fix his punishment at one year, and recommend that the sentence be suspended during good behavior; that said juror went to the court, and was gone ten or fifteen minutes, and came back and said it was all right.

This juror testified that he would not have consented or returned a verdict if he had not been assured that Wallace would not be sentenced, but that his sentence would be suspended. He also testified that he felt that the evidence did not warrant conviction at all, but thought this sort of a verdict and suspended sentence would be better for the defendant than to keep him and subject him to the third trial, with its expense and worry.

Also, in support of his motion for a new trial, appellant filed the affidavit of W. J. Dungan, an attorney, who stated that, after the case was submitted to the jury, one of the jurors, Sanford Davis, came from the jury room and approached the court and said, substantially: "Judge, we can agree on a verdict of guilty and punishment at one year if you will agree to suspend the sentence during good behavior."

It is earnestly insisted by the appellant that this conduct of the juror was improper, and that because of this misconduct he should have a new trial.

The statement of the court is that the juror came to him and made the statement, in substance, as detailed by the attorney, and that the court directed the juror to return to the other eleven without instructing him. In other words, when he came and made the statement to

the court, the court immediately directed him to go back to the jury-room where the other eleven were, and did not give him any instructions or any intimations at all.

It is argued that the juror had to go from one floor to another and pass bystanders, but there is not even a suggestion that he spoke to anybody or that anybody spoke to him, either while he was going to the courtroom or going back to the jury-room.

In trials of felony cases at common law it was necessary to keep the jury together in charge of an officer, and not to permit them to separate from the time of their being impaneled and sworn, but in this State the matter is regulated by statute.

Section 3187 of C. & M. Digest reads as follows: "The jurors before the case is submitted to them, may, in the discretion of the court, be permitted to separate, or be kept together in the charge of proper officers," etc.

Section 3190 of Crawford & Moses' Digest provides: "After the cause is submitted to the jury they must be kept together in the charge of the sheriff, in the room provided for them, except during their meals and periods for sleep, unless they be permitted to separate by order of the court," etc.

The statute also provides that certain instructions shall be given to the jury, and this court has repeatedly held that it was within the discretion of the court to keep them together or permit them to separate.

The record is silent in the instant case as to whether the court had made any order at all, and there is no contention that the court had made an order to keep them together. Some courts have held that where, under a statute like ours, the court may keep them together or permit them to separate, if he once makes an order to keep them together, it is error to thereafter permit them to separate. However, that question is not involved in this case. There is no contention that any order to keep them together was ever made by the court. There is no contention that the juror that separated talked to any-

body or that anybody talked to him during his absence from the other eleven.

Where the court permits the jurors to separate, or where there has been no order keeping them together, the burden rests upon the complaining party to show that prejudice resulted. There is no evidence in the record tending to show that anything was done by the juror or anyone else while he was absent from his fellow-jurors that resulted in any prejudice to the appellant. *Kennedy* v. *State,* 119 Ark. 611, 178 S. W. 920; *Carlton* v. *State,* 109 Ark. 516, 161 S. W. 145; *Reeves* v. *State,* 84 Ark. 570, 106 S. W. 945; *Beason* v. *State,* 166 Ark. 142, 265 S. W. 956.

The affidavit of the juror, however, is to the effect that when Davis came back to the jury-room he reported that he had been to the judge, and it was all right, and for that reason he voted for a conviction, and agreed to a punishment by imprisonment for one year. He testifies that but for that he would not have agreed to convict at all.

Section 3220 of C. & M. Digest is as follows: "A juror cannot be examined to establish a ground for a new trial, except it be to establish, as a ground for a new trial, that the verdict was made by lot."

In discussing the question of the admissibility of the testimony of a juror, this court said: "But this evidence was not competent for that purpose, and would be insufficient to support a finding that members of the jury had read these articles, because jurors are not thus allowed to impeach their verdict." *Capps* v. *State,* 109 Ark. 193, 159 S. W. 193, 46 L. R. A. (N. S.) 741, Ann. Cas. 1915C, 957. See also *Wilder* v. *State,* 29 Ark. 293; *Smith* v. *State,* 59 Ark. 132, 26 S. W. 712, 43 Am. St. Rep. 20; *Hampton* v. *State,* 67 Ark. 266, 54 S. W. 746.

Since there was no order of the court shown requiring the jury to be kept together, the burden is upon the appellant to show that something was done to his prejudice because of the separation of the jury, and this can-

not be shown by the affidavit of one of the jurors, because he is prohibited by statute from giving testimony to impeach the verdict of the jury, except to show that it was arrived at by lot.

Appellant discusses several cases, but none of them announce the doctrine contrary to what we have here said. It is also contended by the appellant that the verdict is indefinite, and that it does not show what the defendant was found guilty of. The verdict is as follows:

"We, the jury, find the defendant guilty, and fix his punishment at one year, and recommend to the court to suspend the sentence on good behavior."

It is true that the verdict must, either in itself or by reference to the indictment or information, contain a finding of every essential element of the crime of which the appellant is convicted. But a verdict of guilty implies a finding of every element essential to constitute the crime as charged, and it need not state the specific crime, it being sufficient that it finds the defendant guilty as charged in the indictment or information, or that from its language as a whole no doubt can arise as to the offense of which the accused is convicted.

"As a general rule, where an indictment charges separate and distinct crimes of different degree, a general verdict of guilty, without mentioning the degree, will be held to apply to the crime of highest degree, and, if defendant is guilty of a higher degree, the jury need not pass upon the lower ground." 16 C. J. 1109.

"The prevailing rule, and the one that is adhered to by this court, is stated by Mr. Bishop as follows: A general finding of guilty will be interpreted as guilty of all that the indictment well alleges. It is sometimes said that such finding, where different grades of an offense are charged, means guilty of the highest grade; but this is only another form of saying that it means guilty of all, because a higher grade includes the lower." *Porter* v. *State,* 57 Ark. 267, 21 S. W. 467.

It is only in cases of murder that the statute makes it necessary for the jury to state in their verdict the degree of the crime.

Section 3205, C. & M. Digest, reads as follows: "The jury shall, in all cases of murder, on conviction of the accused, find by their verdict whether he be guilty of murder in the first or second degree; but, if the accused confess his guilt, the court shall impanel a jury and examine testimony, and the degree of the crime shall be found by such jury."

But there is no such requirement in indictments for other felonies.

In *Porter* v. *State, supra,* this court said: "In this indictment only murder in the second degree is charged. When therefore the jury return a verdict of guilty as charged, it is manifest, under the rule above stated, that they intend to return a verdict for that degree of murder. The object of the statute was to make sure that the accused should not be subjected to capital punishment unless the jury specially find that he is guilty of the first degree of murder. *Simpson* v. *State,* 56 Ark. 8, 19 S. W. 99. The statute does not apply to degrees of homicide less than murder. *Fagg* v. *State,* 50 Ark. 506, 8 S. W. 829. No inquiry can arise as to whether one has been convicted of murder in the first degree when he is indicted only for murder in the second degree. We conclude therefore that it is only on the trial of an indictment for murder in the first degree that the verdict must specify the degree of which the accused is convicted."

The verdict in the instant case is sufficient to authorize a judgment and sentence for grand larceny. We find no reversible error, and the judgment of the circuit court is affirmed.

ESTES *v.* STATE.

Opinion delivered December 9, 1929.

W. U. McCabe, for appellant.

Hal L. Norwood, Attorney General, and *Robert F. Smith,* Assistant, for appellee.

McHANEY, J. This is an appeal from an order of the court overruling appellant's motion to withdraw a plea of guilty to an indictment for grand larceny and permit him to enter a plea of not guilty instead. This motion was filed and overruled before judgment. The plea of guilty was put in by the appellant himself, in open court, which is the only way it can be made. Section 3075, C. & M. Dig. By § 3076 it is provided that: "At any time before judgment the court may permit the plea of guilty to be withdrawn and a plea of not guilty to be substituted." Construing this statute, this court has many times held that it is within the discretion of the trial court to refuse to permit a defendant to withdraw his plea of guilty and to substitute a plea of not guilty, and that such action will not be reversed by this court unless it clearly appears that its discretion in this regard has been abused. *Greene* v. *State,* 88 Ark. 290, 114 S. W. 177; *Joiner* v. *State,* 94 Ark. 198, 126 S. W. 723; *Duncan* v. *State,* 125 Ark. 4, 187 S. W. 906; *Dudney* v. *State,* 136 Ark. 453, 266 S. W. 898; *McClain* v. *State,* 165 Ark. 48, 262 S. W. 987.

Did the trial court abuse its discretion in this case? We think not. The record shows that the court explained the nature of the charge in the indictment to appellant, and asked him whether or not he was guilty of the crime of grand larceny as charged in the indictment, "and he

stated that he was, whereupon the court explained that the penalty attendant upon such crime is from one to five years in the State Penitentiary, and he, being further asked, with the foregoing information before him, if he still desired to enter his plea of guilty of the crime of grand larceny," he answered that he did, and the court accepted his plea.

There is no showing that appellant did not understand the nature of the charge. There were two indictments for larceny—one for stealing the cattle of James and one for stealing the cattle of Minge. He pleaded guilty to stealing Minge's cattle. He knew the extent of the punishment provided by law, and admitted that the court fully explained the matter to him.

The record fails to reflect any abuse of discretion of the court in any manner, and the judgment must accordingly be affirmed. It is so ordered.

UNITED ORDER OF GOOD SAMARITANS *v.* BETTS.

Opinion delivered December 9, 1929.

[redacted]

A. D. Whitehead, for appellant.

Sheffield & Coates, for appellee.

McHaney, J. This is the second appeal of this case. The opinion on the former appeal may be found in 179 Ark. 203, 14 S. W. (2d) 1108. The case was reversed because of an erroneous instruction given by the trial court which, in effect, nullified a by-law of the order providing that dues should be paid by the 10th of each month, and that, if they were not so paid, the delinquent member should be automatically suspended, and no liability enforced against the order during such suspension.

On a retrial there was again a verdict and judgment for appellee. For a reversal it is again urged, as in the former appeal, that the evidence is insufficient to support the verdict as to the time of payment of dues, and that no proof of death had been made within sixty days after death of the insured, as required in the by-laws. The evidence on both points is substantially the same in this record as in the other, and the former opinion concludes appellant on both points. We there said: "The testimony was conflicting as to whether the dues had been paid within the time required by the by-laws, and was legally sufficient to support a finding either way on that subject." On the other point we said: "There was conflicting testimony as to whether the proof of death had been made within sixty days after the death of the insured, as the by-laws of the order required. On behalf of appellee the testimony was to the effect, (1) that proof of death was furnished within the sixty days, and (2) that, within that time, the order denied liability on the certificate. Proof of either of these facts would suffice to meet the requirement in regard to proof of death, and we think the testimony was legally sufficient to support both of them."

Appellant requested an instruction providing against a recovery if the jury should find no proof of death was

made within sixty days. The court modified it by adding, "unless you further find that defendant denied liability on the policy within said sixty days." It is said that this modification was error. But not so. We specifically so held on the former appeal of this case. See also *Mut. Ben. H. & A. Assn.* v. *Tilley,* 176 Ark. 525, 3 S. W. (2d) 320.

It is finally said that the court erred in admitting the receipt for dues, which did not show on its face what it was for, and was not dated. Appellee identified the receipt as dues for January. Appellant's witness Burton identified it as having been issued by her as a receipt for dues, but for a different time. Since both parties agree that it was a receipt for dues, we can see no error in admitting the writing. Since it did not speak for itself as to what dues were being paid, it was proper for each party to testify to its purpose, and for the jury to determine the truth of the matter.

We find no error, and the judgment is affirmed.

[redacted]

BAKER *v.* STATE.

Opinion delivered December 9, 1929.

[redacted]

W. U. McCabe, for appellant.

Hal L. Norwood, Attorney General, and *Pat Mehaffy,* Assistant, for appellee.

BUTLER, J. The appellant, Don Baker, was tried and convicted of the offense of transporting liquor, and on appeal contends, first, that the evidence was insufficient to warrant the conviction, and second, that the court erred in permitting incompetent and prejudicial testimony to be introduced on the trial.

On the date of the alleged offense the appellant appeared at the jail door in Baxter County, in company with one Leonard Wilks. On the outside, near the door, was the jailer's son. The jailer, who was just inside the jail door, with his back to the outside, upon hearing a commotion, turned, and saw the appellant in the act of throwing a fruit jar against the jail wall. The jailer testified that the jar had contained whiskey, which he identified by reason of the odor from the liquid spilled upon the wall and ground. The appellant was drunk at the time. He was immediately arrested and placed in jail.

At the trial the appellant testified that he had not carried any whiskey to the jail, and in this he was corroborated by his companion. He accounted for having the fruit jar in his possession in the following manner: "I saw a pint jar sitting there by the side of the jail, and reached down to pick it up, and Lloyd (the jailer's son) grabbed me and knocked it out of my hand just as I picked it up. There was a flat rock there, and it fell on the rock and broke. I didn't know what was in the jar." The appellant admitted that he was drunk, but claimed to remember everything that had happened.

The jailer testified, in rebuttal, that he had been going in and out of the jail just before the occurrence, bringing in wood, and that there was no fruit jar in the locality as testified to by the appellant; that if there had been he could and would have seen it.

This is practically all the material testimony in the case. The explanation of the appellant as to how he got possession of the whiskey, under all the circumstances in the case, was unsatisfactory, and a majority of the court

are of the opinion that the jury might have reasonably inferred that he not only had the liquor in his hands, but that he brought it to the jail, and that the evidence, while slight, is sufficient to support the verdict. The testimony, which the appellant contends was incompetent and should have been excluded from the consideration of the jury, was that of the jailer, who testified that at the time of the incident the appellant was drunk. We think this was a circumstance which tended to substantiate the theory of the State. The appellant's condition of itself showed that he had had contact with liquor, in addition to his handling the fruit jar by the jail wall. The jury had a right, not only to consider his actions at the time of his arrest, but his condition at the time, in determining whether or not he was guilty of the crime charged.

In view of what we have said, it follows that the judgment must be affirmed.

LONDON & LANCASHIRE INSURANCE COMPANY, LTD., *v.* PAYNE.

Opinion delivered December 16, 1929.

Powell, Smead & Knox, for appellant.

Gus W. Jones, for appellee.

HART, C. J., (after stating the facts). It is first contended that the decree should be reversed because the proof of loss was not filed within the time prescribed by the policy. The compliance with this provision of the policy was expressly waived by the local agent of the insurance company who issued the policy and delivered it to the insured. The local agent had authority to issue fire insurance, write and deliver policies, and collect premiums, and to notify the insurance company of loss. Having been clothed with these powers, he had *prima facie* authority to waive presentation of proof of loss. *National Union Fire Insurance Co.* v. *Wright,* 163 Ark.

42, 257 S. W. 753; *Liverpool, London & Globe Ins. Co.* v. *Payton,* 128 Ark. 528, 194 S. W. 503; *National Union Fire Ins. Co.* v. *Crabtree,* 151 Ark. 561, 237 S. W. 97; and *Citizens' Fire Ins. Co.* v. *Lord,* 100 Ark. 212, 139 S. W. 1114.

It is next insisted that the insurance company was not subject to garnishment in this action, because the money was due by it to Grover C. Payne under the terms of the policy, who was a nonresident of the State at the time garnishment was issued and served upon the insurance company. The insurance company was transacting business in this State, and had complied with the laws thereof permitting foreign insurance companies to do business in the State. This court has held that a debt due from a foreign corporation to a nonresident, who is only constructively served with process, is subject to garnishment in a State in which the corporation does business, although the debt is not payable in that State, and did not arise out of business transacted therein. *Stone* v. *Drake,* 79 Ark. 384, 96 S. W. 197.

In *Johnson* v. *Foster,* 69 Ark. 617, 65 S. W. 105, it was held that, by publication of a warning order against a nonresident defendant and service of a writ of garnishment upon a resident who was indebted to the defendant, the court acquired jurisdiction to ascertain the amount due from the defendant to plaintiff, and to adjudge that the money due from the garnishee to defendant should be applied towards the satisfaction of plaintiff's claim.

In *St. Louis Southwestern Ry. Co.* v. *Vanderburg,* 91 Ark. 252, 120 S. W. 993, it was held that the *situs* of a debt for the purpose of garnishment is where the debtor may be found. It was further held that service of process upon a garnishee creates a lien in favor of the plaintiff on the money due from the garnishee to the defendant, and upon constructive service the court may ascertain the amount due from the garnishee to the plaintiff, and subject such money to the satisfaction of the plaintiff's claim.

Again, in *Person* v. *Williams-Echols Dry Goods Co.*, 113 Ark. 467, 169 S. W. 223, it was held that the *situs* of a debt, for purposes of garnishment, is not only at the domicile of the debtor, but in any State in which the garnishee may be found, provided the law of that State permits the debtor to be garnisheed, and provided the court acquires jurisdiction over the garnishee through his voluntary appearance or actual service of process upon him within the State. Power over person of the garnishee confers jurisdiction on the courts of the State where the writ issues. *Blackstone* v. *Miller*, 188 U. S. 189, 23 S. Ct. 277; and *Harris* v. *Balk*, 198 U. S. 215, 25 S. Ct. 625, 3 Ann. Cas. 1004.

Finally, it is insisted that the decree of the chancery court was erroneous in awarding alimony in a lump sum. It is true that this court has held that it is erroneous to award alimony in a gross sum, and that, in the absence of an agreement between the parties, there should be a judgment for a continuing amount payable at stated periods. *Brown* v. *Brown*, 38 Ark. 324; *Shirey* v. *Shirey*, 87 Ark. 175, 112 S. W. 369; *Walker* v. *Walker*, 147 Ark. 376, 227 S. W. 762.

We think, however, that a reasonable construction of the order in the present case is that the naming of the $2,300 was intended as a limitation of the right of the plaintiff to recover anything more from the garnishee than the amount of its indebtedness to the defendant, Grover C. Payne, and that it was also a limitation of the period in which the monthly payments were to continue. The defendant had left the State, and the plaintiff probably realized that no further payment could be secured from him. He had been gone from the State for over two years at the time of the rendition of the decree, and had not paid her any sum since he had deserted his wife and their minor children. By the fact of their marriage it became the duty of the defendant to support the plaintiff and their minor children, and this was a continuing duty, notwithstanding the fact that he had willfully deserted and abandoned them and had

gone to another State. It was still his duty under the law to provide for their support and maintenance, and the court might take that under consideration in fixing a sum for their support and maintenance. The present action was instituted on October 2, 1926, and the decree was not entered of record until the 27th day of February, 1929. Thus it will be seen that the entire amount due from the garnishee to the defendant would be consumed at the date of the rendition of the decree. We therefore do not think that the award is erroneous, although it was not in the best form. We think that, reasonably construed, it meant to provide for the payment of the monthly allowance for the support of the plaintiff and the minor children dependent upon the defendant, and that it was an allowance in continuing allotment of sums, payable at regular intervals, and, being such, comes fairly within the principles of law announced in our decisions. *Harmon* v. *Harmon,* 152 Ark. 129, 237 S. W. 1096; *Holt* v. *Holt,* 42 Ark. 495; and *Daily* v. *Daily,* 175 Ark. 161, 298 S. W. 1012.

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

AMERICAN BANK & TRUST COMPANY *v.* LANGSTON.

Opinion delivered December 16, 1929.

[redacted]

[redacted]

W. B. Rhyne, James B. McDonough and *Anthony Hall,* for appellant.

Wm. M. Hall, Hill, Fitzhugh & Brizzolara and *George A. Hall,* for appellee.

HART, C. J., (after stating the facts). The principal question raised by the appeal is the right of priority to the retained percentage fund as between the bank and the surety company, which may be settled as a question of law under the practically undisputed facts. The percentage reserved in the contract by the sewer district out of each monthly estimate served to secure it against any loss it might sustain on account of the nonperformance of the contract, and also served to secure any others who had any rights under the contract. The right of the parties to retain a specified percentage dates from the time the contract was entered into. The right of the bank under its assignment also dates from the execution thereof. The bank, by the assignment to it by Langston of all his rights under the contract with the sewer dis-

trict, acquired only such rights as Langston had, and by its equitable garnishment could only impound in its favor such part of the retained percentage fund as the sewer district has, unaffected by prior liens or equities of other parties. The sewer district made no contract with the bank to pay it any amount it might pay out to Langston to aid him in performing his contract for the construction of the sewers. The bank was a mere volunteer. It loaned Langston a certain amount of money, and it did not acquire any liens of any kind by loaning money to Langston to be used in the construction of the sewers. On the other hand, the surety company bound itself by the execution of the bond to pay all bills for material and labor used in the work. It was obligated to do this, and took an assignment of all the claims for labor and material used in the work when it paid the same. Thus it will be seen that the retained percentage in the contract was not only for the benefit of the sewer district and operated as an equitable assignment of the fund to it for any loss or damage suffered by it in the nonperformance of the contract by Langston, but was for the benefit of any one else who had acquired rights and incurred obligations under said contract and bond executed for its faithful performance. The bank knew that Langston had executed a contract with the sewer district for the construction of the sewer, and it will be deemed to have knowledge of the terms of said contract and the obligation of the surety under the bond, which was required by statute. The rights of these parties had become vested before Langston made any contract with the bank, and could not be divested by any subsequent assignment made by Langston to the bank of his rights under the contract.

The bank knew, when it took the assignment from Langston, that its value depended upon whether or not the contract with the sewer district could be executed by Langston at a profit. The contract of the sewer district with Langston provided for a stipulated percentage to be retained until the completion of the contract. This was

not only to protect the district against any claims against the contractor, but also served to protect the surety company and laborers and materialmen. This is so because the contract expressly provides that Langston is to discharge and pay such claimants, and shall give a surety bond in double the amount of the cost of construction for the faithful performance of his contract. The bond is conditioned that the principal shall pay all bills for material and labor used in the work. Under the terms of the contract and bond, the district had a right to recover from Langston any amounts it might pay to discharge any legal liability against Langston for the faithful performance of his contract. The surety company was not a volunteer in the premises. Under its bond it became obligated to pay all bills for material and labor used in the work. Having done so, it became subrogated to the rights of the sewer district. The surety company, by the terms of the bond and contract, became obligated to pay the laborers and materialmen, and thus release the contractor from his obligation to them, and to the same extent released the sewer district from all obligations to see that the laborers and materialmen were paid. Having done this, not as a volunteer, but by reason of contract obligations with the sewer district, entered into before the commencement of the work, it was entitled in equity to subrogation to any right of the sewer district arising through the contract by it with Langston for the construction of the sewer, and the bank's claim, by reason of the assignment, is subordinate to the claim of the surety company. *Prairie State Bank* v. *United States,* 164 U. S. 227, 17 S. Ct. 142; *Henniggsen* v. *United States Fidelity & Guaranty Co.,* 208 U. S. 404, 28 S. Ct. 389; *Hardaway* v. *National Surety Co.,* 211 U. S. 552, 29 S. Ct. 202; *Waco County* v. *New England Equitable Insurance Co.,* 88 Ore. 465, 172 Pac. 126; *Canton Exchange Bank* v. *Yazoo County,* 144 Miss. 579, 109 So. 1; *Lewis* v. *United States Fidelity & Guaranty Co.,* 144 Kentucky 425, 138 S. W. 305; *National Surety Co.* v. *Berggren,* 126 Minn.

128, 148 N. W. 55; *Massachusetts Bonding Co.* v. *Ripley County Bank,* 208 Mo. App. 560, 237 S. W. 182; and *Maryland Casualty Co.* v. *Washington National Bank,* 92 Wash. 500, 159 Pac. 689.

That the equity of a surety on a bond given by the contractor, who, by reason of the contractor's default, has been obliged to pay materialmen and laborers, is superior to that of a bank loaning money to the contractor, secured by the assignments of amounts to become due, has been recognized by this court in *Fidelity & Deposit Co.* v. *Merchants' & Farmers' Bank,* 120 Ark. 519, 179 S. W. 1019. In that case the court quoted with approval from the case of *Prairie State National Bank* v. *United States,* 164 U. S. 227, 17 S. Ct. 142, the following:

"That a stipulation in a building contract for the retention, until the completion of the work, of a certain portion of the consideration, is as much for the indemnity of him who may be guarantor for the performance of the work as for him for whom the work is to be performed; that it raises an equity in the surety in the fund to be created; and that a disregard of such stipulation by the voluntary act of the creditor operates to release the sureties, is amply sustained by authority."

These authorities also hold that the surety cannot be denied the right to subrogation in cases like this because it is a paid surety. Subrogation is allowed because the surety has paid the debt of his principal under his obligation to do so. The question as to what induced the surety to assume the obligation cannot be considered in determining his rights. If he has been compelled under the bond or contract to pay the debt of his principal, he is entitled to be subrogated to the rights of the creditor.

It is next insisted that the decree should be reversed because the engineers were not allowed to recover the sum they paid for an assistant engineer during the period of delay in the completion of the contract. The engineers claimed this right under § 30 of the contract. This section provides for an additional compensa-

tion to the engineers during the period of time of the delay in the completion of the work at the rate of "$350 per month or fraction thereof, and all expenses incident to the work." The engineers were paid at the rate of $350 per month for the period of time in which the completion of the work was delayed after the date stipulated in the contract for the completion of it. They were also paid the stipulated percentage for the work that was done by them under the contract up to the date specified for its completion. Their claim, however, is that the decree should be reversed because under the clause, "and all expenses incident to the work," they were entitled to compensation which they paid to an assistant at the rate of $275 per month. We do not agree with them in their construction of the contract. We think that the clause in question means the personal expenses of the engineer in the work. It did not mean that they might employ other engineers to do the work for them, and call this expense incident to the work. They have not shown that they were out any personal expenses incident to the work between the date the sewer system was required to be completed under the contract and the date it was completed. Hence the chancellor properly disallowed their claim for additional compensation.

The court was also justified in its finding that the sewer district was entitled to recover liquidated damages in the sum of $2,595, and that, on this account, the sewer district only had in its hands, as retained percentage under the contract, the sum of $8,044.64. Section 29 of the contract provides that the time of completion is the essence of the contract, and that the board will deduct from the estimate, as liquidated damages only, an amount equal to $15 per day for each day's delay in completion over the specified time of completion. This was done. The contract price was $66,849.60. The contract gave ample time for the construction of the work, and it is clearly ascertainable that the parties intended the sum stipulated to be the measure of damages for breach of the contract by the contractor. The damages were uncer-

tain, and the amount stipulated was not unreasonable. The importance of completing the sewer within the time limit was evident, and the parties had a right, under the circumstances, to agree that $15 per day should be the measure of damages for the delay by the contractor in the performance of the contract. *Robins* v. *Plant,* 174 Ark. 639, 297 S. W. 1027, 59 A. L. R. 1128.

It does not make any difference that the bond was not filed as required by statute. Its provisions were as broad as the statute, and expressly provided that the surety shall pay all bills for material and labor used in the construction of the system of sewers; and the proof shows that the amounts paid by the surety company were for amounts for material and labor in the construction work, and in each instance the claimant obtained judgment on an express finding that the claim was for labor performed or material used in the construction of the sewer, and the claim was duly transferred to the surety company before it was paid. This was sufficient. *Leslie Lumber & Supply Co.* v. *Lawrence,* 178 Ark. 573, 11 S. W. (2d) 458; *Ætna Casualty & Surety Co.* v. *Big Rock Stone & Material Co., ante* p. 1, 20 S. W. (2d) 180.

On the cross-appeal but little need be said. The attorney or agent for the surety company who had charge of settling the claims of materialmen and laborers practically admitted that the claims disallowed by the court were not such claims as were required to be paid by the surety company under its bond and contract with the district. Hence the court properly disallowed them.

The result of our views is that the decree of the chancery court will be affirmed, both on the appeal and the cross-appeal.

EVANS *v.* ARGENTA BUILDING & LOAN ASSOCIATION.

Opinion delivered December 16, 1929.

[redacted]

Jacoway, Miles, Donham & Fulk, for appellant.

SMITH, J. This suit was brought by the Argenta Building & Loan Association, hereinafter referred to as the association, to foreclose a mortgage on a house and lot in the city of North Little Rock, executed to it by E. A. Hayes and Mary, his wife. The Enterprise Plumbing Company, hereinafter referred to as the company, intervened and claimed the right to remove certain fixtures which had been placed on the premises under a contract between it and one G. W. Massey, who was then in possession of the property under a contract to purchase it.

It was alleged, and testimony was offered tending to show, the fixtures were installed, with the knowledge and consent of the association, under an agreement between the company and Massey, whereby the title to the fixtures should remain in the company until fully paid for; but the general finding of the court indicates that this contention was not sustained by the testimony. How-

ever, the testimony does establish the fact that the fixtures were installed under an agreement between the company and Massey whereby the title thereto was reserved in the company until the fixtures and the cost of installation had been paid; and, it being shown that the agreed purchase price had not been paid, the right to remove the fixtures was claimed. The court found against this contention, and dismissed the complaint as being without equity, and made perpetual the temporary order previously issued, which restrained the removal of any of the fixtures, and this appeal has been duly prosecuted to reverse that decree.

The case of *Beatrice Creamery Co.* v. *Sylvester,* 179 Pac. 154, 65 Colo. 569, involved the validity of an agreement between the buyer and seller of an article affixed to real estate, that it should remain personalty, and the case is extensively annotated in 13 A. L. R. 441. In a note to the case the annotator says that "the preponderance of authority is to the effect that, where the removal of the fixtures will not materially injure the premises, the seller thereof retaining title thereto may assert his right as against a prior mortgagee of the realty." A large number of cases are cited in support of this statement, but we do not review them, as the principles announced accord with the law as declared in previous decisions of this court. *Hachmeister* v. *Power Mfg. Co.,* 165 Ark. 469, 264 S. W. 976; *Anderson* v. *Southern Realty Co.,* 176 Ark. 752, 1 S. W. (2d) 27. See also *Fears* v. *Watson,* 124 Ark. 341, 187 S. W. 178; *Continental Gin Co.* v. *Clement,* 176 Ark. 864, 4 S. W. (2d) 901.

The reasoning of the court in the cases cited sustains the law as stated in the annotator's note from which we have quoted.

The seller of fixtures, who has retained the title thereto, and has installed them on mortgaged premises under a contract with the mortgagor, may, upon default in payment, remove them; but this right cannot be exercised where the removal of the fixtures would materially injure the premises. This is true for the reason, as

pointed out in a number of the cases cited in the annotator's note *supra,* that the conditional vendor has no right, by injuring the premises, to impair or diminish the mortgagee's security.

Here the testimony shows that, under the conditional sale whereby the title was reserved, the company installed certain lines of pipe by which pure water might be furnished and sewerage connections afforded, and there was also put in place in the bathroom a "closet combination, consisting of bowl, tank and seat." The testimony is to the effect that these articles were attached to the floor and walls with screws, and might be removed without material damage to the building or the premises; but the testimony also shows that to remove the pipe would leave holes in the floor and walls of the building, and would require the excavation of the premises adjacent to the house, as the pipe had been placed in the ground. This latter work would disfigure the building and damage it, as well as the ground adjacent to it, and the right to remove the pipe does not exist. We perceive no reason, however, why the closet combination, consisting of the bowl, tank and seat, may not be removed, as their removal will cause no material damage to the property.

The decree of the court below will therefore be modified to the extent of holding that the closet combination may be removed. In other respects it will be affirmed.

ESTES *v.* STATE.

Opinion delivered December 16, 1929.

Wm. U. McCabe, for appellant.

Hal L. Norwood, Attorney General, and *Robert F. Smith,* Assistant, for appellee.

SMITH, J. Appellant was convicted upon his trial under an indictment which charged him with having stolen certain cattle, the property of James Minge, and for the reversal of the judgment has argued the following assignments of error:

That the State failed to prove the venue. But witnesses for the State testified that appellant came "here" (Baxter County, where the venue was laid in the indictment) with Earnest McCorkle from Wichita, Kansas, in a truck in which the cattle were later transported to Springfield, Missouri, and was seen by other witnesses in the truck in that county with McCorkle, and the testimony of the latter establishes the venue. More-

over, Minge testified that the stolen cattle ran on the range between two bayous in Baxter County.

According to the testimony of McCorkle, he and appellant and Bill Estes, a brother of appellant, stole the cattle, and sold them, and divided the proceeds of the sale into three equal parts, and it is insisted there is no testimony connecting appellant with the commission of the crime except that of McCorkle, and that there was no sufficient corroboration of that testimony to sustain the conviction. The testimony shows, as has been said, that appellant came with McCorkle into the county in a truck in which the cattle were later transported, and was seen in the truck with McCorkle shortly before the cattle disappeared, and also directly after McCorkle and Bill Estes returned. Huston Moss testified that he was called as a mechanic to repair the truck at Bill Estes' home a day or two before the cattle were carried away, and that appellant was present at the time, and very nervous, so much so that witness' attention was attracted by that fact, and that appellant inquired every time any one passed who the passer-by was. It is undisputed also that McCorkle sold the cattle in Springfield, and collected the check which was given in payment for them.

It is insisted that the ownership of the cattle was not proved. But Minge testified that he saw them in the pens after they had been sold at Springfield, and identified them as his property.

It is insisted that the court erred in excluding the testimony of Ethel Estes, a niece of appellant, but no objection appears to have been made or exception saved to this ruling of the court. This witness was called by the prosecuting attorney, and the attempt was made to show that she saw McCorkle give appellant some money in bills, and, when she denied that she had seen this, or had stated that she had, the prosecuting attorney exhibited to her the minutes of the grand jury, which he asked her to read, and to state if she had not given such testimony before the grand jury. She then denied that she

had stated before the grand jury that she had seen McCorkle give appellant any money. The prosecuting attorney then asked that he be allowed to cross-examine the witness, and the court stated that this was what he had been doing. The prosecuting attorney asked that the witness be held for perjury, and counsel for appellant objected to the statement, whereupon the court said: "The objection will be sustained, and the jury is instructed that the statement by counsel will not be considered by you, and the testimony of this witness will not be considered by you in any way in arriving at your verdict." The witness was then excused, and no objection was made to the ruling of the court, which was obviously intended as a ruling favorable to appellant, the clear implication being that, in the court's opinion, no testimony had been given by the witness which was adverse to appellant, and no request was made that her statement that she had not seen McCorkle give appellant money be allowed to remain in the record. *Brown* v. *State,* 168 Ark. 433, 270 S. W. 537.

Objection was made to a certain argument of the prosecuting attorney; but, when the objection was made, the court admonished the jury as follows: "Any statements made by counsel is not evidence in the case, and in this case you will not be governed by any statement of counsel not based on the evidence. When you retire to consider of your verdict, you will base your verdict on the testimony of the witnesses as given from the witness stand and upon the law as given you by the court, and upon that, and that alone. What counsel say in the case is not evidence, and you will not so consider it."

If the argument was improper—which we do not decide—this admonition sufficed to remove any prejudice which might otherwise have resulted from it.

A motion for a continuance was filed to obtain the presence and testimony of witnesses which would tend to establish the defense of an alibi which appellant interposed. The substance of the testimony of these wit-

nesses was set out, and, while its materiality may be conceded, the motion did not recite, as the statute requires (§§ 1270 and 3130, C. & M. Digest), that the appellant believed this testimony to be true. There was therefore no error in overruling it, as it did not conform to the statute. Other witnesses gave testimony which, had it been accepted as true by the jury, would have established the defense of an alibi, but the truth of this testimony was, of course, a question for the jury, and was evidently disregarded, and not accepted as true.

Upon a consideration of the record in its entirety no error appears, and the judgment must be affirmed. It is so ordered.

MOORING *v.* WARDELL & WHITTON ROAD MAINTENANCE DISTRICT NO. 2.

Opinion delivered December 16, 1929.

Chas. E. Sullenger, for appellant.

A. F. Barham and *Horace Sloan,* for appellee.

HUMPHREYS, J. This suit was brought by appellant, a landowner and taxpayer in the Wardell & Whitton Road Maintenance District No. 2, in Mississippi County, Arkansas, for herself and all other landowners and taxpayers therein, against appellees, attacking the validity of the district upon the alleged ground that the organization thereof was beyond the jurisdiction of the county court, because organized under the general road maintenance district law, act No. 69, 1919 (Crawford & Moses' Digest, §§ 5463-88), which, it was alleged, had been repealed by special act No. 238, 1920, creating the Wardell & Whitton Road Improvement District No. 2, embracing the same lands; and that the latter act itself contained a provision to the effect that the district should not cease when created, but that the district and the powers of the commissioners should continue for the purpose of continuously maintaining the improvement. The prayer of the complaint was that the assessment of benefits and taxes levied thereon be canceled as a cloud upon the title to her real estate within the district, and that the commissioners of the district be permanently enjoined from exercising any powers as commissioners under their appointment.

Appellees filed an answer, denying that the effect of act No. 238, Ex. Sess. 1920, creating Wardell & Whitton Road Improvement District No. 2, was to make act No. 69, 1919 (Crawford & Moses' Digest, §§ 5463-88), inapplicable to said district, or that the effect of the latter act was to repeal the provisions of act No. 69, 1919, so far as they might relate to the Wardell & Whitton Road Improvement District No. 2, and that it was not within the jurisdiction of the county court to organize the Wardell & Whitton Road Maintenance District No. 2 under the provisions of act No. 69, 1919 (Crawford & Moses' Digest, §§ 5463-88).

Further answering, appellees stated, in substance, that the maintenance clause in act No. 238, creating the original special district, was insufficient to make the nec-

essary repairs and maintain the improvement, and that the commissioners had passed resolutions relinquishing all authority to make repairs or maintain the improvement under the special act creating the district, and had employed attorneys to organize the maintenance district under act No. 69, 1919, for repairing and maintaining the original improvement.

Appellant filed a demurrer to the answer, which was overruled by the court. She refused to plead further, and announced that she would stand upon her complaint and demurrer to the answer, whereupon the court dismissed her complaint for the want of equity, from which is this appeal.

The question presented by the appeal is whether the maintenance clause in special act No. 238, 1920, creating the original Wardell & Whitton Road Improvement District No. 2, repealed the operation of the general maintenance district law enacted in 1919 by the Legislature. The act referred to is act No. 69, 1919, and appears in Crawford & Moses' Digest as §§ 5463-88, inclusive. Act No. 238, Ex. Sess. 1920, did not expressly repeal all or any part of act No. 69, 1919, and we are unable to discover an invincible repugnancy between the two acts. The purpose of the maintenance clause in act No. 238, Ex. Sess. 1920, was to authorize the commissioners to keep the road as completed in good repair; whereas the purpose of act No. 69, 1919, was to authorize the organization of a road maintenance district, not only to keep the road as completed in good repair, but to improve the character of the road, if necessary. For example, if the original road was a completed dirt road, by proceeding under act No. 69, 1919, the district might be organized to surface the original road with gravel. Such was the construction placed upon act No. 69, 1919, in the case of *Cowan* v. *Thompson,* 178 Ark. 44, 9 S. W. (2d) 790. Since the authority conferred by act No. 69, 1919, is broader than that conferred under the maintenance clause of act 238, Ex. Sess. 1920, the two acts are not irreconcilably inconsistent, and either might

be invoked, dependent upon the wishes of the property owners therein as to the character of repairs to be made. The Legislature clearly did not intend to substitute the latter act for the first, else it would not have limited the repairs which might be made under the latter act to keeping and maintaining the improvement in its completed condition. In arguing that the latter act repealed the first by implication, it is said otherwise two boards would exist exercising the same powers and performing the same duties, and both levying the same assessment of benefits for the same purpose. Such a conflict in jurisdiction will not result. Both having jurisdiction, the first assuming same will retain it. No such conflict has arisen in the instant case. The demurrer to the answer concedes that the commissioners appointed under act 238, 1920, are not attempting to function, but, on the contrary, assisted in organizing the district, now attacked, for the purpose of repairing and maintaining the original road. The maintenance clause in act 238, Ex. Sess. 1920, was clearly an auxiliary and cumulative remedy extended to property owners to maintain the road in its completed condition if they did not desire to improve the character of the original improvement. The act itself did not extend exclusive jurisdiction to the commissioners to make or maintain the repairs on the original road. Act 69, 1919, applies expressly to special road improvement districts, whether previously or thereafter created. The act does not limit its operation to districts having no power of their own to repair the road. It refers to all special act road improvement districts alike.

No error appearing, the decree is affirmed.

PERSON *v.* COGBILL.

Opinion delivered December 16, 1929.

[redacted]

T. E. Lines, for appellant.

J. C. Brookfield, for appellee.

KIRBY, J. Appellee brought this suit against appellant to recover taxes paid by him on lands of appellant, under an alleged express promise of the appellant to repay the amount of the taxes, and to enforce the State's lien for taxes against the lands upon which the taxes were paid, and from the judgment in his favor the appeal is prosecuted.

It appears that appellee had purchased a tract of land from the Cross County Investment Company, containing several hundred acres, of which he sold and conveyed 80 acres to the appellant. The entire tract was comprised mainly of fractional units, and the 80 acres sold were described by metes and bounds and of a very irregular shape. The 80-acre tract of land was assessed with the entire tract at the time of the sale to appellant, and continued to be so assessed and paid on by the appellee.

Appellee alleged in the complaint that, by virtue of an express agreement between the parties, he was to pay the taxes until such time as appellant should have the land surveyed and properly assessed as his own.

Any such agreement was denied by appellant, who alleged that he protested against the payment of taxes on his lands by appellee, and pleaded laches and the three-year and seven-year statutes of limitations. He also alleged that, after ineffectual efforts to have this 80-acre tract of land separately assessed, there appeared on the assessment records an 80-acre tract in the vicinity of his land, which was assessed to him, and upon which he paid the taxes for several years, until he discovered that this tract was not the one he had purchased, and belonged to appellee.

Appellee had purchased the larger tract of land from the Cross County Investment Company in the first instance, and, before payment therefor, had then sold and conveyed the 80-acre tract, a part of such purchase, to appellant, the deed being made from the investment company, himself and Brown, upon appellant's paying $400 in cash and the execution of a mortgage to secure the balance, which later was paid by borrowing money upon a mortgage to a third party as security.

Appellee testified in a general way that he had paid the taxes on lands sold to appellant since 1910, but admitted that he had no special agreement with Person that he should refund the money or pay it back. Appellant denied having requested appellee, Cogbill, to pay the taxes or having made any agreement to reimburse him therefor. It also appears that appellant had refused to repay the taxes upon demand made therefor when his land was taken off and separated from the land of appellee, said he was not going to pay any more taxes until his land was separately assessed, which was about three years after the purchase of the land, and the statement was not denied by appellee.

Appellee, after alleging that appellant was the owner of the land and bound to repay the taxes advanced by him under express agreement, amended his complaint to allege the land was unpaid for, and other lands had been conveyed to appellant in lieu thereof, and that he himself

was the owner of the lands in question, and also claimed title thereto by adverse possession and payment of taxes.

Appellant insists that the finding and decree of the chancellor are contrary to the preponderance of the testimony, and his contention must be sustained. Appellee failed to bring himself within the provisions of the statute, § 10053, C. & M. Digest, there being no substantial testimony conducing to show that he paid the taxes on appellant's lands in the capacity of an agent or attorney, etc.; he does not even claim to have done so, and he was not entitled to enforce a lien for any payment of taxes thereunder. *N. Y. Life Ins. Co.* v. *Nichol,* 170 Ark. 791, 281 S. W. 21; *Belleclair Planting Co.* v. *Hall,* 125 Ark. 203, 188 S. W. 574. Appellee was but a stranger and a volunteer in the payment of taxes on the lands in the legal sense, since he had no interest in the lands to protect by such payment. *N. Y. Life Ins. Co.* v. *Nichol, supra.*

The testimony, as already said, does not support the finding of the chancellor that there was an express promise on the part of appellant to refund the taxes advanced and paid on his lands by appellee, the preponderance of the evidence being rather contrary thereto, in the opinion of this court, and the chancellor erred in so holding.

Certainly appellee, who had no interest in the land to protect, could not pay the taxes upon appellant's land for 15 years, for much of the time contrary to his express protest, and still expect to recover the amount so paid and enforce the State's lien for the collection thereof, and in no event could he have recovered, the statute of limitations being pleaded, more than the amount of the taxes for three years, had the evidence supported his contention of an express promise by appellant to repay the taxes.

It follows that the chancellor erred in holding otherwise, and the decree is reversed, and cause dismissed.

CARROLL *v.* WADDELL.

Opinion delivered December 16, 1929.

Oscar Barnett, for appellant.

D. E. Waddell and *D. M. Halbert,* for appellee.

McHANEY, J. Appellee Waddell sued appellant and obtained a writ of garnishment before judgment on the Farmers' & Merchants' Bank of Malvern in the justice court of appellee Caldwell, in which suit appellee Halbert acted as Waddell's attorney. There was a judgment rendered against appellant in said suit, from which no appeal was prosecuted. Instead of appealing the case on account of feeling himself aggrieved because of such judgment, he brought suit in the circuit court against Waddell, the justice of the peace, Caldwell, and the attorney, Halbert, charging that a false affidavit was made to obtain the writ of garnishment or attachment against the bank, and that it was willfully, wrongfully and maliciously sued out. Other matters were set out in the complaint, but we deem it unnecessary to state them. The circuit court sustained a demurrer to the complaint, hence this appeal.

The court was correct. Appellant's remedy, if he was dissatisfied with the judgment of the justice of the peace, was to appeal to the circuit court. By failing to perfect an appeal and try the case out *de novo* in the

circuit court, he must be held to have acquiesced in such judgment. Here the justice had jurisdiction of the subject-matter and the parties, and it is well settled that the judgment of a justice of the peace within his jurisdiction is as conclusive as the judgment of a superior court, and is ordinarily impervious to collateral attack. A justice of the peace has the same right to determine every question that arises in a cause pending in his court as does a superior court, under like circumstances; and, if he commits error on his conclusions of law, the judgments of his court are no more open to attack collaterally than those of the circuit court. *Carolan* v. *Carolan,* 47 Ark. 511, 2 S. W. 105; *Webster* v. *Daniel,* 47 Ark. 131, 14 S. W. 550; *O. P. Dixon Ptg. & Sta. Co.* v. *Plank,* 144 Ark. 485, 223 S. W. 36. This proceeding constituted a collateral attack on the judgment of the justice of the peace, and could not be maintained. No error was committed in refusing to permit appellant to amend, as no cause of action could have been stated.

We find no error, and the judgment is accordingly affirmed.

McCord *v.* Farmers' Bank of Pittsboro.

Opinion delivered December 16, 1929.

Thomas W. Hardy, for appellant.

Flowers, Brown & Hester, for appellee.

BUTLER, J. The appellee, Farmers' Bank of Pittsboro, brought suit in the Ouachita Circuit Court against the defendant on a promissory note made payable to it or bearer, at the Bank of Derma, Mississippi, for $1,130.84, with interest at eight per cent. from maturity until paid, signed by the appellants, J. E. McCord and Henry Denton. The defense was that the signatures were procured to the note by reason of false representations, and that there was no indebtedness due plaintiff (appellee) because of said note.

Testimony was introduced on the part of both the plaintiff and the defendant, and there was a verdict in favor of the plaintiff for the sum represented by the said note with the accrued interest. After the testimony had been introduced, the court permitted the plaintiff to amend by joining N. R. Lamar as a party plaintiff to the suit. This action of the court is assigned by the appellants as error.

It was established by the testimony that the Farmers' Bank of Pittsboro was a banking institution organized under the laws of the State of Mississippi and doing business in that State; that at the time of the filing of the suit it had become insolvent, and was in the course of liquidation; that its affairs were being handled for the benefit of its stockholders and depositors by N. R. Lamar as "liquidating agent" of the State Banking Department of the State of Mississippi. It was shown by the evidence in the case that the Farmers' Bank of Pittsboro, while insolvent, was still a legal entity, and, not having forfeited or surrendered its charter under the laws of the State of Mississippi, might bring suits in its own name when such became necessary in the course of its liquidation. Section 3854 of Hemingway's 1927 Miss. Code. The banking laws of Mississippi further provide that, in the case of insolvent banks being taken over and liquidated through the State Banking Depart-

ment, the Banking Department may act through its liquidating agent, and suits for the collection of the assets of the insolvent bank may be brought either in the name of the bank or by such officer. Section 3854, Hemingway's Code, *supra*.

By § 36 of act 250 of the Acts of the General Assembly of Arkansas, 1927, all corporations, whether they expired by their own limitations or are otherwise dissolved, may nevertheless be continued for a term of three years for the purpose of prosecuting or defending suits. The appellee bank was a going concern at the time of the execution of the note sued on, and thereafter, on October 4, 1923, ceased to do a banking business, and its property and assets were taken over by the State Banking Department for the purpose of liquidation. N. R. Lamar was appointed "liquidating agent," as provided by the laws of the State of Mississippi, and this action was begun on March 9, 1926. Therefore the action was properly brought in the name of the Farmers' Bank of Pittsboro under the provisions of the statutes above named. N. R. Lamar, the liquidating agent, was the representative of the depositors and other creditors of the Farmers' Bank of Pittsboro, and under § 1239 of Crawford & Moses' Digest it was proper, by way of amendment, to add his name as party plaintiff because of his interest in the subject-matter.

The appellants have cited a number of cases to the effect that an amendment substituting another than the original plaintiff should not have been permitted. However, there was not a substitution, but an addition, and, as the original plaintiff was a proper party, the suit as originally begun was not a nullity, and therefore the cases cited have no application here. We are of the opinion that the amendment was not necessary, but it has not, and could not have, prejudiced the defendant in any way or altered any substantial right he might have had.

Finding no error, the judgment is affirmed.

THOMAS *v.* SPIRES.

Opinion delivered December 23, 1929.

[redacted]

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Fred A. Isgrig, for appellant.

Taylor Roberts, for appellee.

HART, J., (after stating the facts). The record shows that Gilbert Lee, Jr., was the owner of the land, and that he executed a warranty deed to the land to Freed G. Spires. It is true that the record also shows that the land was sold in 1922 for the nonpayment of taxes for the year 1921, but this sale was void because the records in the county clerk's office do not show that the result of the school election for the school district in which the land was situated was certified as required by § 8955 of Crawford & Moses' Digest, and the results of the election certified by the county board of election as required by § 8878 of Crawford & Moses' Digest. This rendered

the sale void. *Worthen* v. *Badgett*, 32 Ark. 496, and *Alexander* v. *Capps*, 100 Ark. 488, 140 S. W. 722.

The proper proof was made by L. W. Adams, deputy county clerk, who said that he had been employed in that office for about fourteen years, and was familiar with the land and the tax records of the office for the years 1921 and 1922. He testified that he had made a thorough examination of the records in the office, and knew that the delinquent list had not been posted as required by the statute, and that there had been no certificate showing that a school tax had been voted in the school district in which the land was situated, and that the record showed that the land was sold for the nonpayment of such school taxes as well as for the other State and county taxes due on it. This was sufficient. While matters of record must be proved by exemplification of the record, negative matter may be proved by those familiar with the record and papers. *Hendry* v. *Willis*, 33 Ark. 833.

But it is insisted that the plaintiff only put the defendants on notice that the tax forfeiture was for the sale under taxes for the year 1921. This does not make any difference. The evidence of the deputy county clerk showed that there had only been a sale of the lands in 1922 for the nonpayment of the taxes of 1921. The defendants did not claim any surprise, and the trial court had a right to treat the pleadings as amended to conform to the proof, in the absence of objections made at the time by defendants on the ground of surprise. *Bennett* v. *Snyder*, 147 Ark. 206, 227 S. W. 402.

Thus we see that the record shows that the paper title to the lands in controversy is in the plaintiff, and that he is entitled to the possession of the lands, unless he is barred of relief by the facts proved on the plea of estoppel *in pais* by the defendants. In this connection it may be stated that the plaintiff, as grantee of Gilbert Lee, Jr., the original owner of the land, is his privy in estate and must fail if, under the facts proved, Gilbert Lee would fail if he were a party plaintiff. *Ripley* v.

Kinard, 155 Ark. 172, 244 S. W. 3, and *Straughan* v. *Bennett,* 153 Ark. 254, 240 S. W. 30.

As a general rule an estoppel *in pais* may be set up in actions at law as well as in suits in equity. 21 C. J. 1118, § 121, and Pomeroy's Equity Juris. (3 ed.), vol. 2, § 801; *Dickerson* v. *Colgrove,* 100 U. S. 578, and *Barnard* v. *German-American Seminary,* 49 Mich. 444, 13 N. W. 811. In that case the Supreme Court of Michigan, speaking through Mr. Justice Cooley, held that estoppels *in pais* are called equitable estoppels because they arise upon facts which render their application, in the protection of rights, equitable and just, and that they are just as readily and fully recognized in courts of law as in courts of equity.

The principle invoked is that a party who, by his acts, declarations or admissions, either deliberately or with willful disregard of the interests of another, induces him to conduct or dealings which he would not have otherwise entered upon is estopped to assert his rights afterwards to the injury of the party so misled. *Jowers* v. *Phelps,* 33 Ark. 465, and *Merchants' & Planters' Bank* v. *Citizens' Bank,* 175 Ark. 417, 299 S. W. 753.

Many other cases laying down the principle might be cited, but we do not deem such action necessary in the present case. The underlying principle is that the conduct of the party misleading the other involves fraud, and the remedy is available for the protection of the party induced to act to his injury by reason of the fraudulent conduct and declarations of the other.

If it be conceded that the conduct and declarations of Gilbert Lee, Jr., to G. W. Thomas, as shown by the evidence for the defendants, were sufficient to operate as an equitable estoppel or an estoppel *in pais,* still the judgment must be affirmed. The reason is that the case was tried before the court sitting as a jury, and its finding must be upheld, for there is evidence of a substantial nature to support it. The evidence of Gilbert Lee was of such a substantial character as to warrant the court

in finding that he was not estopped from asserting title to the land. It is true that on cross-examination he testified that he did not remember whether or not he had told Thomas that he was not going to redeem the land, and that he could donate it, still in other portions of his testimony he said that he told Thomas that, if he could get anybody to redeem the land, he would keep it. In his direct examination he denied having any talk with Thomas about donating the land. He testified that he allowed Thomas to move on the land because he thought anybody had a right to donate it, and that he could not help himself. Again, he stated that the reason he moved off the land was that the house he lived in had burned down, and stated several times that it was his intention to keep the land if he could get any one to redeem it for him. Thus it will be seen that the court was justified in finding that the admissions he made to Thomas were made in ignorance of his own rights, because the record showed that the forfeiture for the nonpayment of taxes and the sale thereunder were void. It will be remembered that Lee testified that he permitted Thomas to move on the land because he thought he could not prevent it, and that any one had a right to donate the land. Under these circumstances the court was justified in finding that whatever declarations he made to Thomas were not made with the full knowledge of his own rights, and that he was not estopped to claim title to the land.

No other issue is raised by the appeal. The parties agreed that the claim of the plaintiff for rent and damages should be offset by the claim of defendants for taxes and improvements.

Therefore, the judgment will be affirmed.

CLAYBROOKE *v.* BARNES.

Opinion delivered December 23, 1929.

[redacted]

Ernest Neill, for appellants.

Coleman & Reeder, for appellees.

HART, J., (after stating the facts). It is first sought to uphold the decree on the ground that appellee, Laura Barnes, paid taxes on the land for seven years under color of title, and acquired title by such payment of taxes

under § 6943 of Crawford & Moses' Digest, as construed by the repeated decisions of this court. The record shows that the lands were wild and unimproved, but we do not think that the facts in the record sustain the contention of Mrs. Laura Barnes. It is true that in one place she testified that she had paid the taxes from the year 1911 up to the time she was testifying, in February, 1927. But her claim in this respect is not borne out by the record of tax payments nor in part by her own testimony. She admitted in her testimony that her husband had received a bond for title for the land from T. B. Tate, and that she did not take possession of it until after his death in 1918. T. B. Tate, who had the legal title to the land, and who testified that he purchased it for W. E. Barnes, testified that it was Barnes' duty to pay the taxes on the land. The tax records show that he did pay the taxes on the land until his death in 1918. The mineral interests in the land were separately assessed in 1923, and from that time on appellants paid the taxes on the mineral interest in the land. The payment of taxes by W. E. Barnes from 1911 to 1917 and 1918 inclusive will be deemed to have been made under his duty to pay them, as testified to by Tate, as being required under his bond for title. So it will be seen that Mrs. Laura Barnes did not pay the taxes for seven years in succession before 1923, when the mineral estate was separately assessed, and did not acquire title by the payment of taxes as provided under § 6493 of Crawford & Moses' Digest.

Besides, this court has held that the minerals underlying a tract of land are not lost by failure to pay taxes thereon unless there is a separate assessment of taxes against them. *Bodcaw Lumber Co.* v. *Goode,* 160 Ark. 48, 254 S. W. 345, 29 A. L. R. 578.

The record in this case shows that the deed from appellants to Cole contained an exception of the mineral rights from the ground, within the principles of law de-

cided in *Grayson-McLeod Lbr. Co.* v. *Duke,* 160 Ark. 76, 254 S. W. 350.

Where there has been a severance of the legal interest in the minerals from the ownership of the land, it has been held as to solid minerals, and the same rule has been applied to oil and gas, that adverse possession of the land is not adverse possession of the mineral estate, and does not defeat the separate interest in it. Summers on Oil and Gas, pp. 139 and 140; and Mills and Willingham on the Law of Oil and Gas, § 18. In *Scott* v. *Laws,* 185 Ky. 440, 215 S. W. 81, 13 A. L. R. 369, the court said that, since there was a severance of the mineral estate from the surface estate, the owner of the minerals did not lose his right or his possession by any length of nonuser, nor did the owner of the surface acquire title by the statute of limitations to the minerals by his exclusive and continued occupancy and enjoyment of the surface merely.

The rule was approved by this court in *Bodcaw Lumber Co.* v. *Goode, supra,* and the court said: "The rule of those authorities is that the title to minerals beneath the surface is not lost by nonuse nor by adverse occupancy of the owner of the surface under the same claim of title, and that the statute can only be set in motion by an adverse use of the mineral rights, persisted in and continued for the statutory period."

So it may be taken as settled that the two estates, when once separated, remain independent, and title to the mineral rights can never be acquired by merely holding and claiming the land, even though title be asserted in the minerals all the time. The only way the statute of limitation can be asserted against the owner of the mineral rights or estate is for the owner of the surface estate or some other person to take actual possession of the minerals by opening mines and operating the same. It is only when such possession has continued for the statutory period that title to the mineral estate by adverse possession is acquired. *Hoskins* v. *Northern Lee*

Oil & Gas Co., 194 Ky. 628, 240 S. W. 377; and *Maney* v. *Dennison*, 110 Ark. 571, 163 S. W. 783.

Tested by this rule, we do not think that appellee, Laura Barnes, has acquired title by actual adverse possession of the mineral estate in said land. Under the authorities above cited, the burden of proof to show such adverse possession rested on her. As said in the last case cited, the burden rested on the one asserting title to show adverse occupancy for a definite area sufficiently described to found a verdict upon. Evidence for appellee tended to show that some mining had been done on the land for each year since 1911, but nearly all of the mining had been done on a single 40-acre tract of land. All of the mining was surface mining, and no mines were opened up and mining machinery installed on the land. There was no occupancy of any of the land continuously for a period of seven years. The most that was shown was that, every three or four months, some of the appellees would work surface mines on the land. They all did so under leases from W. E. Barnes in his lifetime and from Mrs. Laura Barnes after his death. It is not possible, however, to take out any definite part of the land which was so mined, and the evidence does not show any continuous operation of mines for the period of seven years. At best it was only a fitful and desultory occupancy for mining purposes, and was not continued for the necessary length of time to give title by adverse possession for the statutory period of seven years.

It follows that the chancellor erred in finding in favor of appellees, and in dismissing the complaint of appellants for want of equity. The decree therefore must be reversed; and, inasmuch as the case seems to have been fully developed, the cause will be remanded with directions to the chancery court to enter a decree in accordance with the prayer of the complaint.

MISSOURI PACIFIC RAILROAD COMPANY *v.* YANCEY.

Opinion delivered December 23, 1929.

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E. B. Kinsworthy and *R. E. Wiley,* 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. A comparison of the testimony abstracted above with that proved upon the former trial will show that the testimony is at least as strong for the plaintiff as it was on the first trial of the case. We there held that the testimony was legally sufficient to warrant the verdict, and this is the law of the case upon this appeal.

The next assignment of error is that the court erred in giving instruction No. 5, which reads as follows:

"The court instructs the jury that if it should find from the evidence that White and Brownlaw, without any warrant, arrested plaintiff, and kept him in prison for any length of time, and that such action was without probable cause, and that said White and Brownlaw at the time of making said arrest were acting for the defendant and within the scope of their authority, then the jury should find for the plaintiff. Even though the jury should believe that defendant's said agents had probable cause

for making the arrest and were acting within the scope of their employment, still it was their duty to use reasonable diligence in making other investigation, and if the jury should believe from the evidence that, after they had obtained the information, or could have reasonably obtained such, which would have dispelled their belief in the probable guilt of plaintiff, they detained such plaintiff in the city prison of McGehee, without cause, then you should find for the plaintiff."

We do not think that the court erred in giving this instruction. According to the testimony for the plaintiff, he was arrested by White, a special agent of the railroad company, because he was suspected of having broken into a merchandise freight car of the company a few nights before. White testified that he had a right to arrest persons under such circumstances. Yancey was arrested by White, and taken to the city marshal to be confined in jail, about eleven-thirty at night. A little while thereafter White returned to the jail and questioned Yancey. The latter was then locked up again, and about the middle of the next morning White and another special agent of the railroad company took Yancey out of jail for the purpose of questioning him. It is also inferable from the plaintiff's testimony that they caused an investigation to be made of his whereabouts on the night of the former robbery, and found out that they were at a dance at the time it occurred. Then they ordered the release of Yancey from jail.

If defendant, by its agent, unlawfully caused Yancey's arrest and incarceration in jail, it was a continuing tort, for the consequences of which the defendant was responsible until, by its agent, Yancey was released about dark on the 17th day of January, 1928. The unlawful imprisonment, if it was such, did not end when Yancey was turned over to the city marshal, but continued during his confinement in jail and up to his release on the

evening of the next day. Hence we do not think that the instruction complained of was erroneous.

It is next insisted that the court erred in placing the burden of proof upon the defendant to show by a preponderance of the evidence that its agents had arrested Yancey at the request of the officers of the city of McGehee, and that any private citizen had a right without a warrant to arrest another when he has probable cause to believe that a felony has been committed by the person to be arrested. The court had already instructed the jury that the burden was upon Yancey to show that White, as special agent for the railroad company, in making the arrest and causing the imprisonment of Yancey was acting within the scope of his authority, real or apparent, as held in *St. Louis I. M. & S. R. Co.* v. *Sims,* 106 Ark. 109, 152 S. W. 985. The undisputed evidence shows that White arrested Yancey. The theory of the railroad company was that White arrested him, not because he was suspected of having broken into one of the box-cars of the railroad company which contained merchandise, but that he arrested him at the request of the town marshal because he was suspected of having broken into some houses in the city of McGehee a short time before.

We do not think the court erred in giving this instruction. The action was one for false imprisonment, and, the arrest having been proved by the undisputed evidence, the burden was upon the defendant to show that it was by authority of law. *McAleer* v. *Good,* 216 Pa. 473, 65 Atl. 934, 10 L. R. A. (N. S.) 303, and cases cited.

Every imprisonment of a man is a trespass; and in an action to recover damages therefor, if the imprisonment is proved or admitted, the burden of justifying it is on the defendant. *Bassett* v. *Porter,* 10 Cush. (Mass.) 418; *Jackson* v. *Knowlton,* 173 Mass. 94, 53 N. E. 134; and *Snead* v. *Bonnoil,* 166 N. Y. 325, 59 N. E. 879.

The last assignment of error is that a verdict of $3,000 is excessive. We cannot agree in this contention, if the facts testified to by the plaintiff were believed by the jury. The plaintiff testified that he was compelled to walk by the station with his hands up, in the presence of a crowd of people, in a community where he was well known, and he was placed in a cold jail, without any fire, while the weather was cold and disagreeable; that he was twice taken out of jail and questioned about a felony which he did not commit; that he was not given anything to eat at all while he was in jail, and that the jail was filthy. Plaintiff further testified that he contracted a bad cold by reason of his imprisonment, and that this finally resulted in him having tuberculosis. The condition of the jail and the allegation that he had contracted tuberculosis by reason of his confinement there were put in issue by an amendment to his complaint before the case proceeded to trial. The plaintiff in an action for false imprisonment may show the condition of the jail in which he was confined and the treatment he received therein as an element of damages he had sustained. *Grimes* v. *Greenplatt,* 47 Col. 495, 19 Ann. Cas. 608, and *Spain* v. *Oregon-Washington Rd. & Navigation Co.,* 78 Ore. 355, 153 Pac. 470, Ann. Cas. 1917E, 1104. Hence we hold that this assignment of error is not well taken.

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

BUTLER, J., not participating.

HOT SPRINGS CONCRETE COMPANY *v.* ROSAMOND.

Opinion delivered December 23, 1929.

E. R. Parham, for appellant.

C. T. Cotham, for appellees.

SMITH, J. This is the second appeal in this case (*Hot Springs Concrete Co.* v. *Rosamond,* 178 Ark. 194, 10 S. W. (2d) 12), and, as appears from the opinion on the former appeal, the suit was brought by appellant to recover the alleged value of certain material used by T. A. and Taylor Rosamond in construction work which they were under contract to perform, incident to which they had executed two surety bonds. The sureties on these bonds were also made defendants, and the chancellor held that, inasmuch as the United States Government was a party to the construction contract, and as the bonds had been required and given under the provisions of § 6923 *et seq.* U. S. Comp. Statutes 1916, and since no suit could be maintained against the sureties on such a bond except in the District Court of the United States, his court was without jurisdiction to try the case, and the cause of action was dismissed on that account. At the institution of the suit, writs of garnishment were issued and served on certain garnishees.

We held on the appeal that, while the court was correct in holding that it had no jurisdiction to try the question of the liability of the sureties on the bond, it did have jurisdiction to try the question of the liability of the contractors themselves, without reference to the bond, and that of the garnishees, and we held that "the court should have dismissed as to the sureties and pro-

ceeded to trial as to the defendants, T. A. Rosamond and Taylor Rosamond," and for that error the decree was 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."

Upon the remand of the cause, judgment was rendered against the contractors for $266.41, and, as it appeared that a bond had been executed to release the funds impounded by the garnishments, upon which bond the Community Bank & Trust Company was surety, judgment was also rendered against it for the same amount, as the garnishees had in their hands at the time of the service of the writs of garnishment a larger sum than the judgment recovered. The bond to discharge the garnishments was executed pursuant to the authority so to do conferred by act 177 of the Acts of 1925 (Acts of 1925, p. 538).

This suit was brought, as is recited in the former opinion, for the sum of $1,002.59, and, as the judgment was for a much smaller amount, the plaintiff has appealed, and the bank and the Rosamonds have also appealed.

The former appeal was not prayed before or granted by the trial court, but was granted by the clerk of this court, and it appears that, when process issued out of this court to perfect the appeal, no process issued against the garnishees, and no service was had upon them. It further appears that, when the bank signed the bond which released the money impounded by the garnishments (and no question is raised as to its authority so to do), the bank required the Rosamonds to deposit $1,080 with it for its indemnification, but, when the case was dismissed, the bank was advised of that fact, and it permitted the Rosamonds to withdraw the deposit which had been required for its protection. No supersedeas bond was ever given.

Appellants insist that, notwithstanding the facts just stated, the opinion on the former appeal adjudicated

the contingent liability of the garnishees, and that nothing remained except to determine the extent of this liability on the remand of the cause, and that such is the necessary effect of the directions of the court set out above.

We do not agree that such was the purpose or effect of our order. We merely decided that a cause of action had been stated as to all parties except the sureties on the construction bond, as to which the Federal District Court had exclusive jurisdiction. No brief was filed on behalf of the defendants, who were served with the process issued out of this court directed to the Rosamonds and the surety companies, and, as we have said, no process was issued against the garnishees, and the officials of the bank who had the matter in charge testified that they had no knowledge that any attempt would be made, after the dismissal of the cause in the lower court, to enforce a liability against the bank, until long after they had paid over the money which they required the Rosamonds to deposit by way of indemnity, and the fact was not called to our attention that there was no supersedeas bond.

It appears that the chancery court had dismissed the suit and discharged the garnishments, and upon the authority of this judgment the impounded money was paid over, and that judgment was never at any time superseded.

There was no authority on the part of the garnishees to continue to hold the money to which the Rosamonds were otherwise entitled, or to deprive them of the use of it pending the final disposition of an unsuperseded judgment.

In the case of *American Nat. Bank of Ft. Smith* v. *Douglas,* 126 Ark. 7, 189 S. W. 161, L. R. A. 1917B, 588, it was said: "In the absence of a statute prescribing that, where a judgment had been entered dismissing a writ of garnishment and discharging the garnishee, the garnishee may retain possession of the property of the defendant during the time allowed for appeal, or until a

reasonable time within that period has elapsed for the perfecting of the appeal or filing a supersedeas bond, the garnishee would have no authority under the law, and therefore no right, to deprive the defendant of the possession of his property."

The act of 1925, *supra,* is not such a statute. It does provide that, after a garnishment has been discharged by the execution of a bond for that purpose, "upon judgment being rendered against the defendant, summary judgment may be rendered against the sureties in such bond." This statute has no application here, because the judgment was not rendered against the defendants, but was in their favor, and, as it was not superseded, the garnishments were discharged, and, as the garnishees were discharged, their surety was also.

The judgment against the bank as surety on the bond will therefore be reversed, and that portion of the suit dismissed.

There remains only the question of fact as to the amount due the plaintiff, and much conflicting testimony was offered upon this issue. Appellant insists that the preponderance of the testimony shows that a larger judgment should have been rendered; while the Rosamonds insist, upon their cross-appeal, that they were not allowed all the credits to which they were entitled, and that the judgment is excessive.

We have considered this testimony, but we shall not review it in this opinion, as no useful purpose would be served in so doing. The plaintiff's case was made by the testimony of a single witness as to the amount, kind and value of the material furnished; while opposed thereto was the testimony of the two Rosamonds, who denied that they purchased certain of the items, and insist that they paid for others either in money or by work performed for the plaintiff. A credit of $225 was claimed for drilling a well, which was done under a contract which did not fix the price to be paid, and the testimony is as conflicting as to this item as it is in regard to the others, and we are unable to say that the chan-

cellor's finding is contrary to the preponderance of the evidence on any of these items except as to a check for $108.57. As to this last item we think the chancellor's finding is against the preponderance of the evidence, and that this credit should not have been allowed.

Plaintiff admits that this check was received, but insists that it was given in payment of material furnished upon another contract not involved in this litigation; and we think that contention should be sustained, for the reason that at the time it was issued there was due the plaintiff on account of the contracts out of which this litigation arose only the sum of $12.13, and, according to defendant's books and accounts, nothing was then due, and no one claims that any loan was ever made or material paid for in advance.

The judgment in appellant's favor will therefore be increased by the amount of this check, to-wit, $108.57, and, as thus modified, it will be affirmed as to the Rosamonds.

COLLIER *v.* THOMPSON.

Opinion delivered December 23, 1929.

James B. McDonough, G. O. Patterson and *Cravens & Cravens,* for appellant.

Pryor, Miles & Pryor and *Jesse Reynolds,* for appellee.

SMITH, J. Appellant, H. W. Collier, filed a complaint against W. W. Thompson, in which he prayed judgment for damages, both compensatory and punitive,

on account of an assault made upon him by Thompson. An answer was filed by Thompson, in which he alleged that he had been slandered by the plaintiff, and a cross-complaint was filed against Collier in which Thompson prayed damages on that account. W. F. Collier, the father, and Linnie D. Collier, the sister, of the plaintiff, were made defendants in this cross-complaint, upon the allegation that they had conspired with the plaintiff and had advised and encouraged him to utter the slander, and had assisted him to promulgate it in various ways.

The testimony on the part of the plaintiff tended to show an assault of a most aggravated and brutal character, and warrants were issued for the arrest of Thompson upon the charges of aggravated assault, carrying a pistol, and drawing it upon H. W. Collier, to all of which charges pleas of guilty were entered, and this suit was brought, as has been said.

At the trial from which this appeal comes the jury was properly instructed that the plaintiff was entitled to compensatory damages, regardless of the provocation which had prompted the assault, and, in addition to this charge, an instruction numbered 9 was given on the question of punitive damages, which reads as follows: "In addition to compensatory damages, the jury have a right to find, if the facts warrant such finding, for the plaintiff, damages by way of punishment, commonly known as punitive damages. If the defendant, with malice aforethought, took the plaintiff under arrest and duress, and compelled him to go to the defendant's home, and if while there, with malice aforethought and with an intent to kill the plaintiff or to do him great bodily harm, the defendant made an unjustified and unwarranted assault upon the plaintiff, and damaged and injured him, and if such assault was with malice aforethought, and if it was also for the purpose of avenging any fancied wrongs suffered or endured by the defendant, and if said injuries by the defendant to the plaintiff, if any, were the result of malice and vindictiveness, then and in that event the jury may find for the plaintiff vin-

dictive and punitive damages in a sum not to exceed that asked in the complaint."

The jury was thus instructed to assess compensatory damages in any event, and to assess punitive damages under the conditions stated in the instruction. These instructions were correct.

The court gave, at the request of Thompson and over the objection and exception of appellant, instructions numbered 1, 8 and 9, which read as follows:

"1. The court instructs you that there are two issues involved in the trial of this case. The plaintiff brings suit to recover damages for an alleged unlawful assault. The defendant in his cross-complaint brings suit to recover damages for slander and libel on the part of the plaintiff against him. In determining the issues you will first consider whether or not the plaintiff has been damaged on account of the alleged assault made by the defendant, and, if so, the amount of damages that he is entitled to recover. If you find from the evidence that the plaintiff did utter or publish false and slanderous words about the defendant, then you should consider the damage, if any, to which the defendant is entitled to recover against the plaintiff."

"8. The court instructs you that if you find from the evidence that the plaintiff is entitled to recover damages from the defendant on account of the assault that was made upon him, yet if you further find from the evidence that the defendant has been damaged on account of the false and slanderous statements made by the plaintiff, if any, concerning his integrity, and the assault made by plaintiff on him, then you may offset such an amount as you may think the defendant is entitled to against the amount that you may also find that plaintiff is entitled to on account of said assault.

"9. The court instructs you that if you find that the amount of damages which the defendant is entitled to recover by way of recoupment equals or exceeds the amount of damages which the plaintiff is entitled to re-

cover, if any, then in that event your verdict should be for the defendant."

The objection made to instruction numbered 9 is not well taken. It did not tell the jury that plaintiff was not entitled to have compensation assessed in his favor in any event. In other words, while plaintiff's right to compensatory damages was not to be defeated, yet if, when such damages were added to the punitive damages, if any were allowed, the total amount of both did not exceed the damages which Thompson had sustained, there could be no recovery against Thompson, and the judgment should have been in his favor. In that event, plaintiff would be given redress by extinguishing the liability for his own wrongful act. Section 1197, C. & M. Digest, expressly so provides. It reads as follows: "A set-off may be pleaded in any action for the recovery of money, and may be a cause of action arising either upon contract or tort." As this question is settled by the statute quoted, we need not consider what the law once was in this State or is now elsewhere. *Coates* v. *Milner*, 134 Ark. 311, 203 S. W. 701.

There is error, however, in instructions numbered 1 and 8, which calls for the reversal of the judgment, which will later be discussed.

Motions were made before the trial began to dismiss the cross-complaint against W. F. Collier and his daughter, Linnie D. Collier, which we think should have been sustained, but this error need not be considered, as the case was dismissed as to them before the submission of the case to the jury, and they have ceased to be parties, and no exception was saved to this ruling. That they were not proper parties will fully appear from the statement of facts which will later be made.

It appears that Thompson, who had married a sister of appellant, was in business for a number of years with W. F. Collier, his father-in-law. This business had prospered, but was dissolved, and ill-will arose over the settlement on the dissolution, which resulted in two encounters

between the Colliers and Thompson, in the last of which plaintiff Collier assaulted Thompson with a pistol, and it was this incident to which instruction numbered 8 refers. In this connection and about this time statements were made and a newspaper article was published and circulars were distributed, which, if false, were slanderous and libelous, their purport being that Thompson had swindled his partner on the dissolution of the partnership and the settlement following. Friends intervened, and a written agreement was prepared and signed, wherein it was recited that all differences of every kind had been composed and settled, and it was further agreed that no party to the contract, which was signed by all the Colliers as well as by Thompson, should thereafter indulge in any propaganda against the others.

A few days before the commission of the assault out of which this litigation arose, plaintiff met Thompson's son, a young man whose college course had not been completed, and told the young man that, while he was giving his father credit for educating him, he was, in fact, being educated on Collier money, and he told the young man that he ought to advise his mother to leave her husband. Collier denied that this conversation had occurred. Young Thompson testified that plaintiff, his uncle, after making these statements, requested him not to repeat what had been said, but, after thinking the matter over a day or two, he decided that he should tell his father, and he did so, and on the occasion of the first meeting of the father and uncle thereafter the assault occurred. The testimony shows that Thompson placed Collier under duress with a drawn pistol, and took Collier to his home, and told him he would be required to apologize to his sister, Thompson's wife, for what he had said. Thompson testified that this was all he had expected to require of Collier, but, after making a partial apology, Collier said, "You know you did it," meaning thereby to repeat, in the presence of Mrs. Thompson, the charge that Thompson had dealt dishonestly with

Mrs. Thompson's father. The testimony is conflicting as to just what was said and done at Thompson's home, but the undisputed testimony is that Thompson struck Collier with a pistol with such force that Collier was knocked senseless and seriously injured.

Sections 1195 and 1196, C. & M. Digest, provide that a counterclaim may be any cause of action in favor of the defendants, or some of them, against the plaintiffs, or some of them, and that, when it appears that a new party is necessary to a final decision upon the counterclaim, the court may permit the new party to be brought in and to reply to the counterclaim in the answer, or may direct that it be stricken out of the answer and made the subject of a separate action. But these sections of the statute created no right on the part of Thompson to sue the elder Collier and his daughter, as they were not concerned in the plaintiff's case. Moreover, any cause of action which Thompson may ever have had against them was barred by the statute of limitations, and was also compromised and settled by the agreement above referred to, which was executed in February, 1925.

It is also insisted that no testimony was admissible concerning the relations between plaintiff Collier and the defendant Thompson which occurred prior to the time within which Thompson might claim damages after the alleged slander. In other words, it is insisted that, as an action for slander is barred after one year, any testimony on that subject should have been limited to transactions which had occurred within the year. But we do not think so.

In the first place, the statement of appellant to Thompson's son, that the young man was being educated on Collier money, was not actionable *per se*. That a grandfather was educating a grandson is a thing so common that such a statement, considered by itself, is apparently innocuous. But the testimony in Thompson's behalf is to the effect that this is not the meaning appellant meant to convey, and did convey. The innuendo

was that the young man was being educated with money stolen by Thompson from the young man's grandfather, and this charge was actionable. It was therefore competent, to sustain the charge of slander, for Thompson to offer testimony showing the true import of the words employed and the meaning they were intended to convey, and it was equally necessary for him to show that the charge thus imported was false. It was competent for Thompson to prove the language employed and its innuendo and falsity by testimony concerning matters which had occurred more than one year before the statements were made.

An error common to both instructions 1 and 8 is that they do not take any account of the statute of limitations, but permit a recovery for any slander at any time, and the objection to this effect is well taken.

The case of *Missouri & North Ark. Ry. Co.* v. *Bridwell,* 178 Ark. 37, 9 S. W. (2d) 781, is decisive of this question. A headnote in that case reads as follows: "A counterclaim or set-off, unconnected with plaintiff's cause of action, is barred as a defense if the right of action thereon was barred before plaintiff's cause of action accrued; otherwise it is not barred."

This opinion is somewhat ambiguous because of the failure to make clear the fact which the court had in mind, to-wit, that the counterclaim of Bridwell was not barred at the time the cause of action in favor of the railroad company accrued, although it was barred at the time suit was brought. So therefore any cause of action which Thompson may have had at the time of the assault, which was barred by the statute of limitations, may not be interposed as a counterclaim or set-off against the plaintiff's right of action for damages for the assault; but, although this is true, Thompson has the right, in proving the innuendo of language spoken within the period of limitations, and also its falsity, to prove any essential fact, without regard to time, not as themselves constituting causes of action, but as explaining language

which is actionable, and in showing that such language was false.

In addition to the error common to both instructions 1 and 8 which we have just pointed out, instruction 8 permits a recovery to compensate the assault made on Thompson by Collier, although that cause of action had been composed and settled, and was also barred by the statute of limitations before the assault on Collier by Thompson was made.

It is earnestly insisted that it was error to permit the jury to consider the alleged slanderous remarks, although made within the period of the statute of limitations, to mitigate even the punitive damages. But we do not agree with counsel in this contention. The law of this feature of the case was stated by Mr. Justice RIDDICK, with his usual clearness, in the case of *LeLaurin* v. *Murray*, 75 Ark. 238, 87 S. W. 131, where he said:

"Now, it is a well settled rule of law that mere words never justify an assault, though, when they are such as to naturally arouse the resentment of those to whom they are addressed, they may go in mitigation of damages resulting from an assault provoked by them; but to do this they must have been uttered at the time of the assault, or so recently before that the provocation and the assault may be considered as parts of the same transaction. If sufficient time has intervened for reflection, and for reason to regain control, words, however provocative, do not in law mitigate such damages, for only provocation that is so recent as not to allow cooling time is competent to mitigate damages; and even then such mitigation extends only to exemplary damages. Damages for pecuniary losses actually sustained from a wrongful assault can never be mitigated below adequate compensation. *Ward* v. *Blackwood,* 41 Ark. 295; *Godsmith* v. *Joy,* 61 Vt. 488, 17 Atl. 1010, 4 L. R. A. 500, 15 Am. St. Rep. 923; *Prentiss* v. *Shaw,* 56 Me. 427, 96 Am. Dec. 475; *Millard* v. *Truax,* 84 Mich. 517, 47 N. W. 1100, 22 Am. St. Rep. 705; Hale on Torts, 262.

"Provocation, so recent and immediate as to induce a presumption that the violence done was committed under the immediate and continuing influence of the feelings and passions excited thereby, may be shown in mitigation of damages. *Mowry* v. *Smith,* 91 Mass. (9 Allen) 67; *Millard* v. *Truax,* 84 Mich. 517, 47 N. W. 1100, 22 Am. St. Rep. 705; 3 Cyc. 1096.

"But, as we have before stated, this provocation occurred some weeks or months before the assault, and the mere fact that the language used by LeLaurin was repeated by Peterson to Murray an hour or so before the assault does not bring it within the time, for there was but little of it that Murray had not heard before. Had LeLaurin repeated his former statement about Murray on the day of the assault, this renewal of an old slander would have been a double provocation; but he is not responsible for the fresh repetition by Peterson. 3 Cyc. 1098."

We are unable to say as a matter of law that such length of time had intervened between the narration to Thompson of the conversation between his son and appellant and the assault upon appellant that cooling time had been afforded and reason had regained control, and especially so as Thompson testified that the offensive remark imputing dishonesty was repeated just before the blow was struck. *Arnold* v. *State,* 178 Ark. 1066.

For the reasons indicated the judgment must be reversed, and upon the remand of the cause the jury will assess damages in plaintiff's favor in accordance with the rules announced in the LeLaurin case, *supra,* and will then consider and determine what damages, if any, should be awarded Thompson for the alleged slander, and will offset the one against the other, and will render a verdict in favor of the party whose damages exceeds the other, and for the amount of the excess.

KIRBY, J., concurs in the reversal.

ARKANSAS POWER & LIGHT COMPANY *v.* SHRYOCK.

Opinion delivered December 23, 1929.

Robinson, House & Moses, T. D. Wynne, Lee & Moore and *Bogle & Sharp,* for appellant.

S. S. Jefferies, for appellee.

HUMPHREYS, J. This is an appeal from a judgment in the sum of $10,000 rendered in the circuit court of Monroe County in a suit by appellees against appellant for the alleged negligent killing of Corrie G. Shryock, wife of Charles F. Shryock, and mother of the other appellees, by electricity which escaped from one of appellant's electric light wires.

Appellant seeks a reversal of the judgment upon the grounds: (1) that there is no substantial evidence in the record tending to show negligence on its part resulting in the death of appellee's decedent; and (2) that the

undisputed evidence shows that her death was the result of her contributory negligence.

(1). The record reflects that the service wire leading from its main wire along the street into the house occupied by appellees and their decedent was insulated with the exception of one and one-half to three inches at the joint under the eaves of the house, and that an outside radio wire, foreign to appellant's wires, was attached to a paling on the front fence and to a pole in the back yard; that, as originally constructed for radio purposes, it was over the comb of the roof and above appellant's service wire which entered the house; that Mrs. Corrie G. Shryock was found suffering from an electric shock, which resulted in her death in a few moments, some forty or fifty feet away from the front fence, with the end of the wire which had been attached to the paling in her left hand, and with the wire coiled about her hand and elbow several times; that the radio wire was lying upon and across the uninsulated part of the service wire at the time she was discovered.

The record reflects a dispute in the testimony as to whether the deceased, in coiling the radio wire around her arm, pulled it off the roof of the house or off the insulated part of the service wire onto the uninsulated part thereof and received the electric shock which injured and killed her. The testimony introduced by appellant tended to show that the deceased pulled the radio wire off the roof onto the uninsulated portion of its service wire. There is substantial testimony in the record, however, tending to show that the radio wire had been lying upon and across the insulated portion of the appellant's service wire for perhaps a month or more, of which condition appellant had notice. Mrs. Saul, mother of deceased, who had lived in the house with appellee for over a month, testified that she was in the habit of taking the baby out in the yard every day and rolling her around in the buggy, and that in doing so she passed under the radio wire every afternoon, and noticed that it was lying

upon and across appellant's service wire, and was touching it. Two witnesses testified that Lloyd Lawrence, manager of appellant, came to appellee's home on the afternoon that deceased received the shock from which she died, and in talking about the occurrence said: "I noticed this wire across our wires several times. I knew it ought to have been taken down, but I heard no howl about it, and left it."

Viewing the testimony in its most favorable light to appellees, it warranted the jury in finding that a foreign wire (the radio wire) had been lying upon and across an insulated service wire at a point near an uninsulated portion thereof, with the knowledge of appellant, and with the further knowledge that the radio wire ought to have been taken down, but that it had not been removed because no howl had been made about it.

This court ruled in the cases of *Pine Bluff Co.* v. *Bobbitt,* 168 Ark. 1019, 273 S. W. 1, and 174 Ark. 44, 294 S. W. 1002, that a duty rested upon an electrical company to discover within reasonable time and remove a foreign wire in contact with its own, which might injure or imperil the life or property of another, who was not himself guilty of contributory negligence. Applying this rule to the facts, viewed in their most favorable light to appellees, appellant was guilty of negligence in not moving the radio wire off its own service wire after discovering the existing condition.

This brings us to a consideration of the question of whether, as a matter of law, the deceased was guilty of contributory negligence in taking hold of the radio wire and attempting to roll or coil it up. The rule or test by which to determine whether one who receives an injury was guilty of contributory negligence as a matter of law, is to ascertain from the undisputed facts whether all reasonable minds would reach the conclusion that, under all the circumstances, he acted as an ordinarily prudent person would have done. *Coca Cola Bottling Co.* v. *Shipp,* 174 Ark. 130, 297 S. W. 856. As long as

the radio wire rested upon the insulated service wire, no injury would or could result to any one taking up the radio wire. This is necessarily so, else the paling would have burned to which the wire had been tied. This is proof conclusive that, in order to injure either person or property, the two wires would have had to come in contact at a point where neither was insulated. There is nothing in the record showing that the deceased knew that the service wire was uninsulated at the joint where it entered the house. The reasonable inference would be that the whole service wire was insulated, as its whole length was insulated except the space of an inch and a half, or thereabout, at the joint where it entered the house. This joint was sixteen or seventeen feet above the ground, and under the eaves of the house. No duty of inspection rested upon the deceased to ascertain the condition existing there, and the lack of insulation at that particular point was not so patent and obvious that one would necessarily observe it without making an inspection. We do not think the condition existing constituted a sufficient warning of peril to find as a matter of law that the deceased was guilty of contributory negligence. The facts in the case clearly warranted the submission of that issue to the jury for determination. This court ruled in the case of *Beal-Doyle Dry Goods Co.* v. *Carr,* 85 Ark. 479, 108 S. W. 1053, 14 Ann. Cas. 48, that one who walked through an open door into what he thought was an elevator, was not guilty of contributory negligence for failure to observe that an elevator was not there, but said that the facts in the case warranted the submission of that issue to the jury. In passing upon that point the court used the following language: "There is strong reason for finding that appellee was guilty of negligence in walking into the open elevator shaft, if it was open as he claims; but we cannot say, as a matter of law, that he was negligent. That was a question for the jury."

No error appearing, the judgment is affirmed.

YATES *v.* PHILLIPS.

Opinion delivered December 23, 1929.

H. L. Ponder, for appellant.

Holifield & Upton and *Arthur Sneed,* for appellee.

HUMPHREYS, J. This is a suit brought by appellants against appellees on the 13th day of July, 1928, in the chancery court of Clay County, Eastern District, contesting the validity of the organization and the assessment of benefits in Light & Power Improvement District No. 1 of the city of Rector, upon the alleged ground that the second petition in the organization thereof limited the cost of the improvement to $40,000, instead of limiting the cost thereof to a percentage of the assessed valuation of the property in said district as shown by the last county assessment, in accordance with the terms of act 395 of the Acts of the Legislature of 1921.

Appellees interposed the defense of the thirty-day statute of limitation to the suit of appellants, as well as other defenses which it is unnecessary to mention.

The cause was submitted to the trial court upon the pleadings and the testimony, resulting in a dismissal of appellant's complaint for the want of equity, from which is this appeal.

We think the action is barred by the 30-day statute of limitation, and for that reason have not set out the other defenses interposed by the appellees nor a summary of the testimony reflected by the record. The district was created on the 26th day of March, 1924, by an ordinance of the city of Rector, under authority delegated to it by § 5652 of Crawford & Moses' Digest, and the assessment of benefits was made pursuant to and in accordance with the subsequent sections of the statute pertaining to municipal improvement districts. Property owners in the district are allowed thirty days, under § 5652 of Crawford & Moses' Digest, to review the action of the city council in creating the district, in the chancery court of the county where such city or town lies; and it is provided in § 5668 of Crawford & Moses' Digest that all persons who shall fail to begin legal proceedings within thirty days after the publication of the assessment ordinance for the purpose of correcting or invalidating such assessment of benefits, shall be forever barred and precluded. These short statutes of limitation have been upheld by many decisions of this court. One of the latest cases ruling that property owners must attack the validity of the district and the assessment of benefits within the time fixed by the act creating such a district is *Ferrell* v. *Massie,* 150 Ark. 156, 233 S. W. 1083. This action was not filed until the 13th day of July, 1928, and was barred by the sections of the statute referred to. It is true that the record in this case reflects that one of the appellants, the Arkansas-Missouri Power Company, brought a suit within the thirty-day period after the creation of the district, attacking the validity thereof, and that it took a nonsuit on the 25th day of April, 1925, and instituted the instant suit within a year after its nonsuit was taken. This fact did not prevent the statutory bar from attaching under the thirty-day statute of limitations referred to. Actions of this character do not come within the provisions of § 6969 of Crawford & Moses' Digest, allowing new suits to be brought

within one year after taking or suffering a nonsuit upon the action brought within the statutory period of thirty days. If so, the very purpose of a short statute of limitation fixed in the act would be thwarted by preventing the construction of improvements therein within a reasonable time.

No error appearing, the judgment is affirmed.

MARTIN *v.* STATE.

Opinion delivered December 23, 1929.

C. E. Condray and *Bogle & Sharp,* for appellant.

Hal L. Norwood, Attorney General, and *Pat Mehaffy,* Assistant, for appellee.

HUMPHREYS, J. Appellant was separately tried and convicted, in the circuit court of Arkansas County, of murder in the second degree, and was adjudged to serve a term of five years in the State Penitentiary, upon the following indictment:

"The grand jury of Arkansas County, Southern District, in the name and by the authority of the State of Arkansas, accuse Perry Martin, Ike Sangston, Glenn Sangston, of the crime of murder in the first degree, committed as follows, to-wit: The said Perry Martin, Ike Sangston and Glenn Sangston, in the district, county

and State aforesaid, on the 20th day of April, A. D. 1929, unlawfully, willfully, feloniously and with malice aforethought, and after premeditation and deliberation, did assault, kill and murder one Ed McGrew, by then and there shooting him, the said McGrew, with a rifle, then and there loaded with gunpowder and leaden bullets, and then and there had and held in the hands of him, the said Perry Martin, Ike Sangston, and Glenn Sangston, and with the unlawful and felonious intent then and there, him, the said Ed McGrew, willfully and maliciously to kill and murder, against the peace and dignity of the State of Arkansas. Guy E. Williams, prosecuting attorney."

An appeal from the judgment of conviction has been duly prosecuted to this court.

Appellant assigns as reversible error, first, the insufficiency of the evidence to support the verdict, and second, the refusal of the court to give his requested instructions numbers 18, 19 and 20.

(1) The substance of the evidence introduced by the State was to the effect that as Ed McGrew, deceased, was returning with a party of friends from a dump situated near the Missouri Pacific bridge on White River, in the town of Benzol, to the landing dock, appellant fired a shot at McGrew, which entered his head, and resulted in his immediate death; that at the time the shot was fired McGrew was leaning over engaged in turning the switch of his motor-boat off. The jury accepted this evidence as true, although disputed by the witnesses introduced by appellant, and it is sufficient to sustain the verdict.

Instructions numbers 18, 19 and 20, requested by appellant and refused by the court, told the jury that the evidence introduced by the State did not tend to show a conspiracy, and that the State's evidence introduced for that purpose was excluded, and should not be considered by the jury. The evidence introduced by the State for the purpose of showing a conspiracy was not objected

to by appellant at the time it was introduced, and it was clearly within the discretion of the court whether he would direct the jury not to consider it when he came to instruct the jury. *Johnson* v. *State,* 156 Ark. 464, 246 S. W. 516. It did not devolve upon the State to prove any conspiracy, as no conspiracy was charged in the indictment between appellant, Ike Sangston and Glenn Sangston. For the reasons given the court did not err in refusing to grant appellant's requested instructions numbers 18, 19 and 20.

No error appearing, the judgment is affirmed.

WEBB *v.* ADAMS.

Opinion delivered December 23, 1929.

John Owens, Claude A. Rankin and *Pinnix & Pinnix,* for appellant.

Tom Kidd, for appellee.

KIRBY, J., (after stating the facts). The act appears, from its title indicating the purpose and its terms, to be general, providing for an optional county unit or a consolidated school system for the State, operating equally and uniformly throughout the State, but for the proviso or exception in § 14 reading: "The provisions of this act shall in no way apply to or affect Gosnell Special School District in Mississippi County, Arkansas. Provided, also, that the provisions of this bill shall not apply to Faulkner and Sharp counties."

Amendment No. 17 reads: "The General Assembly shall not pass any local or special act. This amendment shall not prohibit the repeal of local or special acts." The language of the amendment is plain and unambiguous, and its meaning clear, disclosing the intention of the people in adopting it, and dispensing with the necessity of seeking other aids for its interpretation. The restrictive provisions of the Constitution on the legislative power relative to the passage of local or special legislation, leaving its exercise to the discretion of the Legislature, had been so disregarded and abused as to create an intolerable condition. Numerous measures were enacted in all sessions of the General Assembly, general in their terms and nature, and from the operation of which from one or more of the counties of the State

were excepted, and this amendment was adopted to remedy the evil, and the power of the General Assembly to enact local or special legislation was withdrawn, the General Assembly being prohibited by its terms from passing any local or special act. The effect of excepting from the provisions and operation of the act the Gosnell Special School District and the counties of Faulkner and Sharp was to leave the law applicable only to the remainder of the State not so excepted and the law as to the excepted territory unchanged, as though act 149 of 1929 had not been enacted. *Casey* v. *Douglass,* 173 Ark. 641, 296 S. W. 705.

If two counties and a special school district can be excepted from the provisions of a law otherwise general and operative equally and uniformly throughout the whole State, there would be no reason to say that twenty-five or fifty counties or seventy-four of the seventy-five counties of the State could not be so excepted, leaving its application as a general law to but one county, abrogating by legislative determination and judicial construction the Constitutional Amendment prohibiting the Legislature from passing "any local or special act." The exclusion of a single county from the operation of the law makes it local, and it cannot be both a general and a local statute. *Davis* v. *Clark,* 106 Penn. 384; *State* v. *Mullica Twp.,* 51 N. J. L. 412, 17 Atl. 941; *Miller* v. *Kister,* 68 Cal. 142, 8 Pac. 813; *Township of Lodi* v. *State,* 51 N. J. L. 402, 18 Atl. 749, 6 L. R. A. 56. The courts look to the substance and practical operation of a law in determining whether it is general, special or local, and if its operation must necessarily be special or local, it must be held to be special or local legislation, whatever may be its form. 25 R. C. L. p. 815; 1 Lewis' Sutherland, Statutory Construction, p. 359. A local law is one that applies to any subdivision or subdivisions of the State less than the whole. 3 Words & Phrases, Second Series, p. 172. A law is special in a constitutional sense when, by force of an inherent limitation, it arbitrarily separates

some person, place or thing from those upon which, but for such separation, it would operate. *Van Cleve* v. *Passaic Valley Sewerage Cm'rs,* 71 N. J. L. 183, 58 Atl. 571, 572; *Ry.* v. *Hanniford,* 49 Ark. 291, 5 S. W. 294; *Little Rock* v. *North Little Rock,* 72 Ark. 195, 79 S. W. 785.

This act, by reason of the express provision excepting certain counties of the State arbitrarily from its operation and limiting it to the territory not excepted, becomes local or special within the meaning of the Constitutional Amendment, and was beyond the power of the Legislature to enact, and is consequently void and of no effect, and the court did not err in so holding.

The decree is affirmed.

MEHAFFY, MCHANEY and BUTLER, JJ., dissenting.

BUTLER, J., (dissenting). The majority of the court has concluded that the provision in § 14 exempting a special school district in Mississippi County and the counties of Faulkner and Sharp from the provisions of bill renders the entire act void as a local bill and within the prohibition of Amendment No. 17, and has therefore decided that the act is uninforcible.

From this decision I must respectfully dissent.

The duty was cast upon the General Assembly by § 1, article 14, Constitution of 1874, to "maintain a general, suitable and efficient system of free schools whereby all persons in the State between the ages of six and twenty-one years may receive gratuitous instruction." This the State has been endeavoring to perform since the adoption of the Constitution with but indifferent success, so that today Arkansas lags behind the majority of its sister States in the point of the average education of its citizens. In some communities there were, because of greater local wealth and number of population, ample funds for educational purposes, while in others the funds for that purpose were wholly inadequate. A part of the youth of the State was being educated, a part growing up in ignorance.

An enlightened public conscience became aware that it was the duty of the richer and more favored localities to aid in the education of the children of the poorer communities, and, heeding its voice, the General Assembly of 1929 passed the law under consideration, in aid of other legislation recently passed by which it was expected that educational facilities throughout the State might become equal and uniform, and the blight of illiteracy banished from within our borders.

As gathered from the title and subject-matter of act No. 149, it was the intention of the Legislature to provide for an optional county unit or consolidated school system for the several counties of the State by popular vote. The inclusion of the proviso must have been deemed an immaterial matter, because before the law could become applicable to the counties named in the provision, a majority of the people must have given their assent. But the proviso was in direct conflict with the purpose of the act, which was to provide for an optional uniform county unit system for the conduct of the schools for the entire State. In order for the act to fail because of the proviso, this court must determine that, without the proviso, the Legislature would not have passed act No. 149.

Could it be rationally supposed that the Legislature by the enactment of the "County Unit System" was indulging in a mere vain and useless gesture, and in order that this might be the result inserted the proviso. Was it their intention to deceive and beguile the people, which, when it asked for a fish, would be given a serpent?

In any view of the case, can it be assumed that it did not intend and would not have passed the act with the proviso omitted? I say no. The history of the State, the traditions of the legislative body, the necessity for the law, the unmistakable language of the statute itself, the practically unanimous vote by which the statute was enacted, all cry out against any such assumption; but rather from all of this the conclusion is inescapable that if the Legislature, doubtless esteeming the inclusion of

the proviso unimportant, had anticipated that the proviso would have made the bill a local measure it would have declined to include it and would have passed the act without it.

It is elementary that every reasonable rule of construction must be resorted to in order to save a statute from unconstitutionality, and presumptions should be indulged in to uphold the validity of laws and not to strike them down, and where one construction would render it void and another would render it valid, the latter should be adopted. *Standard Oil Co.* v. *Brodie,* 153 Ark. 114, 239 S. W. 753; *Rice* v. *Lonoke Road Dist.,* 142 Ark. 454, 221 S. W. 179; *State* v. *Handlin,* 100 Ark. 175, 139 S. W. 1112; *Bush* v. *Martineau,* 174 Ark. 214, 295 S. W. 9.

In the case of *State* v. *Jennings,* 27 Ark. 419, the rule was laid down, which has since been followed by this court, that where any particular clause is not so large or extensive in its import as the other expressions in the statute, and if from these the true legislative intent can be ascertained, the real intent of the Legislature should be given effect, and the other disregarded.

This court has consistently held that, where a part of a statute is unconstitutional, if it is apparent the Legislature would have enacted the statute without the unconstitutional provisions, such provisions will be disregarded because it is the duty of the court to indulge in every reasonable presumption in order to uphold the validity of the statute. *State* v. *Marsh,* 37 Ark. 356; *Leep* v. *Ry.,* 58 Ark. 407, 25 S. W. 75; *Pryor* v. *Murphy,* 80 Ark. 150, 96 S. W. 415; *Sallee* v. *Dalton,* 138 Ark. 549, 213 S. W. 762.

It is entirely apparent, taking into consideration the duty resting upon the Legislature to provide equal, adequate facilities for the education of the children of the State, the years it has struggled with this problem, the manifest need of the law, its comprehensive scope and unmistakable terms, the unanimity of its passage, that act 149 would have been enacted without the proviso. As

that proviso is repugnant to the remainder of the act, and its retention would render the entire act unconstitutional, it is our conclusion that the proviso is void, and the act, with the proviso rejected, a valid and constitutional enactment.

Mr. Justice MEHAFFY and Mr. Justice McHANEY concur in this dissent.

HART, C. J., (on rehearing). According to the decision in *Casey* v. *Douglas,* 173 Ark. 641, 296 S. W. 705, the clause, "Provided also that the provisions of this bill shall not apply to Faulkner and Sharp counties," expressly excepts those counties from the terms of the act; and the school law as to them is left in force as it was before the passage of the act providing for an optional county unit or consolidated school system. See Acts of 1929, vol. 1, p. 754.

But it is first insisted that the act is not a local one under Amendment No. 17 to the Constitution which reads as follows:

"The General Assembly shall not pass any local or special act. This amendment shall not prohibit the repeal of local or special acts."

Impliedly, at least, this court has uniformly held that general laws shall have uniform operation throughout the territorial limits of the State; and there are many decisions to this effect, as will be seen by the reasoning of the court in the cases heretofore decided relating to local or special laws. It has been uniformly held that the subject of the legislation, in order to be a general law, must operate uniformly upon every person or thing of a designated class throughout the territorial limits of the State. *Little Rock & Fort Smith Ry. Co.* v. *Hanniford,* 49 Ark. 291, 5 S. W. 294; *Little Rock* v. *North Little Rock,* 72 Ark. 195, 79 S. W. 785; *McLaughlin* v. *Ford,* 168 Ark. 1108, 273 S. W. 707.

In the case last cited, the court said that the difference between a general and special statute is that a gen-

eral law applies to all of a class while a special statute applies to one or two, or part of a class only.

Again, in *Farelly Lake Levee Dist.* v. *Hudson,* 169 Ark. 33, 273 S. W. 711, the court said that a general law must relate to persons and things as a class, and must operate uniformly throughout the State upon the whole subject or whole class, and must not be restricted to any particular locality within the State.

Now, if a general law must apply throughout the territorial limits of the State, the exclusion of one or more counties from its provisions makes it a local statute. This is the common and well-known difference between general and local acts.

Article 4, § 104, of the Constitution of Alabama, adopted in 1901, provides that the Legislature shall not pass a special, private or local law in certain enumerated cases. Section 110 of the same article is as follows:

"A general law within the meaning of this article is a law which applies to the whole State; a local law is a law which applies to any political subdivision or subdivisions of the State less than the whole; a special or private law within the meaning of this article is one which applies to an individual, association or corporation."

The framers of the Alabama Constitution define general and local laws according to the common understanding of the meaning of the language used, and courts have no right to do otherwise. In the construction of this clause of the Constitution in *State* v. *Pitts.* 160 Ala. 133, 49 So. 441, 135 A. S. R. 79, it was held that a prohibition law which, in some of its major parts, applies to all of the State, does not lose its character as a general law because it retains in force local prohibition laws already in operation in some parts of the State. The reason is that the constitutional provision must be considered as applicable to each separate and distinct act. By way of illustration, the court said that there might be a proper classification of the schools of the

State, as to regulations for opening and closing the schools in different localities and for different control and management to meet the needs of the various localities in conformity with different conditions. When a law, as to its material and important features, applies to the whole State, it will not be converted into a local or special law because it does not operate alike in detail throughout the State. Reasonable classification can always be made under a general law.

In the application of this rule in *LeMaire* v. *Henderson,* 174 Ark. 936, 298 S. W. 327, the court sustained a statute classifying school districts in certain counties, and held that in classifying school districts the Legislature may consider the density of population, the wealth of the county, the system of roads, and the topography of the country with reference to whether it is hilly or not.

It is not the form, but the operation and effect, which determines the constitutionality of a statute. All of the counties must be included, or the law is not general. The exclusion of one or more counties from the operation of the act makes it local. If one may be excluded, where shall the line be drawn, and who is to judge?

In discussing the matter in *Edmunds* v. *Herbrandson,* 2 N. D. 270, 50 N. W. 570, 14 L. R. A. 725, the Supreme Court of North Dakota said: "If an act is not special because it relates to all except a single county in the State, without any reason for the classification, then the Legislature can accomplish indirectly what it is beyond their power to bring about by direct steps. Whenever it is desired to introduce a new rule as to a single county, a general law can be passed establishing that rule in all the counties, and then another law can be enacted re-establishing the old rule in all counties except the one singled out to be governed by the new rule. The first law would be clearly general, and, under what it is claimed is the New York doctrine, the second act could not be assailed as special legislation. This would, indeed, be an ingenious mode of neutralizing the constitu-

tional prohibition against special legislation. We would not give it our sanction, however it might be buttressed by authority."

In the case at bar, the Legislature expressly provided that the law shall not be applicable in two counties. As said by the court in the case last cited, these counties are either left out of the provisions of the law or there is no statutory rule permitting them to take advantage of the provisions of the act. Whatever view is taken, Faulkner and Sharp counties are placed in a separate class by themselves. It would not do to say that the Legislature might arbitrarily group together two counties and leave them outside of the provisions of the law. This would amount to allowing the Legislature to wholly disregard the constitutional amendment and leave the Legislature at its own will to say whether or not the law shall apply throughout the whole territorial limits of the State or whether its operation should be restricted to certain counties. While proper classification is allowed, it must stand upon some reason, and have regard to the character of the legislation and cannot be arbitrarily used by the Legislature.

Therefore, we are of the opinion that the law is not a general law because it does not have a uniform operation throughout the State. The entire acts presents a system for the establishment and regulation of the common schools in the various counties, and two counties are left out of the act, and the exclusion of one or more counties from the operation of the act makes it local. The classification of Faulkner and Sharp counties in a class by themselves is arbitrary and prevents it being a general law because the classification is without any reasonable basis.

It is next sought to uphold the statute by invoking the well-established rule that a statute may be in part constitutional and in part unconstitutional, and if it is separable in its nature, so that the valid and invalid parts may stand independent; and if there is no such con-

nection between the constitutional and unconstitutional parts as the Legislature would not have elected to enact the constitutional part without the other, the statute will be held good except in that part which is in conflict with the Constitution.

It is equally well-settled that if the unconstitutional part is so connected with the remainder that they are dependent upon each other and cannot be separated, or that the valid part, if left alone, would so change the character of the original statute that the Legislature would not be presumed to have enacted it without the other, the whole must be set aside.

In *Poindexter* v. *Greenhow,* 114 U. S. 270, 5 S. Ct. 903, Mr. Justice MATTHEWS, in discussing the question, said:

"It is undoubtedly true that there may be cases where one part of a statute may be enforced as constitutional, and another be declared inoperative and void, because unconstitutional; but these are cases where the parts are so distinctly separable that each can stand alone, and where the court is able to see, and to declare, that the intention of the Legislature was that the part pronounced valid should be enforceable, even though the other part should fail. To hold otherwise would be to substitute for the law intended by the Legislature one they may never have been willing by itself to enact."

Again, in *Spraigue* v. *Thompson,* 118 U. S. 90, 6 S. Ct. 988, the court had under consideration a pilotage act of the State of Georgia, which was claimed to be in conflict with an act of Congress on the subject. The court was urged to disregard certain exceptions in a section of the statute which exempted a certain port in the State of Georgia and one in South Carolina and a certain port in the State of Georgia and one in Florida, contrary to the provision of the act of Congress on the subject. The Supreme Court of Georgia had held the statute valid in the application of the rule that the unconstitutional part exempting the ports above referred to, might be stricken

out and the remainder might stand, upon the principle that a separable part of a statute which is unconstitutional may be rejected and the remainder preserved and enforced. Justice MATTHEWS delivered the opinion of the court in this case and said:

"But the insuperable difficulty with the application of that principle or construction to the present instance is that, by rejecting the exceptions intended by the Legislature of Georgia, the statute is made to enact what confessedly the Legislature never meant. It confers upon the statute a positive operation beyond the legislative intent, and beyond what any one can say it would have enacted in view of the illegality of the exceptions. We are, therefore, constrained to hold that the provisions of § 1512 of the Code of Georgia cannot be separated so as to reject the unconstitutional exceptions merely, and that the whole section must be treated as annulled and abrogated by § 4237 of the Revised Statutes."

This rule has been uniformly recognized both by the Supreme Court of the United States and by this court. Employers' Liability Cases, 207 U. S. 463, 28 S. Ct. 141; *Leach* v. *Smith*, 25 Ark. 246; *Bittle* v. *Stuart*, 34 Ark. 224; *Ex parte Jones*, 49 Ark. 118, 4 S. W. 639 and *State* v. *Williams-Echols Dry Goods Co.*, 176 Ark. 324, 3 S. W. (2d) 340. In the late case of *Williams* v. *Standard Oil Company*, 278 U. S. 235, 49 S. Ct. 115, the court quoted from an opinion of the New Jersey Court of Errors and Appeals, delivered by Judge Pitney, (afterwards a Justice of the Supreme Court of the United States), who after setting forth the rule above announced, said:

"In seeking the legislative intent, the presumption is against any mutilation of a statute, and the courts will resort to elimination only where an unconstitutional provision is interjected into a statute otherwise valid, and is so independent and separable that its removal will leave the constitutional features and purposes of the act substantially unaffected by the process."

The legislative journals show the act as originally introduced did not contain the proviso excepting Faulkner and Sharp counties from the terms of the act. How can we know that the proviso was not the consideration or inducement for the Legislature to pass the statute? We do know that the proviso is a part of the statute which we are asked to hold constitutional, and that the statute does not mean the same thing without the proviso as it does with it. The statute with the proviso does not apply to Faulkner and Sharp counties. Without the proviso it would apply to the whole State. We have not been able to find any authorities authorizing us to separate a statute which by its own terms is indivisible, or to construe a statute as separable within the meaning of the rule above announced, when to do so would give the part of the statute allowed to stand a wholly different effect and meaning from the statute as a whole. We have reached the conclusion that the attempt to interpret the act by upholding part and rejecting part of the law, as stated in *Washington* v. *State,* 13 Ark. 75, is equivalent to the usurpation by the court of legislative power.

It is manifest that the territory will be enlarged by the elimination of the proviso that the act shall not apply to Faulkner and Sharp counties, and the territory over which the law is to operate would be enlarged to the extent of these two counties which are specifically named in the act, and this would be in practical effect judicial legislation, which we are not willing to undertake to accomplish what the school men earnestly insist is a wise and beneficial change in our school law. Indeed, we would have been content to let our original opinion stand without enlargement, but for the strong insistence in the matter by leading school men.

The established rule on the subject, laid down by Lewis' Sutherland Statutory Construction, (2d ed.) vol. 1, § 306, reads as follows:

"If, by striking out a void exception, proviso or other restrictive clause, the remainder, by reason of its

generality, will have a broader scope as to subject or territory, its operation is not in accord with the legislative intent, and the whole would be affected and made void by the invalidity of such part.

"An act of a general nature which the Constitution required to have a uniform operation throughout the State excepted certain counties from its operation. This rendered the whole act void. After striking out the exception, if the general words gave the act operation in the excepted counties, such effort would be directly contrary to the expressed intent of the lawmaker."

It is true that article 14 of our Constitution deals with the subject of education and requires the Legislature to make provision for the support of our common schools. It does not require, however, the Legislature to accomplish that purpose by local or special legislation. On the other hand, § 3, of the article expressly provides that the General Assembly shall provide by general laws for the support of the common schools by taxes. The section also provides that the General Assembly, by general law, may authorize school districts by a vote of the qualified electors to vote a millage tax. Amendment No. 14 to the Constitution only changes the section so as to allow the voters to increase the school tax.

In this connection we do not wish to be understood as impairing in the least the force of the decisions in *State* v. *Crawford,* 35 Ark. 236, which holds that a statute settling accounts between the State and certain parties is a general and not a special act; and in *Waterman* v. *Hawkins,* 75 Ark. 120, 86 S. W. 844, holding that statutes establishing or abolishing separate courts relate to the administration of justice and are not either local or special in their operation. This is in recognition of that principle of State sovereignty under which the State, through its Legislature, may protect its own interest, and by virtue of it the Legislature may treat every subject of sovereignty as within a class by itself, and bills of that kind are usually held to be general and not local

or special laws. There are cases where the State, by its Legislature, commits the discharge of its sovereign political functions to agencies selected by it for that purpose, and such acts have usually been held to be general acts.

Neither do we wish to impair the force of cases like *Harwood* v. *Wentworth,* 162 U. S. 547, 16 S. Ct. 890, where Congress by legislation fixed the salaries of county officers of the territory of Arizona and thereby displaced the system of fees and allowances; and the act was held to be a general one, and not a local or special law. The court said that the act was general in its operation, and applied to all counties in the territory. The counties were classified for the purpose of fixing the salaries of the county officers according to population, wealth, and other things, which were calculated to furnish a reasonable basis for the classification so that, as nearly as practical, the officers would be compensated according to the amount of work done.

In the case at bar, the exemption of two counties from the application of the act did not constitute any reasonable basis for classification for school purposes. Indeed, there was no attempt at classification. By the terms of the act, Faulkner and Sharp counties were specifically exempted from its provisions, and we are asked by a judicial interpretation to place them under the operation of the act. While it has been the policy of this court, in construing statutes relating to schools and school districts, to give them a liberal construction and to uphold them when that can be done without violating the Constitution, we have no power by judicial construction to put a law in force in a county or counties where the Legislature expressly provided it should not apply.

The result of our view is that our former opinion was correct, and the motion for rehearing will be denied.

Justices MEHAFFY, MCHANEY and BUTLER dissent.

MURDOCK *v.* REYNOLDS.

Opinion delivered December 23, 1929.

[redacted]

Jno. E. Harris and *Compere & Compere,* for appellant.

Gaughan, Sifford, Godwin & Gaughan, for appellee.

KIRBY, J., (after stating the facts). It is insisted for reversal that the court erred in refusing to allow the parol evidence introduced, explaining the terms of "a turnkey job" under the provisions of the contract, and in giving instructions Nos. 1, 2 and 3 for the plaintiff, and refusing to give requested instructions Nos. 8 and 10 for the appellant.

Instruction No. 3, complained of, told the jury that, "under the terms of the contract and under the evidence herein," that the plaintiff was required to drill the well under the direction and supervision of the Lion Oil and Refining Company, as well as the defendant, and the defendant was bound by any requirements made by a duly authorized representative of the Lion Oil and Refining Company. This instruction was a direct contradiction of the terms of the contract relative to the authority of the representative of the Lion Oil and Refining Company, and the right of the defendant, neither of them having the right to the direction or supervision of the drilling of the well, but only to request the making of a certain test of the formations and oil sand as the drilling proceeded, and, certainly, it was an instruction on the weight of the testimony directing the jury that they were required to find from it that the plaintiff was required to drill under the direction and supervision of said oil company, as well as of the defendant, and was bound by any requirement made by a duly authorized representative of the Lion Oil and Refining Company. This instruction was not only an incorrect interpretation of the contract, but there was no evidence upon which to base it, and it amounted, in effect, to a peremptory direction, and was necessarily erroneous.

If the contract, by its terms, was free from ambiguity, and provided whose duty it should be to furnish the necessary casing in the drilling and completion of the well, then it was the province of the court to construe it, and tell the jury upon whom the duty rested, and his liability for failure to perform it. Under the terms of the contract, it is clear that the parties only contemplated the necessity for using two kinds of casing, surface casing, which was to be furnished by the contractor, who was also to set any other string of casing necessary to be used by the customary methods employed for cementing the same, and to reset same at his own expense, if it should fail to hold. It is equally clear that if oil or gas was encountered at any depth under 3,000 feet in paying

quantities, he was required to complete the well in a workmanlike manner with casing set, cemented, drilled in and bailed at his own cost and expense. When a test was required and the setting of casing, exclusive of surface casing, which the contractor agreed to buy and set at his own expense, the owner was bound to purchase and furnish the contractor with the casing required by the owner to be set by the contractor, who was to pay for all labor and fuel incident to the setting of said casing at any given point, such consideration being included in the contract price. The contract was termed to be "a turnkey job," with the exception of its terms applicable to the different depths of the well, and the prices to be paid at the completion of the well for the different depths, "less and except the cost of all casing except the surface casing, which is to be furnished by the owner."

Each of the parties insist that it was the duty of the other to furnish the casing for shutting off the flow of the artesian water, the contractor, that such casing could not be termed surface casing that he was required to furnish, and the owner, that it was not test casing, the only kind he was required to pay for. The well was a dry hole, and no test casing, as provided by the contract, was required to be furnished, since neither oil nor gas was discovered in sufficient quantities before the well was completed, at the depth required by the contract, to indicate that a test should be made, and none was made. The contractor testified that no test for oil or gas was made when the 12½-inch casing was set in boring down at that point, nor any test by the drill stem, that no oil sand was encountered there, and that the 12½-inch casing, set at 560 feet, and the 10-inch casing, set at 700 feet, was not set for the purpose of making an oil or gas test, "but to cut off water." Under the plain provisions of the contract, unambiguous in the opinion of the writer, the court should have directed the jury that no test casing, within the meaning of the contract, was required or attempted to be set, and that the owner was not liable to the payment of the price of any other casing set for the

purpose of shutting off the artesian water flow, without regard to whether such casing could be classified as surface casing, which the contractor was also obligated to supply. But if the last sentence of the contract quoted, providing that the contract should be "a turnkey job," with the exception of its terms applicable to the different depths of the well, and the prices to be paid at the completion of the well for the different depths, "less and except the cost of all casing, except the surface casing, which is to be furnished by the owner, be regarded as making the contract ambiguous, then the court should have permitted the introduction of parol testimony, explaining the customary local meaning of the words, "a turnkey job," under the terms of the contract, to show who was obligated to pay for the casing, and erred in not doing so. *Batton* v. *Jones,* 167 Ark. 478, 268 S. W. 857; *Alexander* v. *Williams-Echols Co.,* 161 Ark. 363, 256 S. W. 55; 27 R. C. L. 170 (19); *McCarthy* v. *McArthur,* 69 Ark. 313, 63 S. W. 56; *Paepcke-Leicht Lumber Co.* v. *Talley,* 106 Ark. 400, 153 S. W. 833.

If the contract made no provision for payment by the owner for casing necessary to be used in shutting off the flow of artesian water, and, under its terms, the owner was required only to pay for the casing necessary for making a test of the well at its completion or on discovery of oil or gas signs before that depth was reached, warranting the making of such a test, as appears to be the case, then necessarily the payment for any other casing than that for which the owner was bound under the terms of the contract—the test casing—would have to be made by the contractor, who was to furnish all materials and labor and complete the well in a workmanlike manner for the amount stipulated in the contract, in accordance with his agreement. *Ingham Lumber Co.* v. *Ingersall,* 93 Ark. 447, 125 S. W. 139, 20 Ann. Cas. 1002; *Kelly* v. *Zenor,* 150 Ark. 466, 252 S. W. 39; *Smith* v. *Dierks Lumber & Coal Co.,* 130 Ark. 9, 11, 196 S. W. 481; *Polzin* v. *Beene,* 126 Ark. 46-50, 189 S. W. 654; 6 R. C. L., § 364, p. 997.

Instruction No. 2 was abstract and not supported by the testimony. It appears undisputed that no test casing was required to be furnished by the owner. Instruction No. 1 was also erroneous in defining test casing for which appellant was bound to pay under the contract, as all casing necessary to be used in the well other than surface casing, and the error was not cured by giving appellant's requested instruction No. 5, allowing the jury to determine whether the extra casing used and sued for was required for a test for oil or gas, etc., which is in conflict with and contradictory thereof.

Instructions Nos. 8 and 9, requested by the appellant, ought to have been given.

It follows that, because of the errors designated, the cause must be reversed, and will be remanded for a new trial.

It is so ordered.

MORRIS & COMPANY *v.* ALEXANDER & COMPANY.

Opinion delivered December 23, 1929.

M. P. Huddleston, for appellants.

D. G. Beauchamp, for appellees.

MEHAFFY, J. On January 2, 1901, Alexander and others executed a deed of conveyance to certain lands therein described to the National Box Company, and the National Box Company thereafter conveyed to Morris & Company. The appellants occupied the lands conveyed until the first of October, 1921. On that date appellants and the National Box Company and G. L. and Lillie R. McDonald brought suit in the Greene Chancery Court, praying for the construction of the deed executed of January 2, 1901.

The appellants contended that, under a proper construction of the deed, it operated as a conveyance of the lands therein described in fee simple to the National Box Company, the grantor of appellant, and that action in the chancery court was instituted to have the title of appellant to the land confirmed. The defendants in that suit, Alexander and others, contended that a proper construction of the deed is that it conveyed only the right to remove the timber, and that the right to remove the timber had terminated by the removal of the timber. The case was tried in the Greene Chancery Court, and the court held that the deed operated as a conveyance of the lands in fee simple to the National Box Company. An appeal was taken to this court, and on November 23, 1925, this court reversed the decree of the Greene Chancery Court, and, among other things, said:

"Our conclusion is that the deed before us conveyed an estate upon limitation, and that, upon the happening of the event, namely, the removal of the timber, the estate terminated and reverted to the grantors or their heirs. Such being the case, the decree of the chancery court was erroneous, and the same is reversed, and the cause remanded with directions to enter a decree in favor of appellants in accordance with this opinion." *Alexander v. Morris & Co.,* 168 Ark. 31, 270 S. W. 88.

The facts in the original suit and the deed of conveyance will be found in the statement in the above case, 168 Ark. 31, 270 S. W. 88, and will not be copied here.

When the case came on for trial again in the Greene Chancery Court, on April 6, 1925, both parties being present, the cause was submitted and heard on the original complaint of plaintiff and exhibits thereto, the original answer and cross-complaint of defendants and exhibits thereto, and the mandate of the Supreme Court in said cause. The chancery court in its decree stated that the time had expired for the removing of the timber, and adjudged and decreed that the complaint of the plaintiffs be dismissed for want of equity, and the prayer of the cross-complaint of defendants and cross-complaints be granted, and that all the right, title and interest held or claimed by Morris & Company, National Box Company, G. L. McDonald and Lillie McDonald, or either of them or their grantees under and through the deed sued upon by the plaintiffs to the lands, describing them, be and the same is hereby canceled, set aside and held for naught, etc., and that the plaintiffs or their grantees are forever enjoined from asserting or attempting to assert any interest in said land by reason of said deed.

On August 28, 1926, appellants filed a complaint in the Greene Chancery Court, asking that the case be redocketed, and that the decree be opened and plaintiffs permitted to file their petition for the recovery of betterments to said lands; and, if this relief be denied, then they pray that this petition be treated as a bill of review, and that said decree be set aside and plaintiffs be permitted to file their complaint for the recovery of betterments to said lands, and for the recovery of taxes and special assessments; and, if this relief be denied, then plaintiffs pray that this pleading be treated as an original action for the recovery of betterments on said lands, and that they have decree against defendants for the enhanced value of said lands, with interest, and that they be decreed a first lien on said lands until paid. Plain-

tiffs then set out the amounts they are entitled to recover for taxes and assessments and betterments.

No appeal was prosecuted from the decree of April 6, 1925, and no action was taken by appellants until August 28, 1926.

Not only are the parties bound by the opinion of this court in the case of *Alexander* v. *Morris & Company,* 168 Ark. 31, 270 S. W. 88, decided February 23, 1925, but they are bound by the decree of the chancery court from which they took no appeal. The Supreme Court, when the case was here before, reversed the decree and remanded the cause, with directions to enter a decree in favor of appellants in accordance with the opinion. When the trial was had in the chancery court, after the cause was remanded, the appellants could in that suit at that time have litigated all the questions they now seek to litigate.

When this case was here on appeal, we said: "There is, in the first place, a stipulation as to the use to which the land is to be put, that is to say, 'for the purpose of cutting and removing the timber therefrom and conveying the same to and from the sawmill of said grantee.' There is a further covenant that the grantees should pay the taxes on the land, and a provision in express terms that the title should revert to the grantors and their heirs * * * and the deed conferred upon the grantee the privilege of 'reverting' the several tracts, and thereby escaping the burden of paying taxes thereon as the timber should be removed therefrom."

This court then reversed the decree, and remanded the cause with directions to enter a decree in favor of the appellants in accordance with the opinion.

Whatever was decided on the first appeal remains the law of the case for all further proceedings. "This general rule is grounded on public policy, expediency and reason. The rule has been so long established and so uniformly adhered to that it is not a mere matter of practice or procedure." *Henry* v. *Gulf Refining Co of La.,* 179 Ark. 138, 15 S. W. (2d) 979; *Taliaferro* v. *Barnett,* 47

Ark. 359, 1 S. W. 702; *Vogel* v. *Little Rock*, 55 Ark. 609, 19 S. W. 13; *Miller Lbr. Co.* v. *Floyd,* 169 Ark. 473, 275 S. W. 741; *Alford* v. *Prince,* 178 Ark. 159, 10 S. W. (2d) 10; *Dixie Culvert Mfg. Co.* v. *Perry County,* 178 Ark. 454, 12 S. W. (2d) 10; *Arkansas P. & L. Co.* v. *Orr,* 178 Ark. 329, 11 S. W. (2d) 761.

When the case was tried in the chancery court, after it had been remanded, appellant could have litigated every question it now seeks to litigate, and, not having done so, it is estopped by the decree of the chancery court. This court has held that parties are bound not only on the questions actually tried by the court, but on all questions that might properly have been determined in said suit.

The rule has been often announced in this court that the judgment or decree of a court of competent jurisdiction operates as a bar to all defenses, either legal or equitable, which were interposed or which could have been interposed in the former suit. *Gosnell Special School District No. 6* v. *Baggett,* 172 Ark. 681, 290 S. W. 577; *Taylor* v. *King,* 135 Ark. 43, 204 S. W. 614.

Our conclusion is that all the defenses and causes of action mentioned in appellants' petition could have been settled in the original suit. The decree is therefore affirmed.

CATLIN *v.* C. E. ROSENBAUM MACHINERY COMPANY.

Opinion delivered December 23, 1929.

Jonas F. Dyson, for appellants.

Chas. A. Walls, for appellee.

MEHAFFY, J. The appellee began this action in the Woodruff Circuit Court for the recovery of certain machinery described in the complaint, alleging that it was the owner, and that the defendants were in possession and unlawfully detained the same. Appellee had delivered the machinery to the purchaser under a conditional sales contract, and the notes given for the purchase money provided that the property should remain the property of the C. E. Rosenbaum Machinery Company. In other words, the seller retained title to the property; it was a conditional sale.

The appellants answered, denying that appellee was the owner and entitled to possession of the property; admitted that N. E. Catlin had possession, but denied that he was unlawfully detaining same. They also denied that appellee had been damaged, and denied that appellee had the notes mentioned in plaintiff's complaint. Appellants alleged that N. E. Catlin was the owner, and that plaintiff's cause of action was barred by the statute of limitations. The only evidence introduced was the following agreed statement of facts:

"It is agreed by and between Chas. A. Walls, attorney for plaintiff, and Jonas F. Dyson, attorney for defendant N. E. Catlin, that on the first day of March, 1920, plaintiff sold and delivered to defendant W. P. Dawson one 80 H. P. Muncie oil engine, No. 7 CNA-081, with standard fixtures, for the sum and consideration of $6,134, $2,000 of which was in cash paid, and the balance divided into notes, the first for $2,067, due on or before the first day of January, 1921, and the second for the sum of $2,067, due on or before the first day of January,

1922, each bearing interest from date until paid at the rate of 8 per cent. per annum, and specifically retaining title to the property sold until paid for in full; the original notes being attached to this agreement as exhibits A and B, respectively, and made a part hereof. That said engine is a stationary one, and was, immediately after delivery, as aforesaid, firmly affixed and attached to the earth on the north side of the northeast quarter of section 28, in township 5 north, range 1 west, Southern District of Woodruff County, Arkansas, by being firmly placed and bolted to a concrete foundation larger than the base of said engine in length and width, and extending about five feet in the earth, and connected to the pump on said location by means of belts and pulleys, and connected with several oil tanks on said land by iron tubes and pipes, and was so connected that it became a part of the rice well pumping plant on said land, and was housed in a building containing the entire pumping plant. Said engine is now the only engine on said land, or that has been on said land since it was erected thereon. That the tax records of Woodruff County, Arkansas, do not show said engine assessed in any year that it has been thereon located, as personalty, but the said northeast quarter of section 28, with said engine and entire pumping plant, is assessed as realty. That the plaintiff's agent superintended the erection and placing, as aforesaid, of said engine, and at all times thereafter knew of its being so placed on said land. That said notes, or any evidence of same, were never recorded or filed for record by either clerk or recorder of Woodruff County, Arkansas, in either county site of said county. That said engine is now in the same bed or foundation in which it was placed as aforementioned, and has never been moved therefrom since it was placed there in the early part of 1920.

"It is admitted that the last credits paid on said notes were $1,000 on note No. 1, March 5, 1925, and $500 on note No. 2, on March 12, 1926.

"That, some time shortly prior to the 22d day of May, 1923, the agent of the American Investment Company, of Oklahoma City, Oklahoma, a loan company, upon the written application of the said W. P. Dawson for a loan of $6,000 on said land and premises, made an inspection of said land and premises for the purpose of making said loan, and at the time of making said inspection said engine was located on said premises in the condition and affixed to the soil as aforementioned. Neither he nor the company was at that time, or any time thereafter, informed or notified of the existence of such notes, or that any part of the purchase price of said engine was then unpaid, or that this plaintiff claimed any interest or title to said engine. That said land was represented to the said American Investment Company as being a rice farm, and was not used for any other purpose, and would have been valueless as such but for the engine to pull said pump.

"That, by reason of the value being placed upon said land equipped with said pumping plant, which included said engine, said loan was made by the said American Investment Company and said land and premises taken as security therefor; and on the 22d day of May, 1923, the said W. P. Dawson and Armenta Dawson, his wife, executed their mortgage thereon to the said American Investment Company, securing note for said sum of $6,000, which said mortgage is now in the files of chancery suit No. 1277, in the office of the chancery clerk within and for the Southern District of Woodruff County, Arkansas, and was recorded on the 18th day of June, 1923, in mortgage record No. 12, at page 120, Woodruff County, Arkansas.

"That the American Investment Company, for a valuable consideration, assigned said mortgage and note secured thereby to R. H. Shumway, on the 2d day of July, 1923, which assignment was recorded on the 31st day of December, 1923, in mortgage record No. 12, at page 172,

in the office of the recorder of deeds within and for the Southern District of Woodruff County, Arkansas, at Cotton Plant.

"That on the first day of February, 1927, said mortgage and note secured thereby were assigned by the executor of R. H. Shumway to N. E. Catlin, which assignment is now a part of the pleadings and proof in the files of chancery court suit No. 1277, in the office of the chancery clerk of the Southern District of Woodruff County, Arkansas, which was a suit by N. E. Catlin against W. P. Dawson and wife, to foreclose said mortgage, of date of May 22, 1923.

"That default was made by the said W. P. Dawson in the payment of said note and interest coupons, and a legal foreclosure was had on mortgage, and sale under the decree in the Southern District of Woodruff County, Arkansas; and the sale thereof was made by N. N. Cain, commissioner in said decree, on the 10th day of March, 1928, and said N. E. Catlin, being the highest bidder at said sale, purchased said land for the sum of $5,000, which sale was properly confirmed by the chancery court on the 21st day of May, 1928, and deed ordered and made, and is now of record in deed record book No. 19, at page 28, in the office of the recorder of deeds within and for the Southern District of Woodruff County, Arkansas.

"That at said sale the said N. N. Cain announced that, by the request of Chas. A. Walls, attorney for plaintiff in this action, C. E. Rosenbaum Machinery Company claimed title to said engine herein sued for. Said announcement was made before any bid was made on said land and premises."

The case was submitted to the court on the pleadings and the agreed statement of facts and the notes as copied in the complaint, and the court found in favor of appellee, and gave judgment accordingly against the

appellants, and this appeal is prosecuted to reverse said judgment.

The only question for our consideration is whether the property involved was attached to the freehold in such a manner as to deprive the seller of the right to retake the property. After the property was purchased, and while it was on the land belonging to the purchaser, he executed a mortgage, and there was a foreclosure and sale of the mortgaged property, the machinery being on the land at the time. It is the contention of the appellant that it was a fixture, and, since appellant had no notice that the seller had retained title, that the purchaser at the foreclosure sale is an innocent purchaser, and that the cause should be reversed for that reason. It is true that the purchaser had no notice of the conditional sales contract or that the seller of the property retained title.

It is conceded by appellants that, before the law of innocent purchase can be applied in a case of this kind, the chattel must take on the nature and character of a fixture. Appellants rely on the case of *Continental Gin Co.* v. *Clement,* 176 Ark. 864, 4 S. W. (2d) 901. In that case the appellant had sold certain machinery, and had retained title as in this case. The purchaser in that case, after putting the property in place, and while it was not actually attached to the gin stands, placed it directly over them and it was held in position by joists resting on the floor and nailed and screwed to the building housing the gin. It could be removed without physical damage to the gin stands and without material damage to the building. In that case the chief thing relied on was that of innocent purchaser. There was no dispute in that case, and none in this, that, as between the original vendor and vendee, the property remained a chattel, but we said in that case, quoting from *Salmon* v. *Boyer,* 139 Ark. 236, 213 S. W. 383: "This instruction excludes the idea that it was the duty of appellant, in order to bring himself within the doctrine of innocent purchaser, to make inquiry concerning the ownership of fixtures of this character, and,

even though substantially fastened into the soil. * * * In the instant case appellee does not seem to have made inquiry of any one. It is a matter of common knowledge that property of the character of that involved in this suit is purchased in this country on time, and that contracts for this kind of property are constantly made wherein the title is retained until paid for."

The same is true in this case. While the appellants were not notified, this court has repeatedly held that it is their duty to make inquiry. The evidence in this case does not show that they made inquiry of anyone. Doubtless the original purchaser would have told them, if inquiry had been made, but it would have been an easy matter for the appellants or the original mortgagee to have inquired, not only of the mortgagor, but of the person from whom the property was purchased. This he did not do. In another case relied on by appellants, the case of *Salmon* v. *Boyer,* 139 Ark. 236, 213 S. W. 383, the court also held that it was the duty of appellant, in order to bring himself within the doctrine of innocent purchaser, to make inquiry concerning the ownership of fixtures of that character, even though substantially fastened into the soil. The court in the above case laid down certain tests, among which it mentioned the intention of the parties, and stated that the tendency of the times is to attach the most importance to the test of intention. In the instant case of course there can be no question about the intention.

In another case referred to the court held, with reference to certain personal property, that the attachment would not operate to make a fixture of stoves, if such was not the intention of the parties. *Anderson* v. *Southern Realty Co.,* 176 Ark. 752, 4 S. W. (2d) 27. See also *Choate* v. *Kimball,* 56 Ark. 55, 19 S. W. 108.

It would serve no useful purpose to review the authorities further on this question. The rule with reference to innocent purchaser, where there is a conditional sale of the property, the vendor retaining title, is

that the mortgagee, or person who acquires the property from the original purchaser, is bound to make inquiry with reference to the property. This is especially true where it is known that property is of such a character as is universally sold on time, the vendor retaining title.

In another case relied on by appellant the court said: "According to the testimony of Suckle, no reservation of the ceiling fans was made by Stone when he made the sale of the hotel property. According to the undisputed evidence the fans were necessary and adapted to the use of the property for hotel purposes. Hence it was a question for the jury whether or not the ceiling fans were so attached to the electric wiring of the house as to become a part of it and pass with a deed to the realty, and we do not think the court erred in giving these instructions." *Stone* v. *Suckle,* 145 Ark. 387, 224 S. W. 735.

The finding of the circuit judge in this case is the same as the finding of a jury. It was tried before the judge sitting as a jury.

Judgment of the circuit court is affirmed.

McGregor *v.* Cain.

Opinion delivered December 23, 1929.

Ross Mathis, for appellant.

Roy D. Campbell, for appellee.

MEHAFFY, J. In October, 1928, the county judge of Woodruff County, acting under § 5775 of Crawford & Moses' Digest, appointed a board of visitors, consisting of six members, men and women. Two of the members were to serve one year, two for two years, and two for three years. After the board was appointed, they met at the courthouse at McCrory, on the 5th day of November, 1928, and unanimously recommended to the county judge the appointment of Mrs. Ida Cain as chief probation officer for the coming year. Their report and recommendation was filed with the county judge, and thereafter, on the 12th day of November, 1928, the time fixed by law for the convening of the quorum courts of the State, the quorum court made an appropriation to pay the salary of the chief probation officer of the county. The resolution adopted by the quorum court is as follows:

"Resolution to pay salary of probation officer. Whereas the county judge of Woodruff County, under the provisions of § 5775 of Crawford & Moses' Digest of the Laws of Arkansas, has appointed six reputable women and men to constitute a board of visitation; and whereas said board of visitation so appointed has duly convened in the courthouse at McCrory, Arkansas, on the 5th day of November, 1928, and, after being duly organized as provided by law, unanimously agreed upon the chief probation officer of Woodruff County and recommended her appointment as such to the county judge; and whereas the said board of visitation has also recommended that the salary of the chief probation officer be fixed at the sum of $150 per month for the ensuing year of 1929, now therefore be it resolved by the quorum court of Woodruff County, that the sum of $1,800 be and is hereby appropriated from the revenues of the fiscal year of 1929 to pay the said salary of the chief probation officer of Woodruff County, Arkansas,

as selected by the board of visitation of Woodruff County."

The next day after the quorum court had passed the resolution and made the appropriation, an order was entered upon the records of the county court appointing Mrs. Ida Cain as chief probation officer of the county until the 13th day of November, 1929, at a salary of $150 a month. The order of the county court is as follows:

"In the matter of a probation officer of Woodruff County. In pursuance to a recommendation made by the board of visitation and an appropriation made by the quorum court, recommending the appointment of Mrs. Ida Cain to the office of probation officer of Woodruff County, Mrs. Ida Cain is hereby appointed as such probation officer for Woodruff County, to serve for a term of one year beginning from this date, November 13, 1928, at a salary of one hundred per month and fifty dollars per month for expenses, payable on this date monthly. The county clerk is hereby ordered and directed to issue to the said Ida Cain, as probation officer, a warrant on the county general fund for the amount of one hundred and fifty dollars each and every month until her commission expires, November 13, 1929."

The probation officer entered upon and continued the discharge of her duties, and on the 13th day of November a warrant for the sum of $150 was issued to her, and also on the 14th day of January another warrant was issued for $150, payable to Mrs. Ida Cain.

On the 12th day of February, 1929, Alex C. McGregor, as a citizen and taxpayer of Woodruff County, filed his affidavit and bond for an appeal from the order of the county court appointing Mrs. Cain as probation officer and fixing her salary. The appeal was allowed, and transcript filed in the circuit court.

On the first day of January, 1929, Alex C. McGregor assumed the office of county judge of Woodruff County, and thereafter caused the following order to be entered upon a record of the court:

"And now on this day, it appearing to the court that the clerk of this court on January 14, 1929, issued warrant No. 1138 in favor of Mrs. Ida Cain, in the sum of $150, which warrant had not been authorized by this court, the treasurer is hereby directed not to honor said warrant, and the clerk of this court will make and certify to the treasurer a copy of this order."

From this order Mrs. Ida Cain prosecuted an appeal to the circuit court. The two cases were consolidated in the circuit court, and on February 28, 1929, the following order was entered in the circuit court:

"That the appointment of Mrs. Ida Cain as chief probation officer of Woodruff County was justified under the law, and that the quorum court had a right, under the condition of the revenues of the county, to make the appropriation. (Cause No. 146). As to cause No. 145, the court finds that the order of the county judge made on the 24th day of January, 1929, canceling the warrant issued to Mrs. Ida Cain in the sum of $150, be vacated and set aside."

To reverse this judgment of the circuit court this appeal is prosecuted.

Appellee states: "It seems to us the only matter for consideration in the case is whether or not the appointment of the appellee as chief probation officer of the county was authorized by law; if so, the county is liable for the payment of her salary for the time in question."

County courts in the several counties of this State are authorized by statute to appoint probation officers. Section 5765, Crawford & Moses' Digest.

There is no constitutional or statutory provision fixing a definite term for the probation officer appointed by the county court. The appointment of the appellee to serve for a term of one year beginning on the 13th day of November, 1928, was not a valid appointment, because the term of the county judge who made the appointment expired December 31, 1928. The appointment of a county probation officer extending beyond a term of the

county judge is invalid except for the balance of the term of the county judge who made the appointment.

We said in a recent case: "It is a rule of universal application that, where an office is filled by appointment, and no definite term of office is fixed by a constitutional or statutory provision, the office is held at the pleasure of the appointing power, and the incumbent may be removed at any time. But the power of removal is not incident to the power of appointment where the extent of the term of office is fixed by Constitution or statute." *Beasley* v. *Parnell,* 177 Ark. 912. See also *Patton* v. *Vaughan,* 39 Ark. 211; *Ex parte Hennen,* 13 Peters (U. S.) 230; *Blake* v. *United States,* 103 U. S. 227.

The county probation officer is a county officer, and the case is wholly unlike the cases where the county judge or the county court is authorized to make a contract. In such cases the expiration of the term of the individual who was county judge at the time the contracts were made does not invalidate the contract. This, however, is not true of officers where the county judge or county court is authorized to make the appointment and the law fixes no term. Of course, if the appointment was invalid, as we hold that it was, the warrants issued would be without authority. And, holding as we do that the appointment could not extend beyond the term of the county judge, it becomes unnecessary to discuss or decide the other questions discussed by counsel.

The judgment of the circuit court is reversed, and remanded with directions to enter a judgment in accordance with this opinion.

BURNETTE *v.* ELSESSER.

Opinion delivered December 23, 1929.

Robertson & Gathings, for appellant.

Brewer & Cracraft, for appellee.

McHaney, J. Appellee, a young man about twenty-three, being the owner by inheritance from his father of the south part of lot 18 and all of lot 19 in Elsesser's subdivision to the city of Helena, contracted in writing, May 10, 1927, to sell the south part of lot 18 to Jean T. Brown for a consideration of $350. A conveyance was not immediately consummated, as the parties agreed to postpone it until the lapse of one year after the death of appellee's father for the filing of claims against his estate. Thereafter, on October 2, 1927, which was Sunday, appellee executed and delivered a warranty deed covering both lot 19 and the south part of lot 18 to appellant, the deed being dated October 1, 1927. There were valuable improvements on lot 19, same being rented to appellant at the time, and was incumbered by a mortgage for $3,000 to the Guaranty Loan & Trust Company, executed by appellee's father. The agreed consideration for this conveyance was the assumption by appellant of the $3,000 mortgage, the payment of the accrued interest of $120, insurance premium, and, according to appellant, $350 in cash, but according to appellee, $150 in cash, neither of which sums, however, was ever paid. The proof showed the equity in the property to be worth from $3,000 to $5,000 above the mortgage, and that

appellee, while not an incompetent, was young, inexperienced in real estate matters, knew nothing about the value of his inheritance, and was without funds to pay the semiannual interest then due on the mortgage. He was advised by appellant that, unless the interest was paid, the mortgage would be foreclosed, he would lose the property to the loan company, and might involve other of his property. This deed, prepared by appellant's counsel, recited a consideration of $10 and other good and valuable considerations. In it appellant did not assume or agree to pay the mortgage indebtedness, but the conveyance was made subject thereto.

On February 20, 1928, Jean T. Brown brought suit against appellee and appellant for specific performance of her contract, and thereafter appellee brought suit against appellant to cancel said deed on account of the matters above stated, and the additional ground that the deed was void as a Sunday contract. Appellee admitted that he was bound by his contract to convey to Mrs. Brown, but could not do so because of his deed to appellant, and that the south part of lot 18 was fraudulently included in the deed to appellant, without his knowledge or consent.

A decree was entered canceling the deed to appellant on the ground that all negotiations leading up to its execution, as well as the actual execution and delivery of the deed itself, occurred on Sunday. The suit of Mrs. Brown was dismissed for want of equity, as appellee offered to convey to her in the event his deed to appellant was canceled. Although Mrs. Brown has appealed, she is not interested if the decree is affirmed.

We think the court correctly canceled the deed to appellant. The evidence is practically undisputed that the deal was agreed to on a Sunday, and is wholly so that the deed was executed and delivered on Sunday. This being so, the deed was void, unless it was subsequently ratified on a week day. *Davis* v. *Murphy,* 177 Ark. 183,

5 S. W. (2d) 936. Appellant says he went into possession, made valuable improvements, and that appellee ratified the conveyance. None of these defenses were pleaded, but, even though they had been, they cannot be sustained. He was already in possession as tenant, and no new possession was taken under the deed. He paid appellee nothing; therefore no restoration could be made. Appellee merely acquiesced in the conveyance for about six months before seeking to cancel, which is insufficient to constitute ratification.

True, appellant paid the interest on the mortgage and made some repairs, all of which the court offset against the rents due appellee. We do not think this sufficient to constitute ratification. Moreover, the consideration was grossly inadequate, and, when this fact is coupled with the other inequitable conduct of appellant, such as failure to assume the indebtedness in the deed, the inclusion therein of the south part of lot 18, which was already under contract to Mrs. Brown, to appellant's knowledge, failure to pay any part of the cash consideration to appellee, together with appellee's youth and inexperience, was sufficient to justify the court in canceling the deed.

We find no error, and the decree is accordingly affirmed.

TAYLOR *v.* GORDON.

Opinion delivered December 23, 1929.

W. P. Strait, for appellant.

Edward Gordon, for appellee.

McHaney, J. Appellants brought separate actions against appellees, Gordon and Lucas, to recover from Gordon on a promissory note $1,907.65 and interest, and from Lucas $2,400 and interest, both notes being dated January 12, 1926, and given to the Bank of Morrilton in renewal of previous notes given to said bank in July, 1925, in payment for 40 shares each of said bank's stock of the par value of $1,000. In the case of Gordon $500 was paid to said bank in cash by check as part of the purchase price, and note given for $2,000, while in the case of Lucas no cash payment was made, and his note was for $2,500. In January, 1926, a dividend was declared and paid, and credited on these notes, thereby reducing them to the amounts above stated.

This stock was bought under the following circumstances: Loid Rainwater, president of the Bank of Morrilton, was, in July, 1925, appointed State Bank Commissioner. He desired to dispose of his stock in said bank, and induced appellee Stover to take it over and dis-

pose of it to others. He advised the Echols heirs, children of his sister, who were also stockholders, and are appellees here, to dispose of their stock, which they did, acting through Rainwater and Stover, at a price of $2.40 on the dollar. Stover called upon Gordon and Lucas, advised them the bank had some stock for sale, that it was worth three or four for one, was a good buy at $2.40 on the dollar; that they desired to place same with friends of the bank, and urged them to buy. He told them the bank would take their notes for same, and that the dividends would in time pay it out. Each of them agreed to purchase $1,000 par, for which Gordon gave his check to the bank for $500 and his note for $2,000, and Lucas gave his note for $2,500 as above stated. The Echols stock had already been surrendered and paid for by Stover, apparently by taking the bank's money and charging same to his account, without any authority from the board of directors to do so. When he received Gordon's check and the two notes, they were turned over to the bank, and his account credited therewith.

On March 18, 1926, Gordon executed his note to the bank for $431.20 for money borrowed. In December, 1926, the Bank of Morrilton was found to be wholly insolvent, and was placed in the hands of appellant Bank Commissioner for liquidation. Its assets, including said notes, were sold to appellant First State Bank, and this suit involved not only said notes but an assessment of 100 per cent. against all stockholders.

There was a decree canceling said stock purchase notes, permitting Gordon to offset his liability on the note for borrowed money and a small overdraft against his cash payment for stock, and denying a recovery against Gordon and Lucas on account of the 100 per cent. stock assessment. There was an alternative prayer in the complaint that, in the event no recovery was had against Gordon and Lucas, judgment might be had against Stover and the Echols heirs, both for the money of the bank unlawfully used in the purchase of the stock

and the 100 per cent. assessment. The trial court made no disposition of this latter prayer.

We think the court correctly denied a recovery against Gordon and Lucas. If the bank's money was used to acquire the Echols stock, and we think the evidence sufficient to justify the holding that it was, then the bank became the owner of the stock, and, when it was sold, the evidence is sufficient to sustain the finding that it was sold as the bank's property. Gordon and Lucas both say it was sold to them by Stover as the stock of the bank; and, while this is denied by Stover, the circumstances support Gordon and Lucas. The cash payment by Gordon was a check made payable to the bank, and not to Stover; both notes were made to the bank, and not to Stover; the Echols stock transferred to Gordon and Lucas was never in Stover's name, but was transferred from Echols directly to them. The bank, having furnished the money to pay for the stock, became at least the equitable owner thereof, and, through its cashier, attempted to make a sale of same to Gordon and Lucas by taking their notes for the purchase price, in violation of law. Section 8, article 12, Const. 1874; *Bank of Commerce* v. *Goolsby,* 129 Ark. 416, 196 S. W. 803; *Bank of Dermott* v. *Measel,* 172 Ark. 193, 287 S. W. 1017; *Bank of Manilla* v. *Wallace,* 177 Ark. 190, 5 S. W. (2d) 937.

Nor do we think there has been a ratification of the sale. The stock was never actually delivered, but was issued and retained by the bank. No meetings of stockholders were attended by them, and, while a dividend was credited on their notes and renewal notes executed, they did not know a dividend had been paid. They repudiated the transaction as soon as they discovered the true situation.

We decline to pass upon the liability of Stover or the Echols heirs, as the chancery court has not done so. If Stover, without authority, wrongfully took the money of the bank and used it to purchase or take up outstand-

ing stock, he and all those participating in the fraud with knowledge thereof, either directly or through an agent, would be liable to make restitution to the bank, and, if it were in fact insolvent at that time, equity would require them to bear the burden of the statutory liability of stockholders.

The decree will therefore be affirmed as to Gordon and Lucas, but as to all others will be remanded for further proceedings.

NORTHWEST ARKANSAS FARMERS' MUTUAL TORNADO INSURANCE COMPANY *v.* OSBORN.

Opinion delivered December 23, 1929.

John Mayes, for appellant.

John Hale and *John W. Nance,* for appellee.

BUTLER, J. The appellee brought suit against the appellant insurance company on a policy insuring his house in Washington County against destruction by tornado and lightning for the sum of $1,500, alleging that the house covered by the policy, while the same was in full force and effect, was on the.....day of April, 1928, totally destroyed by a cyclone, and the contents of the building, including the papers, insurance policy and checks and receipts for payment of assessments. The appellant defended, denying that plaintiff ever insured his property with it, or that any policy was ever issued covering said property, or that plaintiff had ever paid any premiums or assessments to it. There was a trial, which resulted in a verdict and judgment for the appellee for the sum named in the policy, with interest.

Appellee testified that he procured a fire insurance policy, and at the time of the issuance of it requested tornado insurance. He was informed that the company could not at that time write such a policy, but that arrangements were being made by which tornado insurance could be issued, and that, later on, he was informed by the local agent, Mr. Rogers, who had received his application for fire insurance, that tornado insurance could then be written, and that he (appellee) went to the office of the agent, situated in the back part of a bank, where he made application for tornado insurance, paid the premium of $5.25, which included the local agent's fee of $1.50, and received in due time a policy in the appellant company, the same being the one sued on. He testified that his fire insurance policy was issued in 1924, and the tornado policy in 1925, and that it was in full force and effect at the time of the loss; that he had kept his policy in a box at the local bank, but, after the bank failed, he had taken his policy and other papers to his home, where they were at the time of the destruction of his house and property.

M. C. Rich testified that he visited the appellee during the year 1928, and, while discussing his own insurance, he examined the insurance policies of the appellee and found that he had two policies, one for fire insurance and the other for tornado insurance, and that the tornado insurance policy was written by the appellant company.

Mr. Rogers, the local agent, testified that he was the agent for the appellant company in 1924 and 1925; that Mr. Letch "was president of both concerns. Earl Weir was secretary of one, and Mr. Hartley was secretary of the other. The company was divided into two branches. They wrote two policies, one for fire and the other for tornado. The fire policy covered the county and the tornado policy covered five counties, as I understood it. I received my instructions from Mr. Letch, the president, and I wrote both fire and tornado." Witness further testified that he wrote a fire policy for the appellee, and that at the time tornado insurance was wanted, but witness told him that the "company did not write it, but would come out with it before a great while, and Mr. Letch had told me they were going to organize and take in a bigger territory, and would come out later, and it was a good bit later." Witness stated that he had written a number of fire policies to persons who also wanted tornado insurance, and that, as soon as he could write the tornado insurance, he notified the policyholders to that effect, and a great many came in and brought their fire policies, from which he made application for tornado insurance upon which policies were later issued; that he sent some of the applications to Mr. Weir and some to Mr. Hartley and some to Mr. Letch; that Mr. Letch's office was at his house, and that he had no filing cabinets; "Just took care of them just like an ordinary home—just his tables and things like that." Witness could not remember whether he took appellee's application for tornado insurance or not, but stated "the next day after the tornado, people got to 'phoning just as soon as it was

over, you know, asking me if so and so had any policy, and they 'phoned me about Mr. Osborn's, and I couldn't remember, and then somebody 'phoned me and says, 'Dee says you wrote that in the back end of the bank,' and I says, 'Well, now, by the way, there is where I wrote them all, and undoubtedly I may have done it.' "

It appears from the testimony of the witnesses for the appellant that there were two insurance companies operating in Washington County, one known as the Washington County Mutual Fire Insurance Company and the other as the Northwest Arkansas Farmers' Mutual Tornado Insurance Company; that Mr. Letch was the president of both companies, and some of the officers are the same in each company, but they were separate organizations, kept separate funds, and one company was not liable for any loss occurring to the other. H. E. Hartley was the secretary of the appellee company, and had been since its organization. He testified that he had charge of the books of appellee company, and that no policy was ever issued, except application had been made, in which the description of the property was given; that his records disclosed that there had been 1,081 policies issued at the time of appellee's loss; that they were issued serially, without any break in the numbers from one to 1081, and none of these policies had been issued to the appellee, and all were in exact copies of the application; that if a policy was lost it would appear on the books of the company; that he would not issue a policy until he had first got the application. He further testified positively that he had not issued any policy to the appellee, but that he did not know whether the appellee was a policyholder or not until he consulted his records.

Mr. Weir testified that, as secretary of the company, he had issued to the appellee a fire insurance policy in April, 1924, and that the records of the appellee company, of which he was a director, did not show the issuance of any tornado policy to the appellee.

Mr. Seller testified that he was a director in both companies, and that he had examined the books of the appellee company, and Osborn's name did not appear therein.

After the verdict, and within apt time, the appellant filed its motion for a new trial, alleging, among other things, that after the trial it had discovered new evidence, which was vital and material, and which could not have been, with the exercise of diligence, discovered prior to the trial, and in support of this allegation filed the affidavit of John Mayes, in which the affiant in substance stated that he had read the motion for a new trial, had personal knowledge of the contents thereof, and "that said newly discovered evidence was not known to him, nor any member of the defendant company until after the trial of said cause; that said evidence could not have been discovered by the exercise of any degree of diligence prior to the trial of said cause; that same is vital and material, and would have changed the verdict of the jury if same had been introduced at said trial; that said facts were well known to the plaintiff prior to and on the date of said trial, and that he purposely concealed said facts in order to obtain a fraudulent judgment in this cause, and that such was the effect thereof; that the contents of the affidavit and motion for a new trial are true and correct to the best of my knowledge, information and belief." The affiant was the attorney of record for the defendant (appellant).

There was also filed the affidavit of F. S. Raedels, who stated that he was a local Red Cross director at Fayetteville, Arkansas, and "that he has personal knowledge of the fact that no relief is given to any storm sufferer if any tornado insurance is carried; that a representative of this relief unit made a personal and careful investigation of the loss sustained by Dee Osborn of Lincoln, Arkansas, growing out of the storm disaster which visited that locality; that the said Dee Osborn reported to him, and represented that he had no tornado

insurance on his property which had been blown away by said storm, and made said statement for the purpose of securing a donation from said relief unit; that, by reason of said statement that he carried no tornado insurance on his home or contents, he obtained funds from said unit sufficient to rebuild his home, together with other relief. He further states that it is the settled policy of said 'disaster unit' to pay no loss to any sufferer who carries insurance to cover the same, and that therefore, had Dee Osborn not made the representations that he did not carry any insurance, he could not have obtained the funds with which to build and furnish his home. He further states that the said Dee Osborn obtained judgment in the circuit court of Washington County for the sum of $1,500 by alleging and swearing that he did carry insurance in the Northwest Arkansas Farmers' Mutual Tornado Insurance Company, and that the loss for which said judgment was recovered was the same loss and on the same property the Red Cross aforesaid rebuilt and refurnished for him on his statement that he did not carry any tornado insurance upon the same."

The court, after hearing the motion for a new trial, overruled the same, and on this appeal the appellant relies, as grounds for reversal, first, upon the fact that the verdict of the jury and the judgment of the court are not supported by any competent testimony; and second, that the court erred in not granting appellant a new trial on the ground of newly discovered evidence.

■ On the first ground the appellant relies on the rule announced in the case of *St. Louis Southwestern Ry. Co.* v. *Ellenwood,* 123 Ark. 428, 185 S. W. 768, where it is said: "Appellate courts take notice of the unquestioned laws of nature, of mathematics, of mechanics and of physics; and where, by the application of such laws to the facts in evidence, it is demonstrated beyond controversy that the verdict is based upon what is untrue and what cannot be true, this court will declare as a matter of law that the testimony is not legally sufficient to war-

rant the verdict." The appellant argues that the application of this rule to the evidence introduced on behalf of the appellee will show that such testimony is impossible, and untrue. We do not think that any of the unquestioned laws of nature or of science are involved in the testimony in this case. There was a mere dispute as to whether or not the tornado policy had been issued. The appellee testified that such policy had been issued, and was corroborated by the testimony of other witnesses, while, on the other hand, the witnesses for the appellant testified with equal emphasis that the policy had not been issued, and they were corroborated by the books of the appellant company. This was a disputed question of fact which was dependent upon the memory and conduct of human beings, neither of which is infallible. The appellee might have been mistaken, or there might have been an error in the books of the appellant company. There were circumstances presented by the testimony to cast doubt upon the accuracy and credibility of appellee's testimony, but this was a matter solely within the province of the jury. They were the sole judges of the credibility of the witnesses and the weight to be given to their testimony, and, though this court might differ with the jury and trial court as to the correctness of the conclusions reached on issues of fact, it can only determine whether there be any substantial evidence to sustain the verdict. It was for the jury, and not for us, to weigh the evidence and determine the credibility of witnesses and to reconcile all real or apparent conflicts, and if there is substantial evidence to support the verdict, when viewed in the light most favorable to the appellee, and given its highest probative value with all inferences reasonably deducible therefrom, the verdict must stand. *St. Paul Fire & Marine Ins. Co.* v. *McElvaney,* 175 Ark. 1170, 300 S. W. 448; *Home Life & Accident Co.* v. *Scheuer,* 162 Ark. 600, 258 S. W. 648; *Standard Oil Co. of La.* v. *Hydrick,* 174 Ark. 813, 296 S. W. 708. Applying this rule to the evidence, viewed

in the light most favorable to the appellee, it is apparent that there was substantial evidence to sustain the verdict of the jury.

On the second ground for reversal, it may be said that courts are reluctant to grant a new trial on the ground of newly discovered evidence. A case where a showing made requires a new trial is unusual, and applications for a new trial for this cause are not favored, especially where the newly discovered evidence consists largely of conclusions and hearsay. 46 C. J. 216. This court early adopted the rule that the action of the trial judge in refusing to set aside a verdict on these grounds would not be disturbed unless there was a clear abuse of his discretion. In the case of *Olmstead* v. *Hill,* 2 Ark. 346, at page 352, the reason is given in the following language: "The reasons and principles upon which they rest are so obvious and conclusive that it seems almost impossible to overlook the essential requisites that the law requires to entitle a party to a new trial. He must have been guilty of no neglect or laches in preparing his case for trial. It must have been out of his power to procure the newly discovered evidence upon the former trial by due diligence and exertion to obtain it; and he must show to the court that the newly discovered evidence is material and important, by the affidavit of the witnesses, or by some other legal means; so that the court may judge of its materiality and sufficiency; and it must not be cumulative in its character and consequences. It is the duty of the parties to come prepared upon the principal points, and new trials would be endless if every additional circumstance bearing upon the facts in litigation were a cause for new trial."

In the case of *McFadden* v. *A. B. Richards Med. Co.,* 170 Ark. 1011, 282 S. W. 353, the court said: "The party asking a new trial for newly discovered evidence should not only state in his motion that he did not know of the existence of the testimony in time to produce it at the trial, but should also show facts from which it will

appear that he could not have ascertained or obtained such evidence by reasonable diligence."

It will be noted in the affidavits introduced that much of the statements contained therein are mere conclusions. In the affidavit of S. F. Raedels the statement relative to Dee Osborn reporting and representing to the representative of the Red Cross that he had no tornado insurance on his property is clearly hearsay, and in neither of the affidavits nor in the motion itself is there a compliance with the rule requiring a statement of facts from which it would appear that the evidence could not have been obtained by reasonable diligence; nor was there any showing or allegation that the testimony of the representative of the Red Cross, to whom the alleged statement of Dee Osborn regarding his having no tornado insurance on his property, could have been obtained. "It has been repeatedly held by this court that applications for a new trial upon the ground of newly discovered evidence are left largely within the discretion of the trial court. Unless such discretion has been manifestly abused, the appellate court will not disturb the action of the trial court." *McDonald* v. *Daniel,* 103 Ark. 593, 148 S. W. 271. We cannot say that the trial court abused its discretion in its refusal to grant a new trial in this case.

The judgment is therefore affirmed.

ARKANSAS FUEL OIL COMPANY *v.* STATE EX REL. ATTORNEY GENERAL.

Opinion delivered December 23, 1929.

Trieber & Lasley, for appellant.

Hal L. Norwood, Attorney General, and *George Vaughan,* for appellee.

BUTLER, J. This is the second appeal in this case. The State had sought to collect back taxes on the oil and gas leases of the Arkansas Fuel Oil Company for the years 1924, 1925 and 1926, to which the defense was made that the leases and rights thereunder were not subject to taxation separate from the fee in the lands for either of said years, and that all of said leases and rights were assessed and taxes for each of said years paid as part and parcel of and as entered into the value of the fee of the lands covered thereby, and that no property right or interest in and to the oil and gas *in situ* in the lands covered thereby passed to the lessee, and there was no such separation of the title to the mineral rights in the fee simple as to authorize a separate assessment, the only rights under the leases being incorporeal hereditaments taxable only in the domicile of the oil company. The further defense was made that the taxing authorities acquiesced in, and never opposed or corrected, the assessments made by the county and township assessing officers, and they refused to assess separately from the fee the leasehold interests, and the Attorney General has given an opinion to the effect that the leases were not taxable separately from the land, and, following the opinion of the Attorney General and the instructions of the taxing authorities, the county and township officers intentionally and systematically failed and neglected and refused to separately assess the leases from the fee in the land.

The State interposed a demurrer to this defense, which was overruled by the trial court, and judgment was entered in conformity with the prayer of the oil company.

On appeal to this court the decree of the court below was reversed, and the cause remanded with directions to sustain the demurrer, and to take such further proceedings as necessary to a determination of the issues in the case not inconsistent with the opinion. *State ex rel. Attorney General* v. *Arkansas Fuel Oil Co.*, 179 Ark. 848. On remand, the plaintiff amended its complaint to include the taxes of 1927 and 1928, so that, as amended, the complaint alleged that the taxes for the years 1924 to 1928, both inclusive, were due and unpaid, and prayed for the determination of the amount of the overdue taxes due the State and its several subdivisions on account of said leases for said years, and for judgment therefor.

The appellant, in its answer to the amended complaint, admitted that the leases involved were not assessed or taxed in any form for the years in question, and amended its answer by reciting the history of the discovery and development of oil and gas in this State, and that oil and gas leases from the beginning of the industry until the present time are of the same tenor and effect as the form of the leases involved in this suit, and that the State Tax Commission, during all the years named, was vested with general and complete jurisdiction which it exercised to supervise the assessment and collection of all taxes, and that during said years the Commission and township and county assessors were vested with power to assess all property subject to taxation; that, before the opening of the Union County oil field, there was no fixed policy on the part of the taxing authorities with respect to the taxation of oil and gas leases, and in fact no such leases were ever separately assessed for taxes and no taxes paid thereon; that the county assessor of Union County, in which these leases are situate, acting upon the advice of the prosecuting attorney, the Attorney General, the Arkansas Tax Commission and the decisions of this court in former cases, specifically named in the answer, during all the years involved, intentionally and continuously and uniformly failed and refused to assess for taxation, separate from

the fee in the lands, all oil and gas leases, even in instances where the owners tendered the same for separate assessment, and, as a result, oil and gas leases in Arkansas have entirely escaped taxation for each of the years involved in this suit, irrespective of whether they were or are owned by corporations or others; that during these years from thirty to fifty per cent. of all oil and gas produced in Arkansas came from leases not corporately owned; that the only oil and gas leases on which back or overdue taxes can be collected are those which were corporately owned when the tax accrued or when suit is filed, and that those not owned by corporations cannot be proceeded against for the collection of back taxes; that all oil and gas leases, whether corporately or individually owned, have for the years mentioned alike escaped taxation and to the same extent, by reason of the intentional, systematic and continuous neglect and failure of the taxing authorities to assess the same currently, and that the enforcement of the back-tax statute in this case, under the facts set forth, will be an intentional and systematic violation of the principles of uniformity in taxation, and will result in intentional and unjust discrimination against the appellant's leases and those owned by other corporations during said years in favor of leases of like form, tenor and effect not corporately owned, and will be an arbitrary classification of oil and gas leases for the purpose of taxation as between the owners thereof which are corporations and those who are not, in violation of the equal protection clause of the Fourteenth Amendment to the Constitution of the United States.

We can see no essential difference in the allegations of the amended answer and those of the answer under consideration by this court in *State ex rel. Attorney General* v. *Arkansas Fuel Co.,* 179 Ark. 848. There the allegation was made, as here, that the township officers, acting upon the advice of the Attorney General and the instructions of the taxing authorities, system-

atically failed and refused to list, value and return, separately from the fee in the lands for the purpose of taxation, any of said leases or rights thereunder. In that case the court said:

"It is * * * contended, however, that the statute is unconstitutional because it permits the collection of back taxes on corporately owned oil and gas leases, and intentionally exempts property owned by individuals. As to the statute authorizing the levy and collection of taxes from oil and gas leases there is no discrimination. * * * The statute authorizes the assessment and collection of taxes on leases, whether owned by individuals or corporations.

"But it is contended that the statute violates § 5 of article 16 of the Constitution of the State of Arkansas and the equal protection clause of the 14th Amendment to the Constitution of the United States. We cannot agree with appellee in this contention. * * * And as to the statute authorizing suits for back taxes, we call attention to the following case, which settles the question against appellee's contention: *White River Lumber Co.* v. *State*, 175 Ark. 956, 2 S. W. (2d) 25. In that case the court said: 'In upholding the right of the State to sue for these back taxes, it was stated by Mr. Justice HOLMES, speaking for the court, that it was within the power of the State, so far as the Constitution of the United States is concerned, to tax its own corporations in respect to the stock held by them in other domestic corporations, although unincorporated stockholders are exempt from such tax, and that a discrimination between corporations and individuals in regard to such a tax could not be pronounced arbitrary, although the precise ground of policy which led to the distinction did not appear.' It was there further said: 'The same is true with regard to confining the recovery of back taxes to those due from corporations. It is to be presumed, until the contrary appears, that there were reasons for more strenuous efforts to collect admitted dues from corpora-

tions than in other cases, and we cannot pronounce it an unlawful policy on the part of the State.' ''

As the amended complaint did not change the issues between the parties in so far as it related to the construction of the leases in question, the appellant is concluded by the holding of this court in *State ex rel Attorney General* v. *Arkansas Fuel Oil Co., supra.* The rule that the decision of an appellate court is controlling upon the court below after the case has been remanded and is equally controlling of the appellate court on the second appeal is so universal, and has been so many times declared by this court that the citation of authorities is deemed unnecessary.

It follows, therefore, that the decree of the court below must be affirmed. It is so ordered.

(1) ARKANSAS RAILROAD COMMISSION *v.* CASTETTER.

(2) CAP. F. BOURLAND ICE COMPANY *v.* FRANKLIN UTILITIES COMPANY.

G. E. Garner, for appellant.

Horace Sloan and *Joe C. Barrett,* for appellee.

Rowell & Alexander, amici curiae.

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

Robinson, House & Moses, Pryor, Miles & Pryor and *Harry E. Meek,* for appellant.

Dan W. Bryan, George F. Youmans and *Geo. W. Dodd,* for appellee.

Paul McKennon, amicus curiae.

Jno. W. Stayton, amicus curiae.

BUTLER, J. At the 47th session of the General Assembly of the State of Arkansas, act No. 55 was enacted for the purpose, as stated in the title, of "regulating the sale, delivery and distribution of ice, and vesting the Railroad Commission with jurisdiction over the same." The question to be determined in this case is whether the General Assembly, under the limitations upon the legislative power in the State imposed by the Constitutions of the United States and of Arkansas, can fix by law the price of manufacturing ice and provide regulations for the delivery and distribution of the same; and also whether those engaged in the manufacture and distribution of ice may be limited in number in any given territory.

It is claimed by the appellee that said act contravenes (a) the due process of law and the equal protection clauses of the Fourteenth Amendment to the Constitution of the United States, and that it is also invalid because it is in contravention of the Constitution of the State of Arkansas and of §§ 2, 3, 18 and 19 of article 2 of the Constitution of the State of Arkansas, because said act deprives the appellees of the right to engage in lawful business, and is a denial of equality of privileges, and authorizes the creation of a monopoly; and (b) that the provisions of the act authorizing the Railroad Commission to fix the price of ice is in contravention of the due process of law and the equal protection clauses of the Federal Constitution and similar clauses of the State Constitution, in that the ice business is not a business affected with a public interest.

■ There has of late years come into being a school of political science, numbering some of the leading thinkers of this country, which affirms that the aphorism, "competition is the life of trade," is illusory and false, and that the best method of protecting the public in the prices it must pay for commodities is that those commod-

ities be manufactured and distributed by monopolies. It is argued that by this means excessive investments and expenses will be eliminated, and therefore an article may be produced and distributed to the consumer at a far less cost than by an unregulated competition. It has been said that "competition is at once an expensive and absolutely ineffective ultimate method of regulating either the rates or the service of the modern municipal public utility, and that the objection to competition is the economic one of the unnecessary duplication of the investment and expense of maintenance and operation of two parallel systems, where one could render adequate service at practically half the cost of the installation, maintenance, and even of operation." Our Legislature evidently had this idea in mind when it provided, by § 15 of the act under consideration, that the Railroad Commission should not issue certificates to any person, firm or corporation authorizing the manufacture, sale or delivery of ice at any point where the facilities for the manufacture, sale and distribution of ice already existing are sufficient to meet the public needs therein and in § 16 providing the procedure for carrying its provisions into effect; and also when, in § 17 of said act, it provided that in any city, * * * place or community where more than one person * * * is engaged in the manufacture, sale or distribution of ice, and the expenses of such may be decreased, or the business conducted in a satisfactory or economical manner, joint operation of the facilities used for the purposes aforesaid may be authorized, and where it is shown that any one or more of the separate businesses cannot be operated at a profit, or that it would be to the public benefit, then one or more of the parties might acquire the property of the others, or that the parties might consolidate their businesses, "it being the purpose to prevent the duplication of unnecessary plants, facilities and service, and to afford the public prompt and continuous service at just and reasonable prices."

This may be a sound economic policy, but we cannot consider the expediency of these provisions, for the question for our determination is not that of policy, but of power. In our opinion, these provisions run counter to the genius and policy of our organic law, because the virtual effect of the provisions in the statute adverted to is the creation of monopolies, which are abhorrent to the principles of common law and which are expressly inhibited by the framers of our Constitution, in the Bill of Rights contained in article 2 of the Constitution of 1874. By § 2 of said article, the right to acquire and possess property is recognized and its protection guaranteed. By § 3 of the article the declaration is made that no citizen shall be deprived of any right, privilege or immunity. By § 18 the General Assembly is prohibited from making any grant to any citizen or class of citizens of privileges or immunities which upon the same terms shall not equally belong to all citizens. Section 19 declares that "perpetuities and monopolies are contrary to the genius of the republic, and shall not be allowed." By § 29 the declaration is made "that everything in this article is excepted out of the general powers of the government, and shall forever remain inviolate, and all laws contrary thereto or to the other provisions herein contained shall be void."

A monopoly is said to be "an exclusive right granted to one person or class of persons of something which was before of common right." 41 C. J. 82. Bouvier's Law Dict. defines monopoly as "a grant by the sovereign power of the State, by commission or otherwise, by which the exclusive right of buying, selling, making, working or using anything is given." In *Seattle* v. *Denker,* 58 Wash. 501, 108 Pac. 1086, it is said: "A monopoly exists when the sale or manufacture is restrained to one or to a certain number." The power to create exclusive privileges by legislative grant has long been recognized, but in all instances where this power is exercised the individual citizen had no inherent or natural right to engage

in the occupation or to use the thing granted. Legislatures have from earliest times granted exclusive ferry, turnpike and wharfage rights, but this was because the thing granted was the exclusive property of the sovereign of which it might have exclusive use, or which it might grant to any designated agency. This is also true of what has now come to be designated as public utilities, such as railroads, municipal lighting and water plants, and the like. The reason for the right to make the exclusive grant was because the one to whom the grant was made could not operate without first permission of the State to exercise some right which was originally and exclusively in the sovereign, or to use the property of that sovereign. But in all of the cases where an exclusive privilege to conduct a business has been granted, the citizen had no right before the grant of the privilege to conduct such business. In other words, the thing granted was not something which was a natural or common right.

Power to grant an exclusive franchise, where it is shown in the particular case to be justified as a measure for the safety or interest of the public, is unquestioned, but it is essential that the thing granted be something that is not of natural or common right. For instance, one person cannot be restricted in his right to use and enjoy his property in a particular manner in order that another may use his property in that manner to a greater profit than he could if each was left free to use his own as he pleased. *Commonwealth* v. *Bush* (Ky.), 26 Am. Rep. 189.

In the case of *New Orleans Gas Co.* v. *Louisiana Light Co.,* 115 U. S. 650, 6 S. Ct. 252, it was held that the right to operate gas works and to illuminate a city could not be exercised without special authority from the sovereign. The court said: "It is a franchise belonging to the State, and in the exercise of its police power the State could carry on the business itself or select one or several agents to do so."

The right of the Legislature to prohibit absolutely the engaging in a given calling cannot be doubted, where

such calling is inherently injurious to the public health, safety or morals, or has a tendency in that direction (*State* v. *Armstrong,* 38 Idaho 493, 225 Pac. 491; 33 A. L. R. 835; *Muggler* v. *Kansas,* 123 U. S. 623, 8 S. Ct. 273); and, having the right to prohibit it, would have the right, of course, to prescribe by whom or how the business might be conducted—to permit some to engage in it and deny it to others. But it cannot be said that the manufacture or sale of ice is either injurious to the public health, safety or morals, but, on the contrary, is a useful and necessary occupation. While the manufacture of ice is a modern industry, it is one in which any one might engage as a matter of common right, and did not originally come within the power of the State to license or regulate. Any person, having the means and inclination to engage in that business, might do so without having to call upon the State to grant it some power or privilege not common to all citizens alike.

This court, in the case of *Ex parte Deeds,* 75 Ark. 542, 87 S. W. 1030, in construing a statute denouncing the penalty against any person, *etc.,* who should travel over or through any county and sell certain specified articles, but excepted resident merchants of the county, held the same to be in conflict with the equal protection clause of the Fourteenth Amendment to the Federal Constitution and with § 18, article 2, of the State Constitution prohibiting the General Assembly from granting to any citizen privileges or immunities which were not upon the same terms common to all. The court quoted with approval from *Connelly* v. *Union Sewer Pipe Company,* 184 U. S. 450, 22 S. Ct. 431, as follows: "In prescribing regulations for the conduct of trade, it (the State) cannot divide those engaged in trade into classes and make criminals of one class if they do certain forbidden things, while allowing another and favored class engaged in the same domestic trade to do the same things with impunity. It is one thing to exert the power of taxation so as to meet the expenses of government, and at the same time

indirectly to build up or protect particular interests or industries. It is quite a different thing for the State, under its general police power, to enter the domain of trade or commerce, and discriminate against some by declaring that particular classes within its jurisdiction shall be exempt from the operation of a general statute making it criminal to do certain things connected with domestic trade or commerce. Such a statute is not a legitimate exertion of the power of classification, rests upon no reasonable basis, is purely arbitrary, and plainly denies the equal protection of the laws to those against whom it discriminates."

In *Lewis* v. *State,* 110 Ark. 204, 161 S. W. 154, a statute granting the exclusive privilege to take fish in a navigable stream to certain classes of persons and under certain circumstances and denying the right to others, was held unconstitutional as in contravention to the Bill of Rights of our Constitution. This also is the effect of the holding in *Dreyfus* v. *Boone,* 88 Ark. 353, 114 S. W. 718, but in that particular case it is held that the monopoly sought to be created by the statute was not a private business, but one which the State, under its police power, might regulate and limit in the proper manner. The court there quoted from *In re Lowe,* 54 Kansas 757, as follows: "While monopolies of any ordinary legitimate business are odious, we have seen that monopolies are upheld when deemed necessary in executing a duty incumbent on the city authorities or the Legislature for the preservation of public health. It is sometimes a matter of great nicety and difficulty to determine whether a particular business or calling is in its nature so directly connected with the public welfare that the performance can only be safely intrusted to some one acting under public authority."

In the case of *Replogle* v. *Little Rock,* 166 Ark. 617, 267 S. W. 353, the court, in construing and holding invalid an ordinance restricting and regulating the occupation of plumbing, speaking through Mr. Justice Wood,

said: "Under our State and Federal Constitutions all men have the inalienable right to acquire, possess and protect property and to pursue their own happiness, and of these sacred rights no man can be deprived without due process of law. Any statute, or municipal ordinance enacted pursuant thereto, which challenges the right of any person to engage in the legitimate and honest occupation of plumbing, without restraint or regulation, must find its justification in the fact that such a statute or ordinance is necessary to promote the general welfare. No individual can be deprived of the right to pursue his happiness in his own way, and to engage in honest toil in any avocation and in any manner he sees proper, in order to make a living for himself and those who may be dependent upon him, so long as he does not use such right in a manner to injure others. So long as the individual does not transcend this bound, his conduct is not subject to police regulation. Police power can only be exercised to suppress, restrain or regulate the liberty of individual action when such action is injurious to the public welfare. When statutes, and municipal ordinances pursuant thereto, have been enacted purporting to protect the health and welfare of a community, all doubts as to the constitutionality of such legislation must be resolved in its favor. * * * But, when such enactments are challenged as an invasion of the rights and liberties of the individual guaranteed by the fundamental law, then it becomes the duty of the courts to lay these enactments alongside the Constitution and determine whether the exercise of the police power in the suppression or regulation of ordinary occupations, trades or callings is really necessary for the public good."

In the case of *Balesh* v. *Hot Springs,* 173 Ark. 662, 293 S. W. 14, the court considered and held invalid a statute of this State permitting cities of the first class to prohibit the sale of merchandising by auction because in conflict with article 2 of the Bill of Rights of our Constitution. The court there quoted with approval from the

case of *Butchers' Union Co.* v. *Crescent City Co.,* 111 U. S. 746, 4 S. Ct. 652, as follows: "The common business and callings of life, the ordinary trades and pursuits, which are innocuous in themselves, * * *must therefore be free in this country to all alike upon the same conditions;" and from *Lawton* v. *Steele,* 152 U. S. 133, 14 S. Ct. 490, as follows: "The Legislature may not, under the guise of protecting the public interest, arbitrarily interfere with private business, or impose unusual or unnecessary regulations upon lawful occupations."

In the case of *Scougal* v. *State of South Dakota,* 3 S. D. 55, 51 N. W. 858, 15 L. R. A. 477-84, the following declaration is made: "It necessarily follows from the rules above laid down that, if a business is offensive to the community, or injurious to society, and is to be prohibited, it must be prohibited as to all. If it is regulated and controlled, it must be so regulated and controlled as to leave the business or calling free, under such restraints as the Legislature may impose, to be exercised alike by all. The government, under the guise of regulation, cannot prohibit or destroy. It cannot deprive any citizen of his right to pursue a calling, occupation or business not necessarily injurious to the community, who is willing to comply with all reasonable regulations imposed upon it."

Before a statute can be held unconstitutional, it must appear to be in conflict with some constitutional provision, or be opposed to natural right or the fundamental principles of civil liberty. Statutes are presumed to be constitutional and will not be held to be invalid unless expressly or impliedly forbidden. *Dabbs* v. *State,* 39 Ark. 353; *Moore* v. *Alexander,* 85 Ark. 171, 107 S. W. 395. But, as the business of manufacturing and producing ice is a business not inherently dangerous to the public welfare or morals, but is a legitimate business in which all might engage as a common right, such business could not be regulated or prohibited as to some and per-

mitted to others, especially where it is apparent that the right to limit the number engaged in the manufacture and sale of ice at any given point is for the benefit of others engaged in like business, and the benefit to the public would be remote and problematical. It is clear that the §§ 15 and 17 of act No. 55 are violative of the Constitution of this State, and are void.

By § 1 of the act under consideration the Legislature has declared "that the use of ice is a public necessity; that the use, manufacture, sale, delivery and distribution thereof within the State of Arkansas has direct relation to the health, comfort, safety and convenience of the public, the same being a prime necessity of life and monopolistic in its nature, and the price, manufacture, sale and delivery and distribution of ice within the State of Arkansas is hereby declared to be a public business impressed with a public trust and subject to public regulation as hereinafter enacted." By § 4 of the said act the Railroad Commission of Arkansas is clothed with the power to make and adopt reasonable and just rates and charges for the price of ice manufactured or sold in the State, and for the delivery and distribution thereof, and may adopt all necessary rates, rules, regulations and charges to govern and regulate the manufacture, sale, delivery and distribution of ice and to prevent unjust discrimination and extortion in such business.

The appellees in this case contend that the Legislature is without power, through any of its agencies, to fix the price of ice or to formulate rules for its delivery and distribution, because it contravenes the due process of law and equal protection clause of the Federal Constitution and similar clauses of the State Constitution, and that the ice business is not a business affected with a public interest. It is admitted that, if the manufacture and sale of ice is a business affected with a public interest, the Legislature had the power to enact laws by which the price of the product and its manufacture and distribution might be regulated. As is said by Mr. Chief Justice

Taft in the case of *Wolff Packing Co.* v. *Industrial Court,* 262 U. S. 522, 43 S. Ct. 630: "Business said to be clothed with a public interest justifying some public regulation may be divided into three classes: (1) Those which are carried on under the authority of a public grant of privileges. * * * (2) Certain occupations, regarded as exceptional, the public interest attaching to which was recognized from earliest times. * * * (3) Businesses which, though not public at their inception, may be fairly said to have risen to be such and have become subject in consequence to some government regulation. They have come to hold such a peculiar relation to the public that this is superimposed upon them." In order for the statute to be valid fixing the price and regulating the business of the manufacture and sale of ice, it must come within the third class above mentioned by Chief Justice Taft. It is contended by the appellees that such business is not one affected with a public interest, because such business could be only in the rendition of a service and not in the sale of a commodity; that an ice dealer may or may not sell ice as he chooses; that an ice company has no right to exercise the power of eminent domain, and that the ice business in Arkansas does not constitute a monopoly. In the able and exhaustive briefs filed by counsel for the appellees and *amici curiae,* a number of cases are cited and quoted from at length to support the position taken by them. They contend that the declaration by the Legislature that the ice business is a public business impressed with a public trust (affected with a public interest) and subject to public regulations, is not conclusive upon the court.

In *Wolff Company* v. *Industrial Co., supra,* it is said: "The circumstance of its alleged change from the status of a private business and its freedom from the regulation into one in which the public have come to have an interest, are always subject to a judicial inquiry," and, where the classification is obviously unreasonable and arbitrary, courts may disregard it. But, as is said in *Lindsay* v. *Gas*

Company, 220 U. S. 61-78, 31 S. Ct. 337: "When the classification in such a law is called in question, if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed." Appellees assert that the manufacture and preparation of human food, the manufacture of clothing for human wear, and the production of any substance in common use for fuel, have been held to be businesses not affected with a public interest justifying price regulation, and they argue that, if a business dealing in the manufacture and sale of food for human consumption is not a business affected with a public interest and subject to price regulation, the ice business would be a business having certainly no greater interest than the sale of food, and therefore would not be subject to statutory regulation.

A number of cases have been cited to sustain this view, notably that of *Wolff Packing Co.* v. *Industrial Court, supra; Williams* v. *Standard Oil Co.,* 278 U. S. 235, 49 S. Ct. 115; *Fairmont Creamery Co.* v. *State of Minnesota,* 274 U. S. 1, 47 S. Ct. 506; and *Tyson* v. *Banton,* 273 U. S. 418, 47 S. Ct. 426. We have examined with care the case of *Wolff Packing Co.* v. *Industrial Court, supra,* and are unable to appreciate that case as authority for the views advanced by the appellees. This case was brought to test the validity of the Court of Industrial Relations Act of Kansas, chp. 29, special session, Laws of 1920, which declared as affected with a public interest the manufacture and preparation of food for human consumption, the manufacture of clothing for human wear, the production of any substance in common use for fuel, the transportation of the foregoing, public utilities, and common carriers, and vested an industrial court of three judges with power to hear any dispute over wages or other terms of employment in such industries, and to make findings and fix wages and other terms for the future conduct of the industries.

Under the provisions of the above act the Industrial Court heard a dispute between the Wolff Company and its employees respecting wages the latter were receiving, and made an order as to wages, increasing them over the figures to which the company had recently reduced them. That controversy reached the Supreme Court of the United States on appeal, where, in considering it, the court said: "It is very difficult under the cases to lay down a working rule by which readily to determine when a business has become clothed with a public interest. All business is subject to some kind of public regulation; but when the public becomes so peculiarly dependent upon a particular business that one engaging therein subjects himself to a more intimate public regulation is only to be determined by the process of exclusion and inclusion, and to gradual establishment of a line of distinction. We are relieved from considering and deciding definitely whether preparation of food should be put in the third class of *quasi*-public businesses, noted above, because, even so, the valid regulation to which it might be subjected as such could not include what this act attempts." And further: "We are considering the validity of the act as compelling the employer to pay the adjudged wages, and as forbidding the employees to combine against working and receiving them. The penalties of the act are directed against effort of either side to interfere with the settlement by arbitration. Without this joint compulsion, the whole theory and purpose of the act would fail."

It will be seen from the above quotations from the decision that the court did not undertake to consider or decide that the manufacture of public food, clothing, *etc.*, were businesses not affected with a public interest and not subject to a proper regulation by the State.

In *Williams* v. *Standard Oil Co., supra,* the court held that the business of dealing in gasoline, whatever its extent, is not a business affected with a public interest, because gasoline was one of the ordinary commodi-

ties of traffic differing in no essential respect from a great variety of other articles commonly bought and sold by merchants and private dealers in the country, and that there was nothing to justify the conclusion that the sale of gasoline was a monopoly in the State of Tennessee. It is in fact a matter of common knowledge in this State that the business of selling gasoline is highly competitive, and we may reasonably assume that such conditions exist in Tennessee, and were known to the court.

Tyson v. *Banton, supra,* was a case involving the validity of an act of the Legislature of New York which sought to regulate the price of theatre tickets. A majority of the court held that the business of selling theatre tickets was not a business necessary in its nature and differed widely in character and degree from a business which was necessary to the comfort and happiness of the public; that it bore no relation to the commerce of the country, but that the public merely derived ease and amusement by reason of its operation; that theatres were mere private enterprises, and that the sales of theatre tickets were interdependent transactions standing, both in form and effect, separate and apart from each other and terminating in their effect with the instances. However, to the conclusion and judgment of the majority four justices dissented, their dissent being voiced in a very able opinion by Justices Holmes and Stone.

In *Fairmont Creamery Co.* v. *Minnesota, supra,* involving the validity of a Minnesota statute prohibiting any person, *etc.,* buying milk or cream from discriminating between different localities by paying a higher price in one than in another, in holding the statute unconstitutional, the court said: "The real question comes to this: May the State, in order to prevent some strong buyers of cream from doing things which may tend to monopoly, inhibit plaintiff in error from carrying on its business in the usual way heretofore regarded as both moral and beneficial to the public, and not shown now to be accompanied by evil results as ordinary inci-

dents? * * * The statute itself ignores the righteous distinction between guilt and innocence. * * * It is not permissible to enact a law which, in effect, spreads an all-inclusive net for the feet of everybody upon the chance that, while the innocent will surely be entangled in its meshes, some wrongdoers also may be caught.''

''It is very difficult to lay down a working rule by which it may be determined when a business has become 'clothed with a public interest,' '' but it seems fairly certain, from the cases which have passed upon that question, that, where these conditions arise in a given case, then a business may be said to be affected with a public interest, to-wit, when it is such that the public must use its commodities in such manner as to make it of public consequence; where the nature of the service rendered has become indispensable for the convenience and happiness of the people, and where it is fairly probable that excessive charges and arbitrary control of the business may arise.

The leading case perhaps on this subject is that of *Munn* v. *Illinois,* 94 U. S. 113, where the question determined was the right of the State to fix by law the maximum charge for storage of grain in warehouses at Chicago and other places in the State having not less than 100,000 inhabitants. In affirming this right, the Supreme Court of the United States, through its Chief Justice, after stating the case, said: ''This brings us to inquire as to the principles upon which this power of regulation rests, in order that we may determine what is within and what is without its operative effect. * * * Property becomes clothed with a public interest when used in a manner to make it of public consequence and affect the community at large. When therefore one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good, to the extent of the interest he has thus created. He may withdraw his grant by discontinuing the use;

but, so long as he maintains the use, he must submit to the control."

After reviewing the growth of the State and of the businesses regulated by the act under consideration, the court continues: "This indicates very clearly that, during the twenty years in which this peculiar business had been assuming its present 'immense proportions,' something had occurred which led the whole body of the people to suppose that remedies such as are usually employed to prevent abuses by virtual monopolies might not be inappropriate here. For our purposes we must assume that, if a state of facts could exist that would justify such legislation, it actually did exist when the statute now under consideration was passed. For us the question is one of power, not of expediency. If no state of circumstances could exist to justify such a statute, then we may declare this one void, because in excess of the legislative power of the State. But, if it could, we must presume it did. Of the propriety of legislative interference within the scope of legislative power, the Legislature is the exclusive judge. Neither is it a matter of any moment that no precedent can be found for a statute precisely like this. It is conceded that the business is one of recent origin, that its growth has been rapid, and that it is already of great importance. And it must also be conceded that it is a business in which the whole public has a direct and positive interest. It presents therefore a case for the application of a long-known and well-established principle in social science, and this statute simply extends the law so as to meet this new development of commercial progress. There is no attempt to compel these owners to grant the public an interest in their property, but to declare their obligations, if they use it in this particular manner. * * * It is insisted, however, that the owner of property is entitled to a reasonable compensation for its use, even though it be clothed with a public interest, and that what is reasonable is a judicial, and not a legislative, question. As has already

been shown, the practice has been otherwise. In countries where the common law prevails, it has been customary from time immemorial for the Legislature to declare what shall be a reasonable compensation under such circumstances, or, perhaps, more properly speaking, to fix a maximum beyond which any charge made would be unreasonable. Undoubtedly, in mere private contracts, relating to matters in which the public has no interest, what is reasonable must be ascertained judicially. But this is because the Legislature has no control over such a contract. So, too, in matters which do affect the public interest, and as to which legislative control may be exercised, if there are no statutory regulations upon the subject the courts must determine what is reasonable. The controlling fact is the power to regulate at all. If that exists, the right to establish the maximum of charge, as one of the means of regulation, is implied. In fact, the common-law rule, which requires the charge to be reasonable, is itself a regulation as to price. Without it the owner could make his rates at will, and compel the public to yield to his terms, or forego the use. * * * We know that this is a power which may be abused; but that is no argument against its existence. For protection against abuses by Legislatures, the people must resort to the polls, not to the courts."

In the case of *Leep* v. *Railway Co.*, 58 Ark. 407, 25 S. W. 75, the court recognized the power of the Legislature to regulate a business where same was clothed with a public interest, quoting with approval from the case of *Munn* v. *Illinois, supra,* and, as illustrative of the cases wherein such power was properly exercised, referred to the case of *Spring Valley Waterworks* v. *Schottler,* 110 U. S. 347, 4 S. Ct. 48, where it is said: "It is within the power of the government to regulate the price at which water should be sold by one who enjoys a virtual monopoly of the sale;" and to *Davis* v. *State,* 68 Ala. 58, 44 Am. Rep. 128, upholding an act making it unlawful for any person to transport, after sunset and before sun-

rise of the succeeding day, within certain counties, any cotton in the seed, except the owner might move from his field to his place of storage, because, as is said by the Alabama court, "its object was to regulate the traffic in the staple agricultural product of the State, so as to prevent a prevalent evil, which, in the opinion of the law-making power, may have done much to demoralize agricultural labor and to destroy the legitimate profits of agricultural pursuits, to the public detriment, at least in the territory affected;" and, the case of *Powell* v. *Pennsylvania,* 127 U. S. 678, 8 S. Ct. 992, holding that the Legislature of Pennsylvania had the power by statute to regulate or prohibit the sale or manufacture of oleomargarine.

Not a great many years ago, the business of ginning cotton was purely a private business, the owners of many small farms having their own private gins, and, where the farms were too small to warrant this, each small neighborhood having its own community gin. The gins were operated by horses or mules; their construction was simple and their cost small, and at that time and under those conditions they were not the subject of State regulation. However, the ginning industry has completely changed, so that now the great modern ginneries gin many times the number of bales in a day that the old-fashioned horse gin could produce, and serve large territories and great numbers of people. Therefore many of the cotton growing States have found that this business has become affected with public interest, and have passed various regulatory statutes, which have been uniformly upheld as a valid exercise of legislative power.

In the case of *Simms* v. *State,* 80 Okla. 254, 196 Pac. 132, 23 A. L. R. 1475, the Supreme Court of Oklahoma sustained an act prescribing the retail price of bagging and ties to be charged by the operators of cotton gins. In the case of *Tisdale* v. *Scarborough,* 99 S. C. 377, 83 S. Ct. 594, the court said: "A general law with reference to the sale of cottonseed can be enacted." A num-

ber of other cases to the same effect are cited in the note to *Simms* v. *State, supra,* at pages 1478 *et seq,* 23 A. L. R.

In *Tallahassee, etc., Co.* v. *Holloway,* 200 Ala. 492, 76 So. 434, L. R. A. 1918A page 280, the Alabama Supreme Court, speaking of mills for the grinding of grain, said: "They have always been considered so necessary for the existence of the community that it was proper for government to foster or maintain them. And, in the absence of government aid, the individual proprietor, not pretending to serve the public, might maintain such mills as private mills, free from legislative interference, precisely as he might maintain a store, shop, or other private business; but when such proprietor makes his mill public and assumes to serve the public, then he dedicates his mill to public use, and it becomes a public mill, subject to public regulation and control. * * * Cotton gins were, of course, not so classed by the common law, for the reason that they are of comparatively modern invention, dating back no further than the year 1792. The question as to when private property becomes so clothed with a public interest and used in such a manner as to make it of public consequence was treated by the Supreme Court of the United States in *German Alliance Ins. Co.* v. *Lewis,* 233 U. S. 389, 34 S. Ct. 612, (and other cases cited). * * * Any one has, of course, the right to erect a gin for his own private purposes, but, when he undertakes the ginning of cotton for the public, his gin is dedicated to the public use, and, under the authorities above cited, it becomes clothed with a public interest affecting the community at large and subject to governmental regulation.

Act No. 55 of the Acts of 1929 has declared the use of ice a public necessity, having direct relation to the health, comfort, safety and convenience of the public, and monopolistic in its nature, and the business of the manufacture, sale and distribution of ice is declared to be a public business. As we have seen, in order for a

business to be said to be clothed with a public interest, the use of its commodities by the public must be such as to make it of public consequence or be of such nature that the service rendered has become indispensable for the convenience and happiness of the people, and where it is fairly probable that excessive charges and arbitrary control of the business may arise. This is in effect the legislative declaration as to the business of the manufacture, sale and distribution of ice in the State of Arkansas. Is such a classification so unreasonable that no state of facts can be conceived that would sustain it? If it is of such nature, then it is the subject of judicial inquiry, and may and ought to be held invalid. We do not think, however, that such classification is unreasonable or arbitrary. It is a matter of common knowledge that the use of ice is universal in all the urban communities of this State; that it is both convenient and necessary for the comfort and wellbeing of a large proportion of our citizens; that the cost of machinery for the manufacture of ice and its installation is beyond the reach of the average citizen, and that in all of the smaller towns there is no competition, and the manufacture and sale of ice is conducted by a single manufacturer. These facts warrant the assumption on the part of the Legislature that the business is monopolistic in its nature.

The learned Chief Justice, in the case of *Munn* v. *Illinois, supra,* might well have been discussing the growth and character of the ice business in Arkansas and the necessity for its regulation when, after giving a history of the growth of the business then being considered by the court, he said: "This indicates very clearly that during the twenty years in which this peculiar business has been assuming its present immense proportions, something had occurred which led the whole body of the people to suppose that remedies such as are usually employed to prevent abuses by virtual monopolies might not be inappropriate here. For our purposes we must assume that, if a state of facts could exist that would justify

such legislation, it actually did exist when the statute now under consideration was passed."

When the rules which have been stated by the cases cited *supra,* which determine what constitutes a business affected with a public interest, are applied to the ice business, it is manifest that a state of facts may well be conceived to exist which will clothe that business with a public interest. The Supreme Court of Oklahoma has so decided in the case of *Okla. Light & Power Co.* v. *Corp. Commission,* 96 Okla. 19, 220 Pac. 54, where it is said: "In this situation the distributor of such a necessity as ice should not be permitted, by reason of the impracticability of any one else engaging in the same business, to charge unreasonable prices. * * * It may be contended that, if the manufacture, sale and distribution of ice is subject to regulation for the reason that the distributor happens to be the only one engaged in the business in a particular community, a mercantile establishment, which happens to be the only one in a community, would be subject to regulation for the same reason. The fallacy of such contention is apparent. Ice is an article of common household necessity, the supply of which must ordinarily be purchased every day. Ordinary articles of merchandise may be purchased at a convenient time and in sufficient supply for ordinary use for a considerable time."

That the ice business is a business clothed with a public interest has also been held in the case of *Denton* v. *Denton Home Ice Co.,* 18 S. W. (Tex.) 606, 2d ed.; also in the case of *Tombstone* v. *Macia,* 30 Ariz. 218, 245 Pac. 677, 46 A. L. R. 828; and in *Saunders* v. *Arlington,* 147 Ga. 581, 94 S. E. 1022. As pointed out by appellees in their several briefs, there are cases taking the opposite view, notably those of Louisiana, Missouri and Wisconsin. However, the Louisiana decision, *Union Ice & Coal Co.* v. *Town of Ruston,* 135 La. 898, 66 So. 662, held that the construction and maintenance of a municipal ice plant by a small city operating municipal waterworks

and electric light systems could not be maintained by exercise of the taxing power, because of the peculiar language of the Louisiana State Constitution limiting the taxing power of municipal corporations under authority delegated by the General Assembly to businesses strictly public in their nature. The court holding that the word "strictly," as used in the Constitution, was used in the sense of undeviating, accurate, governed by exact rules. In the states of Wisconsin and Missouri, where it has been held the ice business is not public in its nature, the climatic conditions are vastly different from those of Arkansas, and the harvesting and storage of ice may be profitably pursued by individuals, and the necessity for the manufacture by artificial means does not exist as in this State.

We therefore conclude that the legislative declaration that the ice business is one properly the subject of governmental regulation is not arbitrary or unreasonable, and must be upheld by this court.

■ Having determined that §§ 15, 16 and 17 of the act under consideration are void as within the inhibition of the Constitution, and that it is within the power of Legislature to declare the sale and distribution of ice a business affected with a public interest, and as such the subject of proper legislative regulation, we have lastly to consider and determine whether the act is severable—that is, whether or not the act may stand with §§ 15, 16 and 17, *supra,* eliminated, or whether the remaining sections are so related to the unconstitutional ones that the whole act must fall.

By § 1 of act No. 65 of the Acts of 1929 the declaration is made that the use of ice is necessary, that the manufacture, sale and distribution of same is monopolistic in its nature, and subject to public regulation. Sections 2, 3 and 4 grant to the Railroad Commission jurisdiction over the ice business, empowering it to fix prices and rates for the sale, delivery and distribution, and to adopt such rules as might be necessary to carry

into effect the powers granted. Section 5 prohibits unjust discrimination, defines same, and fixes penalties for such. Section 6 provides for the printing and publishing of schedules of rates and charges. Section 7 defines the offenses for violation of the rules of the Commission fixing the prices for charges for distribution, for unjust discrimination, and for soliciting or accepting any discrimination. Section 8 requires those engaging in the manufacture, etc., of ice to file with the Commission a schedule of rates and charges for sale and delivery, with a statement giving information as to locality, capacity, persons in charge, etc., and provides for procedure for hearings regarding orders fixing rates. Section 9 provides for procedure for amending or changing regulatory orders. Section 10 and § 11 provide that rates fixed shall be deemed just until otherwise found by the Pulaski Circuit Court, and provides for appeals from orders of the Commission and procedure therefor. Section 12 authorizes the inspection of books and papers. Section 13 requires answers to questionnaires, and provides the penalty for failure to make same under oath within a specified time. Section 14 provides for license fees, etc. Section 16 has no relation to any portion of the act except the section immediately preceding (§ 15), which authorizes the Railroad Commission to deny permit to make or sell ice in a locality where it may determine the facility for those purposes already sufficient. Section 16 provides for the procedure for carrying into effect the provisions of § 15. Section 18 authorizes the Commission to adopt rules governing its proceedings, to regulate the manner of necessary investigations and hearings, and that same be public, and grants power to compel the attendance of witnesses and for production of books and papers, and to administer oaths. Section 19 empowers the Commission to employ assistants and regulate their salaries and all expenses to be paid out of funds derived from license fees, etc., and requires the Commission to make

an annual report of its proceeds, receipts and disbursements. Section 20 exempts those who make ice solely for their own use or for consumption by their employees. Section 21 repeals all laws in conflict. Section 22 provides that "if any section or part of this act shall be held to be invalid, it shall not affect the remaining portions thereof."

Even though the Legislature might not have expressed its will that valid parts of a statute should be preserved, though a part might be unconstitutional, it is the duty of the court to accomplish this purpose if, as stated in Cooley's Constitutional Limitations, 6 ed. p. 210, "a statute attempts to accomplish two or more objects, and is void as to one, it may still be in every respect complete and valid as to the other. But if its purpose is to accomplish a single object only, and some of its provisions are void, the whole must fail, unless sufficient remains to effect the object without the aid of the invalid part."

The General Assembly of 1917 enacted a special statute creating an improvement district, and authorized the assessment of personal property, as well as real estate, to raise funds to provide for the construction and maintenance of the improvement, and provided that, if any part of the assessment should be declared to be void, then only that part of the property which it was legal to assess should be assessed to defray the cost of the improvement. In the case of *Snetzer* v. *Gregg,* 129 Ark. 542, 196 S. W. 925, the personal assessment was declared unconstitutional, and that the entire act was void except for the provision above, but held that, by reason of it, the act was severable, the court saying: "In R. C. L., § 123, is this statement: 'Occasionally the Legislature expressly states its will that the valid provisions of a statute shall be enforced in spite of any judicial determination that certain sections of the act are unconstitutional. Such expression of the will of the Legislature is generally carried out.' We are

not prepared to say that the rule stated by the text-writer can be given general application so as to apply to all cases where the lawmakers may see fit to incorporate such a declaration into a statute, but we do say, when applied to a statute like this, it constitutes a legislative declaration of its full purpose, and that declaration can and should be carried into effect."

In *Sallee* v. *Dalton,* 138 Ark. 549-56, 213 S. W. 762, this statement is made: "There is another reason why material parts, if not all, of this statute should be upheld, even if assailed portions were void. There is a section of the statute which reads as follows: 'If, for any reason, any provision of this act shall be held to be unconstitutional, it shall not affect the remainder of the act, but the act, in so far as it is not in conflict with the Constitution, shall be sufficient to stand.' "

In the case of *Snetzer* v. *Gregg,* 129 Ark. 542, 196 S. W. 925, we passed on the question of partial invalidity of a statute, and held, "that a provision similar to the one in the present case giving expression to the legislative will to put into effect every part of the statute found to be constitutional and valid, was effective to preserve intact parts of the statute found to be valid, even though other portions of the same statute were violative of the Constitution."

In the case of *Nixon* v. *Allen,* 150 Ark. 244, 234 S. W. 45, the act before the court was an act, "as shown by its title as well as the subject-matter of its various sections * * * a comprehensive and complete plan of government for the county of Pulaski. Section 28 of the act provided that, if any part should be held to be unconstitutional, that decision should not affect the validity of its remaining portions. The court held that § 1 of the act, which provided for two county judges for Pulaski County, was in conflict with § 28, article 7, of the Constitution, and that § 8, creating a board to fix the salaries of county officers and the salaries and numbers of their clerks, was a delegation of legislative authority, and void

under § 4, article 16, of the Constitution. After an examination of the remaining sections of the act, the court, after carefully reviewing and considering same as related to the section violative of the Constitution, concluded as follows: "A critical analysis of the various provisions of this act discloses that §§ 1 and 8 touch at some angle nearly all of the provisions of the act, except those embodied in the two last sections (the two last sections were § 28, noted *supra,* and § 29, providing the act to be supplemental to existing laws and not to repeal any except as are in conflict with the act). Sections 1 and 8 are to this act as is the hub to the wheel and the foundation pillars of a building. Since these two sections fall under the condemnation of the constitutional inhibition, they must be removed from the act, and thereby the whole fabric of the county government built up by the framers of this law necessarily falls to pieces."

Examining the act in the instant case in the light of the decisions of this court and applying to its construction the rules therein announced, we conclude that the act is not dependent upon §§ 15, 16 and 17, *supra.* They do not "touch at some angle nearly all the provisions of the act;" they are not "to this act as is the hub to a wheel and the foundation pillars of a building," but seek to accomplish a different purpose to the remainder of the act, and are neither necessary nor helpful for carrying it into effect. Without the invalid sections (15, 16 and 17) we have a comprehensive and workable plan for the regulation, sale, delivery and distribution of ice, and those sections are not indispensable or helpful in carrying this purpose into effect. The remaining sections of the act do not relate to and are not dependent upon the invalid sections. We are therefore of the opinion that the act is severable, especially with the aid of the expression of the legislative will that it should be so construed, and with such declaration it is manifest that the Legislature intended that the plan regarding the price and distribution of ice should stand, even though those

sections inserted, by which were given to the ice manufacturers a monopoly, should be unconstitutional.

It follows from what we have said that §§ 15, 16 and 17, *supra,* must be stricken from the act, and that the remainder of the act is a valid exercise of the legislative power and an expression of its will, and therefore must stand.

Inasmuch as the cases brought to this court on appeal were for the purpose of preventing the appellees from engaging in the ice business in Fort Smith and Jonesboro, Arkansas, the decree of the court in each case, in so far as it holds the act in question unconstitutional as to §§ 15, 16 and 17 and dismisses the complaint of the appellants for want of equity, is affirmed.

HISEY *v.* SLOAN.

Opinion delivered January 13, 1930.

[redacted]

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[redacted]

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D. E. McGowan and *Caraway, Baker & Gautney,* for appellants.

Eugene Sloan, for appellees.

HART, C. J., (after stating the facts). It is contended that the court erred in not allowing the minors to redeem the land from the tax sale, and, in this contention we think counsel are correct. Our statute authorizes the sale of land delinquent for nonpayment of taxes, and it also contains a saving clause, granting to minors the right to redeem the land from the tax sale within two years after the expiration of their disabilities as minors. This court has uniformly held that all the world must take notice of the statute granting to minors the privilege of redeeming the land from a sale for taxes. *Bender* v. *Beam,* 52 Ark. 132, 12 S. W. 180; *Seger* v. *Spurlock,* 59 Ark. 147, 26 S. W. 819; *Hodges* v. *Harkleroad,* 74 Ark. 343, 85 S. W. 779; *Bradbury* v. *Johnson,* 104 Ark. 108, 147 S. W. 865; Ann. Cas. 1914, 6, 419; and *Lightle* v. *Laws,* 123 Ark. 537, 186 S. W. 73.

Counsel for appellee, Sloan, the purchaser at the tax sale, seeks to uphold the decree holding the tax sale valid, for the reason that appellants did not raise this issue in their complaint, and did not offer to redeem the lands therein. Appellee, Sloan, filed a cross-complaint in which he asks that the title be vested in himself, under his purchase at the tax sale. When this was done, it became the duty of those representing the minors to raise the issue for them, and if they did not do it, it became the duty of the court to protect their interest. The court did treat

this as an issue, as appears from the decree, but the chancery court was wrong in decreeing that the title should vest in appellee, Sloan, without giving the minors the right to redeem. This issue was raised by the cross-complaint, and by the facts on this point recited in the decree, and the court erred in not allowing the minors the right to redeem from the tax-sale.

Again, counsel seek to uphold the decree upon the ground that there is no bill of exceptions, and that oral evidence was introduced at the trial. The decree does show that oral evidence was introduced, but it also undertakes to recite all the facts in the decree itself, upon which the chancellor based his opinion. This court has uniformly held that no bill of exceptions is necessary, where the judgment of the lower court, reciting the facts on which it is based, shows error on its face. *Baucum* v. *Waters,* 125 Ark. 305, 188 S. W. 802, and cases cited; *Sizer* v. *Midland Valley Railroad Co.,* 141 Ark. 369, 217 S. W. 6; and *Howell* v. *Miller,* 173 Ark. 527, 292 S. W. 1005.

The error of the chancery court in not allowing the minor children the statutory right of redemption appears upon the face of the record. Not only the facts recited in the decree were part of the record, but the pleadings in the case were also a part of it. Therefore, the error of the court was apparent from the face of the record itself, and no bill of exceptions bringing in the testimony on the record was necessary.

Inasmuch as the decree must be reversed for the error in not allowing the minors their statutory rights to redeem from the tax sale, we will call attention to their rights, and the rights of the purchaser at the tax sale upon redemption. The purchaser at the tax sale was entitled to a deed two years from the date of the sale, and, after the execution of the deed, the purchaser was entitled to the possession of the land. The existence of the right of redemption in the minors until two years after majority has the effect of making such right a con-

dition subsequent to the tax deed. The same law under which the purchaser acquired his right to the land also confers the right of redeeming upon the minors. Without redeeming, the minors hold no present interest, and can only assert a right to the rents after they have offered to redeem. *Lightle* v. *Laws,* 123 Ark. 537, 186 S. W. 73; *Bender* v. *Bean,* 52 Ark. 132, 12 S. W. 180; and *Seger* v. *Spurlock,* 59 Ark. 147, 26 S. W. 819.

These authorities hold that the tender made by the owner to the purchaser is the point at which the title changes, and the positions are reversed. Up to that time, no rents are due from the purchaser, while all moneys paid out for taxes and the value of all the improvements are due to him. Improvements made after an offer to redeem, and taxes paid afterwards, except by contract, are not charges against the owner or on the land, and the purchaser in possession is bound for rents accruing after that date.

Inasmuch as the case does not seem to have been developed upon this point, the decree will be reversed and the cause will be remanded, with directions to the chancery court to allow the minors their statutory right of redemption, and to settle the question of taxes and improvements in accordance with the principles of law above laid down, and for such further proceedings as may be necessary under the principles of equity, and not inconsistent with this opinion.

EZZELL *v.* OIL ASSOCIATES, INC.

Opinion delivered January 13, 1930.

[redacted]

Patterson & Rector, for appellants.

Marsh, McKay & Marlin, for appellee.

HART, C. J., (after stating the facts). As will be seen from our statement of facts, the lease contains no express covenant as to the number of wells that should be drilled after the completion of the first one producing oil or gas in paying quantities. It did not contain any covenant requiring the drilling of producing wells to prevent oil or gas from draining from the leased premises

to the adjoining lands, where wells by other parties might be drilled and operated.

It is the contention of the lessors that there was an implied covenant, on the part of the lessee, to prosecute the development work with reasonable diligence, and that it was its duty, after the completion of the first well, to continue the search for and the production of either oil or gas with reasonable diligence on the remaining part of the leased premises.

On the other hand, it is the contention of the lessee that it was not required to further continue its operations for oil or gas, nor to pay the rental provided in the lease and supplemental contract after the failure to do so, but that the lease continued in force under its own terms as long as oil or gas continued to be produced in paying quantities on the well brought in section 11 on the leased premises.

A clear and comprehensive statement of the rule of law governing cases of this sort may be found in a case note to 11 L. R. A. (N. S.), commencing at page 417. After stating that oil and gas leases are peculiar in their nature, and that courts are more inclined to construe a lease with greater latitude as forfeiting the lease for failure to develop than in construing leases of other minerals, the editor continues as follows:

"Generally all leases of land for the exploration and development of minerals are executed by the lessor in the hope and upon the condition, either express or implied, that the land shall be developed for minerals; and it would be unjust and unreasonable, and contravene the nature and spirit of the lease, to allow the lessee to continue to hold under it any considerable length of time without making any effort at all to develop it according to the express or implied purpose of the lease; and, in general, while equity abhors a forfeiture, yet, when such a forfeiture works equity, and is essential to public and private interests in the development of minerals in land, the landowner, as well as the public, will be protected

from the laches of the lessee and the forfeiture of the lease allowed, where such forfeiture does not contravene plain and unambiguous stipulations in the lease. This principle will be more readily enforced and applied by the court as to gas and oil cases, because of the peculiar nature of those minerals, and the danger of entire loss to the lessor of oil or gas in his lands by reason of well drilling on adjacent lands."

In Ann. Cases 1917E, p. 1126, it is said: that in oil and gas leases, where the owner of the land leases the same for a nominal sum and the further consideration of a royalty or a percentage of the profits realized by the lessee in working and developing the land, in the absence of an express agreement, there is an implied covenant that the lessee will use reasonable diligence in commencing and continuing operations. Numerous cases are cited which support the rule.

While there is a conflict in the authorities upon this subject, we think that the rule above laid down is established by our previous decisions upon the subject, as well as by the better reasoning.

In *Mansfield Gas Co.* v. *Alexander,* 97 Ark. 167, 133 S. W. 837, it was held that where a lease of land for the purpose of prospecting for gas and minerals was executed in consideration of the lessee's agreement to pay royalties upon such gas or minerals, the law implies a covenant upon the lessee's part to begin the exploration for gas and minerals within a reasonable time. In discussing the subject, the court said that the authorities uniformly hold that there is an implied obligation on the part of the lessee to proceed with the search, and also with the development of the land with reasonable diligence, according to the usual course of such business, and that a failure to do so amounts, in effect, to an abandonment, and works a forfeiture of the lease.

It was further held that where a lease of land, for the purpose of prospecting for gas and minerals, was executed in consideration of the lessee's agreement to pay royalties upon such gas or minerals, the law implies a

covenant upon the lessee's part to begin the exploitation for gas and minerals within a reasonable time. In discussing the subject, the court said that the authorities uniformly hold that there is an implied obligation on the part of the lessee to proceed with the search, and also with the development of the land with reasonable diligence, according to the usual course of such business, and that a failure to do so amounts, in effect, to an abandonment, and works a forfeiture of the lease.

Again, in *Mansfield Gas Co.* v. *Parkhill,* 114 Ark. 419, 169 S. W. 967, it was held that in every oil and gas lease a covenant is implied that the lessee will prosecute a diligent search and operation, and when the only consideration for the lease is a royalty, a failure on the part of the lessee to commence operations for a period of ten years will be held to be an abandonment, and the lessor may have the lease canceled, even though he has failed to notify the lessor of his intention to have the lease canceled.

In *Mauney* v. *Millar,* 134 Ark. 15, 203 S. W. 10, where the court had under consideration the construction of the lease of a diamond mine, it was held that where the sole benefit of a contract results from a continued performance of the contract (such as to develop a mine, to operate it, pay royalties or to divide the proceeds), where one party completely abandons the performance thereof, equity will give relief by canceling the contract. For a partial breach the parties will be remitted to their remedies at law, but for abandonment equity affords relief by rescission or cancellation.

In *Millar* v. *Mauney,* 150 Ark. 161, 234 S. W. 498, it was held that, where the conduct of the lessees in mining leases, given in consideration of royalty to be paid, is such as to show that the lessees do not intend in good faith to perform the covenants by which they are bound, they have, in legal effect, rescinded those covenants and released the lessors from the obligations of the contract, and the latter are justified in treating the contract as rescinded. In that case it was also held that where a

lessee in a mining lease, the consideration of which is a royalty to be paid, has, after a reasonable time, failed to begin and to continue the work of development and exploration provided in the contract, the lessor has three remedies, viz: (1) he may sue in equity to cancel the contract and recover incidental damages; (2) he may sue at law for damages for breach of the contract, or (3) he may treat the contract as rescinded, and sue at law to recover possession of the property leased.

In *Drummond* v. *Alphin,* 176 Ark. 1052, 4 S. W. (2d) 942, it was held that where an oil and gas lease, covering 27 scattered tracts of land, provided that in case operations were not commenced and prosecuted with due diligence within one year, the lease should be void, but that a forfeiture could be prevented by payment of quarterly rentals until drilling operations were commenced, after which no rent was to be paid, a drilling of two wells was not a compliance with the lessee's obligation to continue development of lands.

So it may be taken, as the well-settled rule in this State, that there is an implied covenant on the part of the lessee in oil and gas leases to proceed with reasonable diligence in the search for oil and gas, and also to continue the search with reasonable diligence, to the end that oil and gas may be produced in paying quantities throughout the whole of the leased premises.

It is true that the original lease provides for the payment of $3,000 in common stock of an operating oil company, controlled by the lessee, to be given to the lessors, but the principal consideration for the lease was the payment to the lessors of a part of the oil and gas produced on the leased premises. Where the payment of royalties is the principal consideration for the execution of the lease on the part of the lessors, it is evident that the parties contemplated that oil should be searched for and produced with reasonable diligence, to the end that both parties might be profited by the production of oil or gas in paying quantities. Because of the absence of an express provision as to the number of wells to be drilled,

it does not follow that this matter is subject alone to the will of the lessee. There is in every lease for the production of oil and gas, where the principal consideration is the payment of royalties, a condition, implied when not expressed, that, when the existence of either oil or gas in paying quantities is found from drilling wells on the leased premises, the lessee should drill such number of wells as in the exercise of sound judgment he may deem reasonably necessary to secure oil or gas for the mutual advantage of the lessor and the lessee. One of the principle reasons is that oil and gas are of a wandering and vagrant character, and this has been recognized by the courts, and oil and gas leases have been construed with reference to this well known characteristic. Hence it becomes necessary for the lessee to use reasonable diligence in exploring the leased premises for oil or gas, and to continue to do so after a well has been brought in, showing the existence of oil or gas in paying quantities, in order to carry into effect the purpose and object of the lease.

Of course, due deference should be given to the judgment of the lessee as operator to determine how many wells should be drilled, but he must use sound judgment in the matter, and cannot act arbitrarily. He must deal with the leased premises so as to promote the interest of both parties, and to protect their mutual interests. He must act for the mutual advantage, and proceed for both of them, and must not consider his own interest wholly, or for the most part. He must perform the contract so as to further the original purpose and intention of the parties.

In *White* v. *Green River Gas Co.*, 8 Fed. (2d Series) 261, the court held that two wells in five years on about 900 acres of land was not reasonable diligence. This case was relied upon, and cited with approval, in *Drummond* v. *Alphin, supra.* Many other illustrative cases are cited in the briefs, but we do not deem it necessary to cite them, or to review them in this opinion.

The lease under consideration embraced 1,170 acres of land. One well was brought in on section 11, which produced oil in paying quantities. The lessee claimed that, as long as this well produced oil in paying quantities, he was entitled to operate it without the payment of the additional rent provided in the lease, and without further drilling of additional wells. To so hold would enable it to speculate upon a lease which embraced a large block of land, and to relinquish operations at any time he saw fit to do so, without in any manner consulting the interest of the lessors. It is true that the drilling of oil wells is very costly, but the parties understood this when they executed the lease. The lessee only agreed to pay the lessors one-eighth of the oil produced as rent, and reserved seven-eighths of it for its own profit in drilling the well, and in undertaking the risk of not finding any oil. Then too, after drilling the first well, the lease continued in force for 5 years, and as long as oil was produced in paying quantities, without the lessee being required to pay any further rental. If the lessee wished to avoid the expense and risk of continued exploration for the discovery of oil or gas, it should have paid the additional rental provided by the lease and the supplemental contract.

Therefore, we are of the opinion that the court erred in holding that there was not an abandonment of operation upon the whole 1,170 acre tract by the lessee, and in not canceling the lease contract. In this connection, it may be stated that the appellants did not ask for a cancellation of that part of the contract relating to the well brought in in section 11, and now operated by the lessee, and the ten acres of land immediately surrounding it.

It is next contended that appellants are not entitled to proceed in equity to have the lease canceled, but that their remedy at law to recover damages is adequate. We do not think that contention is well taken. Here, again, we are confronted with the peculiar character of this kind of lease. When we consider the migratory character of oil and gas, and the fact that, if the lease should not

be canceled for noncompliance with its terms, there would be a cloud left upon the title of the lessors, and it would be extremely difficult for them to secure another lease on the land. It is not like the case where a specified rental is to be paid for a definite term, a subsequent lessee would know exactly where he stood, and the risk he ran in accepting a lease which had a definite period to run, and a fixed sum of money to be paid as rental. Here the original lease provided for its duration for a period of five years, and as long thereafter as oil or gas was produced in paying quantities. The consideration was a continuing one, to be paid only by the labor and expense of the lessee in the development of the property. The lessors had a continuing interest in the leased premises, and the lessee was not at liberty to do with the property as he pleased. He could not use, or fail to use, it to the prejudice of the lessors. It would be very difficult for the lessors, in cases like this, to establish and prove their injury in damages. The lessee was not required to develop the property against his will. He could quit at any time he saw fit to do so, and the lessors could not require specific performance on the part of the lessee, however solvent he might be.

It is true that the court, in *Blair* v. *Clear Creek Oil & Gas Co.*, 148 Ark. 301, 230 S. W. 286, 19 A. L. R. 430, in a suit by the lessors to cancel the lease on the ground that the lessee was drawing off the gas from the land through wells drilled on adjoining lands without drilling protection wells on the leased lands, held that a court of equity, having taken jurisdiction for the cancellation of the lease, might award damages to the lessors; but that is very far from holding that this was the only remedy the lessors had. Under the facts of that particular case, the remedy by damages was the only one that would avail the lessors anything. Part of the damages had already been incurred, and a decree cancelling the lease would not have given them an adequate remedy.

As held in *Millar* v. *Mauney,* 150 Ark. 161, 234 S. W. 498, the lessor might either sue for damages, or he might

cancel the contract in equity, and recover the incidental damages, as was done in the Blair case. Here the lessors elected to proceed in equity to cancel the lease, as the remedy most effectual to protect their interest. This they had the right to do.

Finally, it is contended that the court should not have canceled the lease under the facts proved. We cannot agree with counsel in this contention. It is true, as claimed by them, that the lessors did commence, in 1923, to claim that the lease had been abandoned by the lessee, but it does not appear that this had the effect to prevent the lessee from continuing the exploring of the land for oil and gas. No suits of any character looking to that end were brought by the lessors. On the other hand, they were urging the lessee to proceed with diligence to the exploration of the remaining land for oil or gas. The lease was assignable, and the lessors did nothing to prevent the lessee from assigning the lease to any one. The lease comprised 1,170 acres of land, and oil wells were being brought in on lands in the same neighborhood. Only two wells were drilled upon the entire tract, and only one of them became a producing well. No other drilling operations were even commenced by the lessee. Under these circumstances, we think that the chancery court erred in not cancelling the lease for abandonment by the lessee. The question of abandonment or not is a mixed question of law and fact, and each case must depend upon its own particular facts and circumstances. The intention of the lessee cannot be gathered from any statement of his alone. It must be determined from his intention, as shown by his acts and conduct. When the illusory character of oil and gas is considered, when the danger of oil and gas being drained from the leased premises by wells being drilled on contiguous tracts of land, when the cost of installing drilling machinery is considered, and when all the customary expense incidental to drilling in oil fields are considered together, we are of the opinion that the chancellor erred in not cancelling the whole lease, as requested by appellants;

and for this error the decree must be reversed, and the cause remanded with directions to the chancery court to cancel the lease, except the 10-acre tract surrounding the well in section 11, and for further proceedings according to the principles of equity, and not inconsistent with this opinion.

BLACKWOOD *v.* SIBECK.

Opinion delivered January 13, 1930.

Hal L. Norwood, Attorney General, *Claude Duty* and *Walter L. Pope,* Assistants, for appellant.

Neill Bohlinger, for appellee.

SMITH, J. The question involved in this appeal is the liability of the counties of the State for the payment of the license fee, for the issuance of the tag or plate, which is placed upon motor vehicles owned by the counties, and used exclusively for public purposes.

In support of the contention that counties are not required to pay this license fee, we are cited to that portion of article 16, § 5, of the Constitution, which reads as follows: "* * * Provided, further, that

the following property shall be exempt from taxation: Public property used exclusively for public purposes."

In further support of this contention, there is cited the case of *Board of Improvement* v. *School District,* 56 Ark. 335, 19 S. W. 969, wherein it was announced, as a rule of statutory construction, that counties and other governmental agencies are exempt from taxes, unless the statute imposing the taxes expressly, or by necessary implication, provides that they shall not be exempt.

Answering these contentions in the order stated, it may be first said that the imposition of this license fee is not a tax, within the meaning of the Constitution.

The case of *Pine Bluff Transfer Co.* v. *Nichol,* 140 Ark. 320, 215 S. W. 579, involved the validity of an act authorizing the levy of a tax in Jefferson County upon automobiles carrying passengers and freight, and in upholding the validity of the act we quoted from the case of *Fort Smith* v. *Scruggs,* 70 Ark. 549, 69 S. W. 679, as follows: "The license fee imposed is, then, not a tax upon property, but is in the nature of a toll for the use of the improved streets. In other words, it is the privilege of using vehicles on the improved streets, and not the vehicle itself, that is taxed. We are therefore of the opinion that the statute is not subject to the criticism that it authorizes double taxation, and the contention of the defendant on that point must be overruled." See, also, *State* v. *Handlin,* 100 Ark. 175, 139 S. W. 1112; *St. L. Sw. Ry. Co.* v. *State,* 106 Ark. 321, 152 S. W. 110; *Floyd* v. *Miller Lbr. Co.,* 160 Ark. 17, 254 S. W. 450, 32 A. L. R 811; *Standard Oil Co.* v. *Brodie,* 153 Ark. 144, 239 S. W 753; *Stanley* v. *Gates,* 179 Ark. 886, 19 S. W. (2d) 1000.

The case of *Board of Improvement* v. *School District, supra,* did not hold that public property might not be taxed, but held only that there was a presumption against any such intention on the part of the Legislature, and that such a tax could be levied and collected only when the authority so to do was expressly con-

ferred, or arose by necessary implication from the legislation imposing the tax. As the reason for this rule, the court quoted from Cooley on Taxation (2d ed.) page 172, as follows: "Some things are always presumptively exempted from the operation of general tax laws, because it is reasonable to suppose they were not within the intent of the Legislature in adopting them. Such is the case with property belonging to the State, and its municipalities, and which is held by them for governmental purposes. All such property is taxable, if the State shall see fit to tax it; but to levy a tax upon it would render necessary new taxes to meet the demand of this tax, and thus the public would be taxing itself in order to raise money to pay over to itself, and no one would be benefited but the officers employed, whose compensation would go to increase the useless levy. It cannot be supposed that the Legislature would ever purposely lay such a burden upon public property, and it is therefore a reasonable conclusion that, however general may be the enumeration of property for taxation, the property held by the State, and by all its municipalities for governmental purposes, was intended to be excluded, and the law will be administered as excluding it in fact."

There is therefore a presumption that the Legislature did not intend to impose this privilege tax on the property of the counties; but there is no limitation upon the power of the Legislature to do so, and the question is, has the Legislature sufficiently manifested the intention that the tax shall be paid by the counties to overcome the presumption to the contrary? A review of the legislation on the subject convinces us that it has, and that the counties must pay the tax.

Act 494 of the General Acts of 1921 (General Acts 1921, p. 490), is an act entitled, "An act to regulate the registration of motor vehicles and for other purposes." Section 2 of this act provides what the license fee shall be, and how it shall be ascertained. Section 3 of the

act provides that none of the fees provided by section 2 shall be charged against any vehicle, the title to which is in the Federal, State, or any county or city government, and directs the Highway Department to issue appropriate registration cards, and sets of plates free of charge, except the actual cost of said registration car and plates for any of the vehicles so owned, upon appropriate affidavit as to the title being filed. In the case of vehicles owned by the county, the statute provided that the affidavit should be made by the county judge.

By act 52 of the Acts of 1929 (Acts 1929, vol. 1, p. 103), § 3 of act 494 of the Acts of 1921 is expressly repealed, and by § 1 of act 52 it is provided that no automobile license tax shall be issued or furnished by the State Highway Department to any person, firm or corporation until a receipt signed by the duly authorized collector has been filed with the State Highway Department, showing that the full amount of said license fee as required by law has been paid.

Act 65 of the Acts of 1929 (Acts 1929, vol. 1, p. 264), as its title indicates, is a codification of the laws relating to State highways, and, by § 29 of this act, it is made the duty of the Highway Commission to furnish to the sheriffs of the various counties application blanks for the registration of motor vehicles on or before January 1 of each year. These blanks bear serial numbers, and are charged to the sheriff in the same manner in which poll tax receipts are charged to the collectors by the State Auditor, and the sheriff is required to pay $35 for any blank not returned or accounted for.

Other sections of the act provide that the sheriff can issue receipts for the motor license only upon the payment to him of the fees required by the act. Upon the exhibition of this receipt it becomes the duty of the Highway Commission to issue to the applicant a registration card and tags or plates. There is no other authority for the issuance of these registration cards or tags.

The only exemption from the payment of this license fee is found in § 35 of act 65, which reads, in part, as follows: "Motor vehicles belonging to the United States Government, and used in its business exclusively, shall not be required to pay any motor vehicle fuel tax or exhibit a State license plate, but in lieu of a State license plate shall have exhibited thereon a license plate in a form approved by the State Highway Commission, showing that they are United States Government motor vehicles."

It thus appears that in the case of this—the only—exemption from the act, the State license plate does not have to be obtained or exhibited, and the inference is therefore clear and irresistible that the Highway Commission cannot issue registration tags or plates, except upon the production of a receipt for the license fee which the law requires.

The excellent brief of the Attorney General cites many cases on this question, all of which are in harmony with the views here announced.

A general statement of the law appears in 42 C. J., page 670, in the chapter on motor vehicles, which reads as follows: "The fact that municipally owned motor vehicles are exempt from taxation, as property, does not exempt them from being licensed and registered under the State license regulations of motor vehicles."

Among the numerous cases cited in the note to the text quoted, and in the brief of the Attorney General, is that of *State* v. *Preston,* 103 Ore. 631, 206 Pac. 304, 23 A. L. R. 414, which is a well-considered case exactly in point. In discussing the effect of an act of the State of Oregon, imposing a license fee on certain motor vehicles, and exempting certain others, the Supreme Court of Oregon said: "When the Legislature declared what motor vehicles should not be affected by the act, those not within the exception were without it," this result being reached by the application of the maxim applic-

able alike in the construction of constitutions and statutes, "*expressio unius est exclusio alterius.*"

We conclude therefore that the counties of the State are required to pay the fee upon motor vehicles owned by them, and the judgment of the court below, to the contrary, is reversed, and the cause will be dismissed, and it is so ordered.

TRUEMPER *v.* BURNETTE.

Opinion delivered January 13, 1930.

Moore & Moore and *Jo M. Walker,* for appellant.

W. G. Dinning, for appellee.

HUMPHREYS, J. This is an appeal from a judgment for $2,907.50, rendered in the circuit court of Phillips County in favor of appellees against appellant for one-half the original cost of a brick wall, less the cost of a portion thereof, which was not restored after same was injured by fire. The original wall was constructed by appellees, partly on their lot and partly on appellant's, which lots adjoined, under a written agreement that appellant would pay them one-half of the actual cost of the

wall before using same in any way, except to attach the north side of his present warehouse thereto.

It was in contemplation of the parties, at the time the contract was made, that appellees would immediately build a two-story brick house on their lot, and that later appellant would build a two-story brick house on his, and that then the wall in question should become a party wall upon the payment of one-half the cost thereof by appellant to appellees. Appellees constructed a two-story brick building on their lot in 1920, one-half of the south wall of which extended over on the lot belonging to appellant. The actual cost of the wall was agreed upon, and attached to the written contract as a part thereof.

Appellees' building was destroyed by fire in 1926, and the wall in question was damaged. After the fire appellees repaired the first story of the wall in question, and used same in the construction of a one-story brick building. In repairing the wall they built a ledge out several inches near the top thereof so that it might be used by appellant when he built his house. Subsequently, appellant built a one-story brick building on his lot, the north wall of which was made of brick, mortar and cement about eighteen inches thick. It was constructed by pouring the mixture against the wall built by appellees, and behind the temporary frame wall erected that distance from the wall in question so as to support the mixture until it hardened sufficiently to stand. The joists of appellant's building rested upon this concrete wall. The rafters of the roof rested upon the ledge mentioned above, and the roof was flashed into the ledge, a part of the way, and into a brick laid on top of the ledge the balance of the distance.

The cause was sent to the jury over appellant's objection, upon the theory that he would be liable to appellees for one-half the cost of the original wall less the cost of the portion thereof not restored after the fire, provided appellant had used the wall constructed by appellees in any way.

Appellant contends the trial court erred in submitting to the jury the question whether he used the wall in

any way built and repaired by appellees, for the reason that the undisputed evidence reflects that his north wall was constructed by pouring a concrete wall between a frame, erected by him, and the wall built by appellees, upon which the joists of his building rested, and that he used the ledge extending out of appellees' wall over his own land as a support for his roof; and that these acts did not constitute a use in any way of the wall constructed and repaired by appellees. Appellant's conclusion that the facts do not tend to show that he made any use of the wall, constructed and repaired by appellees, is incorrect. In erecting his north wall he poured the concrete against the wall constructed by appellees, which tended to show that he used said wall as a support for his; and the appropriation of the ledge in their wall, as a support for the roof of his house, tended to establish a use of their wall by him.

The issue therefore of whether he used the wall in any way, constructed and repaired by appellees, was properly submitted to the jury for determination.

Appellant also contends for a reversal of the judgment because the trial court incorrectly instructed the jury as to the measure of damages. In this contention he is right. One-half of the actual cost of the wall, as repaired after the fire for a one-story building, constituted the extent of appellant's liability to appellees. After the fire neither appellees nor appellant desired to build a two-story house. Each used the wall in the construction of a one-story building, and by their acts modified the contract for the construction of the wall in this respect. The contract was not abandoned or abrogated on account of the damage to the original wall by fire, but the wall was repaired by appellees, and used by the parties jointly as a one-story, instead of a two-story, wall.

On account of the error indicated, the judgment is reversed, and the cause is remanded for a new trial.

TITSWORTH *v.* MENA.

Opinion delivered January 13, 1930.

Alley & Olney, for appellant.

Duke Frederick, for appellee.

MEHAFFY, J. The appellant was charged with the crime of transporting liquor from place to place in Mena, Arkansas, and on the 8th day of October, 1929, he was convicted in the city court, and fined $100. He appealed to the circuit court, where a trial was had on October 30, 1929, and he was there found guilty by a jury, and his fine fixed at $100. He filed motion for a new trial, which was overruled, and to reverse the judgment of the circuit court, he prosecutes this appeal.

Mrs. Bill Watkins was, at the time, October 3, 1929, operating the Blue Front Cafe, and was assisted by her husband, Bill Watkins.

Doug Walker, a deputy sheriff, testified that he saw the appellant about the third of October in the Blue Front Cafe in Mena, leaning on the counter on his arm; that he went down the street and got Mr. Harris, the night policeman of Mena, told him about what he had seen, and they went back to the Blue Front Cafe; that Mr. Harris went in and talked to the restaurant man and they left the cafe; went across the street and watched the appellant. The restaurant man tried to wake up appellant, and then witness and Harris went to the cafe, and got appellant out. Appellant, according to this witness, was very drunk. Harris finally took appellant under the arms, and picked him up, and witness

took one arm and Harris the other, and appellant kept his hand up. Witness did not know why, but when they got across the street Harris pulled appellant's jumper back and pulled out a pint of whiskey out of his pocket. That was the first time witness had seen the whiskey. Appellant was locked up in jail. Witness did not see anybody else in the restaurant when they first saw appellant there. When he went back there he did not see any one else go in or out, Mr. and Mrs. Watkins being the only ones that witness saw. Appellant was lying on the table. It was about 20 minutes from the time they first passed the cafe, until they went back and arrested appellant. Witness said that Harris had the whiskey that they took from appellant.

Harris, the night policeman, testified to substantially the same facts that Walker did, and also that he talked with the owner of the restaurant, who said he did not know appellant. Witness tried to talk to appellant, but appellant did not answer him. This witness also said that appellant was drunk. This was about 9 o'clock at night. Appellant never said anything with reference to the liquor at all. This witness testified that there was no one in the Blue Front Cafe but the restaurant man and his wife. There was about one-half an inch from the neck of the bottle of liquor. Witness did not see appellant transporting the liquor. This witness presented the bottle of liquor, and said it was in about the condition it was when they arrested appellant.

Bill Watkins, the restaurant man, testified that his wife ran the Blue Front Restaurant; that she was running it on the 3d of October, and that he stayed there and helped his wife run the restaurant; recalled the time that Harris and Walker arrested appellant, and said that appellant had been in the restaurant something like an hour, but that he had done nothing but sleep; did not know whether he had any liquor on him or not, and did not see the bottle. Witness did not see appellant come in, but there was no one with him when wit-

ness first saw him. There were two or three persons who passed in and out of the restaurant, after appellant came in. Appellant was asleep at that time. There was nobody who appeared to be with him. Appellant came in and ordered some coffee. At that time witness did not notice that he was under the influence of liquor. They were about to close the restaurant when the officers took appellant out. They closed the restaurant somewhere about nine or ten o'clock. Witness did not put this liquor in appellant's pocket, and did not see anybody else put it there.

Mrs. Watkins testified substantially the same as her husband, except that she saw the appellant when he first came in; did not talk to him; only spoke to him when he came in. He ordered a cup of coffee, and witness waited on him. He went to sleep on the counter, and did not drink the coffee. Appellant came in by himself, and went to sleep and did not wake up any more until the officers took him out. When he came in, he did not act like anything was wrong with him. This witness testified that she did not put the whiskey in his pocket, and never saw anybody with the whiskey; did not see anybody put any whiskey in his pocket.

The appellant insists that there is no evidence whatever as to transporting, and that the court erred in refusing to direct a verdict of acquittal. There was no controversy about the city ordinance, it being agreed that it was the same as the State statute. It is contended that the evidence is wholly insufficient to show that the appellant was transporting liquor.

We do not agree with the appellant in his statement that the circumstantial evidence shows he might not have brought the liquor in there with him. The evidence, we think, is sufficient to justify the jury in finding that he did bring the liquor in with him. The undisputed testimony is that he came in the restaurant alone; that the man and his wife who kept the restaurant were there; that neither of them put the liquor in his pocket, and

they did not see anybody else do this. The undisputed proof also shows that, after he ordered his cup of coffee, he went to sleep, and slept until the officers arrested him. So it appears that there was ample evidence to show that he came in there with the liquor in his pocket.

Appellant relies on the case of *Wilson* v. *Batesville,* 179 Ark. 1094, 20 S. W. (2d) 114. In the case of *Wilson* v. *Batesville,* the person charged with transporting the liquor was in a livery barn, and the officers followed him into the barn. When they got about one-half way back in the barn, they saw the person charged with transporting reach in his shirt, pull out a pint of whiskey, and pour it out, and throw it to one side, and the officers thought that he had started out of the barn with the whiskey. The court there said: "It must be shown, inferentially at least, that the defendant was in the act of carrying the intoxicating liquor from one place or locality to another, in order to render him guilty under the statute, or under an ordinance based upon the statute." The court also said: "In this case the marshal did not testify that appellant took the liquor into the barn, nor that he took it out of the barn. He thought he intended to take it out, but that was only a surmise. We cannot presume that he did so. All the evidence shows is that he had a pint of liquor in his possession in a livery stable, which is made unlawful by § 6169, C. & M. Digest. To transport or move liquor from one place in a room of a building, to another place in the same room, would not constitute an unlawful transportation, within the meaning of the statute."

In the instant case, the proof shows, as stated in the Wilson case, inferentially at least, that the defendant had carried the intoxicating liquor into the restaurant. Where he came from is not shown, except he came from somewhere on the streets. It was not shown in the Wilson case that the person charged had had the whiskey anywhere, except in the barn. The marshal did not testify that he went into the barn with it, or

that he took it out of the barn. The witnesses in the present case testify that he came into the restaurant; stayed there something like an hour, and that no person put any whiskey in his pocket, and when the officers came he had the liquor in his pocket. He must necessarily have transported it, if the witnesses are telling the truth about it.

In the case of *Fly* v. *Fort Smith,* 165 Ark. 392, 264 S. W. 840, the facts stated by the court are as follows: "Appellant was arrested on a street car in the city of Fort Smith by one of the police officers of the city, and, after being lodged in jail, was taken into the municipal court by the officer, and the charge preferred against him of being drunk and transporting whiskey." The court said in that case: "Appellant denied that he was intoxicated at the time he was arrested, and undertook to explain the presence of a bottle of whiskey in his pocket, by saying that he found the bottle under a seat in the street car, and put it in his pocket, and that he had no knowledge of the contents of the bottle. We think that the evidence was sufficient to warrant the jury in finding that appellant was transporting whiskey in violation of law."

We think that the above case is controlling here.

There was sufficient evidence in this case to warrant the jury in finding that there was an actual transporting of the liquor from place to place. The appellant did not testify, and the only evidence introduced was the evidence on the part of the city, and from that evidence the jury could very well have reached the conclusion that he transported it on the streets of Mena, because the facts testified to could not be true unless he did.

The judgment of the circuit court is affirmed.

McLAIN *v.* MILLER COUNTY.

Opinion delivered January 13, 1930.

Shaver, Shaver & Williams, for appellant.

Will Steel, for appellee.

MEHAFFY, J. J. H. McLain was county judge of Miller County for four years, and during that time as such county judge and ex-officio road commissioner he had the care, custody and control of the mules and other stock belonging to said county. Immediately after he went into office, January, 1925, he took charge of the stock, and, as county judge rented 80 acres of land from his sisters for the purpose of pasturing and keeping said stock, and it was so used by him during said four-year period. The rental was fixed at $240 a year. J. H. McLain, as county judge, executed one note for $240 as follows:

"Rent note, $240, Texarkana, Arkansas, January 2, 1928, December 31, 1928, I as county judge of Miller County, Arkansas, promise to pay to Mrs. W. J. Timberlake, and others, or order, at Texarkana, Miller County, Arkansas, $240 for the use of 80 acres of land about two miles east of Texarkana, and situated on the north side of old Rando road; said lands are to be used for pasturing the county's teams. J. H. McLain, County Judge, Miller County, Arkansas."

The notes were not paid for quite a while, and, finally, while J. H. McLain was still county judge, he filed a claim in his own name for three of the notes. The claim filed is as follows:

"To J. H. McLain, Dr., Road District No. 5.

"To rent of corral and pasture lands for county's

team for the year 1925 ..... $240
"To the same for the year 1926 240
"To the same for the year 1927 240

"$720"

There was also a claim filed by Hal Green for $96.50, $80 of it being for 160 bales of hay, and $16.50 for alfalfa. This claim was filed in the name of Hal Green. The claims were all properly verified, and were all allowed by the county court, and warrants were issued; one warrant for $80 to Hal Green, a warrant in the sum of $720 to J. H. McLain, and a warrant for $240 to Mrs. J. W. Timberlake. All of the warrants were paid.

An appeal was taken from the order and judgment of the county court to the circuit court by a taxpayer, and, when the case reached the circuit court, McLain filed a motion to dismiss, and Hal Green also filed a motion to dismiss the appeal. The circuit court overruled the motions to dismiss, and affirmed the judgment of the county court as to the claim allowed Mrs. Timberlake for $240, and affirmed the judgment in favor of Hal Green in the sum of $80, but disallowed the sum of $16.50 in the Hal Green claim. This appeal is prosecuted to reverse the judgment of the circuit court.

The circuit court disallowed the claim of J. H. McLain for $720, and reversed the judgment of the county court on the ground that McLain had no personal interest in the subject-matter of the claim, and that the allowance of the claim by the county court was void, and should be set aside without prejudice to the claim being made in behalf of the parties who were entitled to assert the same for rent of pasture for some amount, if any rent should be due, but affirmed the judgment of the county court and allowed the claim of $240 in favor of Mrs. Timberlake, whose claim was filed in the county court in her own name.

J. H. McLain contends that the motion to dismiss the appeal in the circuit court should have been sus-

tained, because it was allowed and paid by the county court to the persons who were entitled to receive the same, and that there was nothing left for the circuit court to try.

It is contended that, because the warrants were issued after the judgment in the county court and paid to the parties to whom they belonged, and because it is contended that there ceased to be an issue, facts having intervened; that is, the judgment of the county court having been paid, rendered the decision of no practical application to the controversy between the litigants.

We do not agree with the appellants in this contention. The law provides that appeals may be granted, as matter of right, from all final judgments of the county court at any time within six months after the rendition of same. Section 2287, Crawford & Moses' Digest. And the statute provides that the circuit court shall proceed to try such appeal cases. Section 2292.

This court said, in a case appealed from the county court to the circuit court: "The judgment of the circuit court disallowing the claim rendered invalid the warrants previously issued under the judgment of the county court; and when they were presented to the county court for reissuance, that court properly rejected them." *Murphy* v. *Garland County,* 99 Ark. 173, 137 S. W. 813.

The court also said in the above case: "The appeal from the county court was prosecuted by a citizen and taxpayer, who had the right to so prosecute from a judgment allowing a claim against the county."

The taxpayer had a right to prosecute the appeal from the county court; the circuit court had jurisdiction to try the case, and the fact that a warrant had been issued, before it was tried in the circuit court, was immaterial. When one has a claim allowed in his favor by a county court, he is bound to know that a taxpayer may prosecute an appeal to the circuit court within six months from the judgment allowing the claim. And whether he is paid in the meantime or not, the circuit

court has jurisdiction to try the case, and a judgment of the circuit court disallowing the claim operates as a reversal of the order of the county court, and makes void the warrant issued thereunder unless reversed by the Supreme Court.

As we have already said, McLain's claim was filed in his own name in the county court, and, he had, according to his own testimony, no interest in the claim. He said that he represented his sisters, as their agent. If he did this, he had no right to make a contract with himself as county judge, representing both the county and the owners of the land. A public officer cannot make a legal contract with himself as agent of some other person, whether the contracts are made in good faith or not.

"As the efficiency of the public service is a matter of vital concern to the public, it is not surprising that agreements tending to injure such service should be regarded as being contrary to public policy. It is not necessary that actual fraud should be shown, for a contract which tends to the injury of the public service is void, although the parties entered into it honestly, and proceeded under it in good faith. The courts do not inquire into the motives of the parties in the particular case, to ascertain whether they were corrupt or not, but stop when it is ascertained that the contract is one which is opposed to public policy. Nor is it necessary to show that any evil was, in fact, done by or through the contract. The purpose of the rule is to prevent persons from assuming a position where selfish motives may impel them to sacrifice the public good to private benefit." 6 R. C. L. 730.

If J. H. McLain, as an individual, represented the land owners in making the contract, he could not represent the county. In acting as county judge, he could not represent the other parties. In other words, he could not contract with himself.

"It is, of course, clear that a contract which induces a public officer to violate his duties to the public is against

public policy. It is not necessary that there should be an express agreement to that effect. The acceptance of private employment, which conflicts with his public duties, may be sufficient. An officer's duty is to give to the public service the full benefit of a disinterested judgment, and the utmost fidelity. Any agreement or understanding by which his judgment or duty conflicts with his private interest is corrupting in its tendency. * * * The law will not permit public servants to place themselves in a situation where they may be tempted to do wrong, and this it accomplishes by holding all such employment, whether made directly or indirectly, utterly void." 6 R. C. L. 739.

"The rule prohibiting public officers from being interested in public contracts is embodied in the statutes of some States. The rule is, however, not dependent on statute. According to the weight of authority, a contract by a board or public body, with a member thereof, or in which a member thereof is interested, is unenforceable, even in the absence of a statutory prohibition, although from some of the decisions it is not clear whether such contracts are to be regarded as void or voidable." 6 R. C. L. 740.

The county had the right, not only to the faithful service, but to the best judgment, of the county judge in making all contracts, and he could not lawfully make a contract either with himself, or with himself as agent for others. But in this case the claim filed in the county court was filed in the named of McLain himself. It was claimed that the county owed him $720. It is the contention of the appellant that McLain had a right to file this claim under § 1092, Crawford & Moses' Digest, which provides that, "an executor, administrator, guardian, trustee of an express trust, or a person with whom, or in whose name a contract is made for the benefit of another, may bring an action without joining with him the person for whose benefit it is prosecuted." This section has no application. McLain did not make this in

his own name for the benefit of his sisters who owned the land, but it was made to them in their name with him as county judge. It was allowed, and the warrant issued to him, and it is wholly immaterial whether he paid the money to persons entitled to it, because, in the first place, he had no interest in it according to his own contention, and therefore had no right to file the claim or collect the judgment. And, in the next place, he had no right to file a claim against the county in his own name and try the case himself. Section 20, article 7, Constitution of Arkansas.

No effort was made to amend in the county court; no suggestion was made in the county court that the claim belonged to somebody else, but J. H. McLain, as county judge holding county court, allowed the claim in his own name. An appeal was then prosecuted to the circuit court, and then it was sought to substitute other parties who claimed an interest for McLain, who had no interest. This would be equivalent to bringing a new suit in the circuit court, and the circuit court would have no jurisdiction to try the claim.

"The county courts shall have exclusive original jurisdiction in all matters relating to county taxes, roads, bridges, ferries, paupers, bastardy, vagrants, the apprenticeship of minors, the disbursement of money for county purposes, and in every other case that may be necessary to the internal improvement and local concerns of the respective counties. The county court shall be held by one judge, except in cases otherwise herein provided." Section 28, article 7, Constitution of Arkansas.

In the very nature of things there could not have been any trial. You could hardly imagine a person filing a claim for himself, swearing to its correctness, and then disallowing it.

We have recently held that an amendment cannot be made by the substitution of another person for the plaintiff in the case.

"The code is very liberal, but it is the well established rule that courts will not allow amendments to be made which change the parties to the action, unless there is something in the record to authorize the amendment." *Fencing Dist. No. 6 of Woodruff County* v. *Mo. Pac. Rd. Co., ante* p. 488.

"Under a statutory provision permitting the adding or correction of the name of a party, an entire change in the parties plaintiff or defendant cannot be permitted. A statute permitting amendments as to judgment will not permit an amendment making new parties plaintiff in order to sustain an action that was originally brought without authority." 31 Cyc. 475.

This court, in construing this provision of the code. said: "This provision of the Code assumes that the plaintiff has a cause of action, and does not authorize the court in any case, where the plaintiff has failed to show any cause of action, to amend by adding the name of a party in whose favor a cause of action is shown by the complaint to exist, because such a proceeding would be practically instituting a new action, and forcing a party, at the instance of one who has no right to demand it, to commence an action when he does not wish to do so. Broad and liberal as the provisions of the statute of amendments are, we see no authority in them for such a proceeding." *State use Oliver* v. *Rottaken*, 34 Ark. 144; *Fencing District No. 6 of Woodruff County* v. *Mo. Pac. Rd. Co., ante* p. 488.

An additional reason why the amendment could not be made in this case is that the circuit court had no original jurisdiction of a claim against the county. The county court had exclusive original jurisdiction. The circuit court can try a case of this kind; has jurisdiction to do so only when it is appealed from the county court. To permit an amendment substituting a party in the circuit court in this case, would be permitting the circuit court to exercise original jurisdiction, and this it cannot do.

It becomes unnecessary to discuss whether the contract could have been ratified. The circuit court had no original jurisdiction to try this claim, and properly dismissed it. The allowance of the claim for $240 in favor of Mrs. Timberlake was proper. As to the claim filed by Green, it may be said that he did not claim the $16.50, but that belonged to another party, and this party did not file any claim.

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

Mr. Justice KIRBY dissents.

McWILLIAMS *v.* KINNEY.

Opinion delivered January 13, 1930.

Jesse Reynolds, and *Jacoway, Miles, Donham & Fulk,* for appellant.

Hays, Priddy & Rorex, for appellee.

McHaney, J. Appellant was formerly the wife of appellee. In June, 1926, on her complaint, which was uncontested, she was, by the Johnson Chancery Court, granted a divorce from appellee, and in August following was married to her present husband, Frank McWilliams. Thereafter, in October, 1926, appellee sued Frank McWilliams for damages for alienation of his wife's affections. This suit resulted in a verdict and judgment against McWilliams in the sum of $2,500. On appeal to this court, said judgment was affirmed on December 3, 1928. *McWilliams* v. *Kinney,* 178 Ark. 513, 11 S. W. (2d) 1. This judgment became final after the lapse of fifteen judicial days from said date, and on December 29, 1928, appellant brought this suit in the same chancery court to recover the sum of $810, which she claimed she had expended since said divorce decree, for the support and education of their thirteen-year-old son, who had been in her care and custody ever since said decree, and for an order for a monthly allowance for support of said child in the future. At the same time, she caused a writ of garnishment before judgment to be served on Frank McWilliams, her then husband.

After hearing the evidence, including the testimony in the case of *Kinney* v. *McWilliams,* which was made a part of the record in this case by agreement, the court entered a decree dismissing appellant's complaint for want of equity, and she has appealed.

The complaint in the divorce case made no mention of a child, and the decree was therefore silent as to its custody. When appellant married McWilliams in August, 1926, this child was taken into the McWilliams family as a member thereof, and has ever since been

supported, maintained and educated by the funds furnished by Frank McWilliams. Appellant admits that she had no money when she married the second time, has earned none since, and that the money she spent on her child was furnished by her husband. She brought this suit in her own name to recover an amount expended, in fact, by her husband, and caused him to be garnished just about the time he would be required to settle the judgment in the alienation suit. But for that judgment, it appears doubtful that this suit would have been brought.

The dissolution of the bonds of matrimony creates a new relationship between the parties. Whereas, they were husband and wife, with all the privileges, immunities and burdens imposed by law because of this relationship, they are now strangers in law, third parties, as it were, with no legal obligations, each to the other, except those preserved by decree or contract. When a child is born, both become parents, and, although the ties of matrimony may be broken by decree of court, none can be made that severs the relation of parent and child. It is the rule in this State, and, generally elsewhere, that the father is bound, primarily, in case of divorce, to support his infant children, and this, too, where the decree of divorce awards the custody of the child to the mother, with no provision being made regarding support. One of our leading cases on the subject is *Holt* v. *Holt,* 42 Ark. 495. In that case, the husband divorced the wife for desertion, but she was given the custody of their two infant children for a period. No provision was made in the decree as to who should pay their expenses. More than two years later, she sued the father for the expenses of their board, clothing and medical bills she had incurred, alleging his ability to pay. The lower court sustained a demurrer to the petition, but this court reversed the case, holding the lower court had jurisdiction, and further stated: "The dissolution of the marriage tie and decreeing the custody of the children, either permanently or temporarily to the mother, do not relieve the father of his obligation to support them. If they are

too young to earn their own livelihood, the father must continue to furnish them a maintenance out of his estate, regard being had to his means and condition in life." See also *Shue* v. *Shue,* 162 Ark. 216, 258 S. W. 128 and *Longinotti* v. *Longinotti,* 169 Ark. 1001, 277 S. W. 41. The case of *Holt* v. *Holt, supra,* was again cited with approval in the case of *Daily* v. *Daily,* 175 Ark. 161, 298 S. W. 1012. There the parties were divorced on January 6, 1926, the decree being silent as to the custody, support and education of their minor daughter. She later brought suit against him to recover for money paid by her for the support and education of the daughter, and for an order for a monthly sum for her future support and education. She testified that it was agreed between them that she should have the custody of their daughter, and that she should support her until school should be out in May following, and that thereafter he was to contribute towards the support and education of the daughter, but had failed to do so. There was a decree for $100 for past support and $20 monthly for future support. This court modified this decree by disallowing the $100, and permitting the $20 monthly support to stand, taking into consideration the condition of his health and ability to pay. The effect of that holding is that a divorced wife may maintain an action against the former husband for the future support and education of their minor child, even where the decree is silent as to the custody and maintenance of said child.

These cases announce correct principles of law, and we do not intend to impair them in the least by the decision we now make in this case. As we view the case in hand, it is entirely different from them, and is not controlled by them. Here the wife obtained a divorce, apparently, for the purpose of marrying the man who had stolen away her affections. She obtained it on a complaint that did not disclose to the court the existence of a child, and under a decree that was silent as to its custody or support, and without any agreement with her husband touching its custody or support. After mar-

riage, the child was taken into the McWilliams home as a member of the family, and was supported and schooled with money furnished by the step-father, for about two and one-half years, without any claim being made, and then only when payday had come on the alienation judgment. We think the chancery court was amply justified in holding them mere volunteers, and in denying a recovery for support money prior to the suit. Nor do we think any error was committed in denying a recovery for future support, so long as the same conditions prevail. *Nelson* v. *Nelson,* 146 Ark. 362, 225 S. W. 619.

Considering all the facts and circumstances in this case, we have reached the conclusion that the decree is correct, and should be affirmed. It is so ordered.

HART, C. J., SMITH and BUTLER, J.J., dissent.

CONSOLIDATED SCHOOL DISTRICT No. 1 *v.* FITZGERALD.

Opinion delivered January 13, 1930.

M. P. Huddleston and *Dudley & Dudley,* for appellant.

Jeff Bratton, for appellee.

MCHANEY, J. Appellee brought this suit against appellant to recover $650, which he claimed to be due him by reason of a written contract with appellant district

to teach school for it for nine months, at $100 per month. He alleged that appellant breached the contract, after he had taught two and a half months, for which he was paid, and refused, without cause, to permit him to teach the remaining six and a half months covered by his contract. Appellant admitted the execution of the contract with appellee, that it had discharged him at the end of two and a half months, but denied that it had breached the contract, in that appellee was guilty of insubordination by failing and refusing to obey the reasonable rules and regulations of the superintendent of the school, and by refusing to work in harmony with the superintendent and the board, and by other conduct making him unsuitable as a teacher in said district. The case was tried to a jury, which resulted in a verdict and judgment for appellee for $203, with interest.

For a reversal of the case, appellant first says that the directors were without power to make a contract with appellee for a term longer than three months, because the record fails to show affirmatively that the electors in appellant district, at the annual school election in May, 1928, determined that a school for a longer term than three months should be taught, as required by § 8952, C. & M. Digest, which provides that, "the electors of every school district shall, when lawfully assembled in annual school meeting with not less than five electors present, have the power, by a majority of the votes cast at such meeting, * * * sixth, to determine the length of time during which a school shall be taught more than three months in a year." Appellant also relies upon the decision of this court in *Brassfield* v. *Jones,* 125 Ark. 415, 188 S. W. 1181, construing said statute, and holding that, "affirmative action on the part of the voters at the annual school meeting is required to enable the board to make a valid contract for a school of more than three months." First syllabus. Appellant is in error, however, in its contention, as said statute is not applicable to this case. Appellant is, as shown by its name, a consolidated school district, whereas the above statute ap-

plies only to common school districts. The above section was taken from § 56 of act 46 of the Acts of 1875, page 54, entitled, "An act to maintain a system of free common schools for the State of Arkansas," and the sixth power of the electors enumerated in § 56 of said act has never been changed, although the section has been amended in other particulars by subsequent acts. While this section says that the electors of "every school district" shall have the powers therein enumerated, the title of the act, and the whole context thereof, shows that it has to do with common school districts only, and that the words, "every school district," refers only to every common school district. Therefore appellant's contention in regard to this statute cannot be sustained, and the decision of this court in *Brassfield* v. *Jones, supra,* as well as the other cases cited on this point, have no application.

It is next said that the directors of appellant district were without authority to contract with appellee to teach a school in said district for any term, whatever, during the period covered by the contract, because appellant did not have sufficient money to its credit to pay the expenses necessary to operate said school, and that therefore the contract was in violation to § 9030, C. & M. Digest. This section is as follows: "It shall be unlawful for any director, or board of directors, in any school district in this State, to employ a teacher to teach a school in any district in this State, unless said district has money to its credit, in treasury of the county in which said district is located, to pay said teacher for such work; provided, that if the amount of taxes to be paid in by the collector of any county shall be sufficient to have a school taught in any district in which such taxes are to be paid, then the directors shall have the power to employ teachers to teach a school in such district; provided further, that a majority of the patrons of any school district in this State shall, at all times, have the right to petition said board of directors to employ a teacher, and cause a school to be taught in any district, whenever

they so desire; provided, further, that said directors do not pay more for services of said teacher than would be necessary to pay said teacher for said service if said money were in treasury. Any board of directors violating this law shall be fined in any sum not less than ten nor more than one hundred dollars."

It will be noticed that there are several provisos in this section, and one of them is that, by petition of a majority of the patrons of the district to the directors, they may cause a school to be taught. Appellant failed to set up this defense in its answer, and there was no proof that a majority of the patrons did not so petition the board. Whether this would defeat appellant in its contention in this regard, we do not find it necessary to decide, as we find from an examination of the record that the district had ample funds with which to pay the expense of operating the school throughout the period covered by appellee's contract. We think it would serve no useful purpose to set out the figures showing the amount of funds on hand, and those that were to come in, to the credit of the district during that school year, but suffice it to say that the funds were sufficient, and that appellant must fail in this contention.

It is finally said that appellee was guilty of insubordination, refused to work in harmony with the superintendent and school board, and otherwise conducted himself so as to justify his discharge, and that appellant should not be held liable for any part of the salary he would have earned, had he continued to teach the school. This question was submitted to the jury under proper instructions, about which there is no complaint, and the finding of the jury is against appellant. It is frankly conceded that, if this court should find the facts to be in dispute in this regard, the verdict should not be disturbed. We have examined the testimony carefully in this regard, and find it to be in dispute—that of appellant tending to justify appellee's discharge, and that of appellee tending to show that he had done nothing to justify his discharge. Especially is this true, when the

evidence is considered in the light most favorable to appellee, as we must do in order to determine whether there is any substantial evidence to support the jury's verdict.

We find no error, and the judgment is affirmed.

WALLOCH *v.* HEIDEN.

Opinion delivered January 13, 1930.

Frank B. Pittard and *Jacoway, Miles, Donham & Fulk,* for appellee.

Floyd L. Brown and *T. N. Robertson,* for appellant.

BUTLER, J., (after stating the facts). The appellant complains, first, of the giving of instruction No. 4, as follows: "The court instructs the jury that if you find from the evidence that neither the plaintiff nor defendant was guilty of negligence, as defined in other instructions, but that the injury was the result of accident, then your verdict will be for the defendant."

Appellant contends that this instruction presented a question not within the issues raised by the pleadings, and that there was no evidence upon which the instruction might be based, and that it was therefore abstract, and tended to confuse the minds of the jury, and to divert their minds from the proper consideration of the real issue. The testimony on the part of appellee tended to establish the fact that the swimming pool had been maintained for about two months only before the injury to Wesley Walloch, and within that time he had visited the pool and gone swimming four or five times; that he was an expert swimmer and diver, and was acquainted with the particular part of the pool at which he was later injured, which was brilliantly lighted, and that on the evening in question he had dived several times, at or near the place of the injury. This testimony was given by James Fisher and others, Fisher stating, in answer to question, that he had seen Wesley dive off the landing where he was hurt the night of the injury, but did not see him dive at the time the injury occurred. There was also

testimony tending to show that at the time of, and immediately before, the injury, the pool was being refilled, but that a considerable part of the bottom of the pool at the shallower end had not yet been covered by water, which was entering the pool from a nearby reservoir and making a loud roaring noise; that, after leaving the smaller pool containing the toboggan slides and entering the larger pool, Wesley disported himself for a time with some young girls, and at that time there were more than a hundred people in the pool, diving into the deeper water and swimming and wading around near where the injury occurred. There was also testimony to the effect that Wesley Walloch, before then, and on that evening, had dived in that part of the pool where the water was normally ten feet deep; that afterward he proposed doing some stunts for the instruction and entertainment of the girls, and was warned by his companion, Leonard, that he should not do so, because the water was too shallow.

Miss Helen Mack testified that she and a young lady companion, on the evening in question, were at the pool engaged in diving into the deep water, and, while so engaged, Wesley Walloch came to where they were, and began to make fun of the way in which they were diving, and proceeded to demonstrate how to dive and swim. After this, while witness was still in the deep water, she saw Wesley go out upon the board from which he dived, receiving his injury. Witness described his actions at the time he was in the act of leaving the board for the plunge into the water, stating that, "he put his hands upon his hips as though he was going to dive and it looked like he thought better of it—looked like it was between jumping and diving—looked to me like he jumped off and fell off." In answer to a question as to whether or not he had his hands on his hips, witness answered, "It looked like he was posing." And she was caused to notice by his looking and winking at her. On cross-examination witness stated in answer to question as to whether or not she had seen Wesley on the board, and as to her statement that he dived or fell off, that,

"It looked like he didn't know what to do; he changed his mind—didn't know whether to dive or jump. It looked like he did both."

The testimony of this witness was introduced without objection, and at the conclusion of the testimony the court gave, on its own motion, instructions Nos. 1 and 2, as follows:

"1. You are instructed in this case that it was the duty of the defendant, operating a swimming pool and equipment for hire, to exercise ordinary care to maintain the same in a reasonably safe condition for the uses and purposes to which it was to be put. If you find from the testimony in this case that the defendant negligently failed to maintain the pool in its depth of water, so as to be reasonably safe for the users of the equipment and pool by reason thereof, plaintiff, while in the exercise of ordinary care for his own safety, was injured, your verdict will be for the plaintiff."

"2. If you find in this case that the equipment as used on this pool, together with the depth of the pool at the time the plaintiff was injured, was dangerous because of the depth of the water, then it was the duty of the defendant to exercise ordinary care to warn the plaintiff of such dangers, if any, in using said pool in its condition, and if you find in this case that the defendant negligently failed to give such warning, and by reason thereof plaintiff was injured while in the exercise of ordinary care for his own safety, provided, if you further find that he himself was not aware of the danger or depth of the pool, or that it was not apparent to an ordinarily prudent person of his age and experience, then your verdict will be for the plaintiff."

By these instructions the question of the negligence of the defendant was submitted to the jury, which instructions, it is conceded, were warranted by the testimony in the case. We do not think that instruction No. 4 set out above was in conflict with these instructions, as contended by the appellant. The effect of instruction

No. 4 was merely to tell the jury that if the injury could not be attributed to the negligence of the defendant, there could be no recovery.

In the case of *LaGrande* v. *Arkansas Oak Flooring Co.*, 155 Ark. 585, 245 S. W. 38, where the action was for damages for personal injuries, received on account of the alleged negligence of the defendant in failing to furnish plaintiff a safe place to work, and in failing to make proper inspections of the equipment, and where the defense set up was contributory negligence and assumed risk, an instruction similar to the one challenged, *supra,* was held to be applicable to the facts, and within the issues. Plaintiff was a workman in the employ of the defendant, and at the time of his injury was engaged in putting boards on the table for the ripsaw. He was injured by the breaking of a belt, some fourteen or fifteen feet away, which belt struck the plaintiff in the eye putting it out. The breaking of the belt was said to have been caused by the negligence of the defendant in using an old belt, without the protection of any safety device by which the belt would have been prevented from flying off, if broken, and that, if such appliance had been provided, the injury would not have occurred. It was contended, further, that there had been no inspection made of the belt, which inspection, if made, would have resulted in the discovery that the belt was old and dangerous. There was testimony on the part of the defendant tending to show that the injury was not due to the breaking of the belt, and that such break was ordinarily incident to the employment of the plaintiff, and was a risk assumed by him.

The issues in that case were not essentially different from those in the case at bar. The evidence of the witness, Helen Mack, together with all the circumstances in the case, might reasonably have led to the inference that when Walloch went out upon the springing board he was acquainted with the shallowness of the water, but that the girls had distracted his attention and caused him to forget for a time the true situation, and that he at first

intended to further demonstrate his skill to the girls, and prepared to leap for the dive in the usual manner, when, suddenly remembering that the water was shallow, he attempted to change the manner of his dive so as to make it safe, and in doing so made an awkward movement by which his entry into the water was in a manner undesigned and unexpected by him. For, it resulted in an injury not only to his head but also to his heels, which were shown to have been injured. Which struck the bottom of the pool first can only be a matter of conjecture.

An "accident" is defined by the lexicographers as the "sudden happening of an undesigned event with unexpected results." This is one of the definitions which has been approved by the courts. Some have stated an "accident" is "an event happening without the concurrence of the will of the person by whose agency it was caused;" others as "an undesigned contingency—a happening without intentional causation." Walloch testified that he could dive with safety in water of the depth contained in the pool at the time of his injury, and the jury might have inferred from the evidence that in the act of diving he attempted to change the manner of his dive and, because of this, entered the water in an undesigned and unexpected manner, by reason of which his injury resulted. This, of course, was an accident, and if there was no negligence on the part of the defendant, there could be no recovery.

We do not undertake to say that the giving of the instruction complained of, in view of other instructions given, was necessary for the proper determination of the issues involved, but we cannot see where any prejudice could have resulted to the rights of the appellant. Moreover, as there was no objection to the testimony of Miss Mack, *supra,* as we have frequently held in such cases, the pleadings should be treated as amended to conform to the proof.

The next assignment of error is that the court erred in giving instruction No. 6, as follows: "The jury is further instructed that it was the duty of Wesley Wal-

loch to exercise ordinary care for his own safety when diving into said pool, and if the jury believe from the evidence that the plaintiff, Wesley Walloch, saw or might, by the exercise of ordinary care, have seen the danger, if any, incident to diving into said pool, but that he negligently failed to do so and thereby caused or contributed to his own injury, then your verdict will be for the defendant." It is contended that this instruction is inapplicable to the evidence in the case, and in conflict with instructions Nos. 3 and 4 given by the court, as follows:

"3. It was not the duty of the plaintiff, Wesley Walloch, in the exercise of ordinary care for his own safety, to make an inspection of the pool to determine the depth of the water and the danger of diving into the pool."

"4. The plaintiff, Wesley Walloch, can only be charged with such knowledge as to the depth of the water, and the danger of diving into the pool as was actually known to him, or that was so open and patent that an ordinarily prudent person of his age, knowledge, and experience could not have failed to observe."

Instead of instruction No. 6, *supra,* being in conflict with instructions Nos. 3 and 4, *supra,* we think these instructions explain and limit the expression "ordinary care," as contained in instruction No. 6. By instruction No. 3 the jury were told that it was not the duty of Wesley Walloch, in the exercise of ordinary care, to make an inspection of the pool, and in instruction No. 4, that the ordinary care, which he was bound to exercise, was limited only to such facts as were within his actual knowledge, and to such other facts as were so patent and obvious that a person of his age, knowledge and experience could not have failed to observe. Instruction No. 6 might well have stated that the ordinary care required of Walloch was to take cognizance of facts within his actual knowledge, or which were so apparent that one of his age, knowledge and experience could not have failed to observe; and doubtless, had the court's attention been called by specific objection to the instruction, as written,

and this limitation suggested, the court would have clarified same in these particulars. But, as we have seen, the instruction, as given, taken in connection with instructions Nos. 3 and 4, fully advised the jury as to what, and what only, were Walloch's duties in the exercise of ordinary care. We think the testimony was sufficient to warrant the giving of this instruction.

It is next contended that the court erred in giving instruction No. 10, which is as follows: "You are instructed that, if you find from the evidence in this case that the depth of the water was visible and apparent to patrons by ordinary prudence, of the age and maturity of the plaintiff, then you are instructed that the defendant was under no obligation to warn plaintiff of the depth of said water, and his failure to do so would not constitute negligence on his part." This instruction merely told the jury that it was not necessary to apprize the appellant of the danger which was so apparent that any one of his age, experience, and prudence would have seen and appreciated such danger at a glance. The court had told the jury that it was the duty of the appellee, if the equipment used and the depth of the pool at the time of appellant's injury was dangerous because of the condition of the water, to warn appellant of such danger in using the pool, unless the appellant himself was aware of the depth of the pool and the danger incident thereto.

In the case of *Johnson* v. *Hot Springs Land & Improvement Co.*, 76 Ore. 333, 148 Pac. 1137, L. R. A. 1915F 689, the court said: "One of the objections of the rule requiring the owner of a place of amusement like the one maintained by defendant to warn patrons of danger is to acquaint the patron with the hazard so that he may avoid injury. If the deceased had knowledge of the shallowness of the water, and the danger incident to diving from the springboard, then he knew all, and no less than he could have known had defendant expressly warned him of the risk. If the defendant had in fact cautioned Johnson against the peril, and, notwithstanding the warning, the latter dived off the springboard, then, on the facts of

the instant case, the defendant would not be liable because of the knowledge imparted to Johnson; and so, too, the same result follows if Johnson did in fact know of the danger, even though not told by the defendant. If, with knowledge of the danger, Johnson placed himself in peril, and on account thereof was injured, he was chargeable with contributory negligence."

The instruction on the duty of warning given at the request of the appellant, and instruction No. 10, fairly and properly presented the several theories of the appellant and appellee.

It is insisted, also, that error was committed in permitting counsel for the appellee to ask the appellee, while on the witness stand, the following question: "Do you know of any reason why any person could not observe the depth of the water," and in permitting the witness to answer, "I don't know of any reason." The appellee had already narrated the conditions existing at the pool as to the quantity of water, number of people, lights, equipment, *etc.,* at the time of his injury, and his answer to the question propounded by counsel was but a statement of a fact based upon the facts, as previously stated by him, and upon the fact that he was constantly observing the condition of the water and the general situation. While the testimony is negative in its character, this does not render it incompetent, the only requirement being that the witness should have been so situated that he would, in the ordinary course of events, know all of the particular attendant circumstances. *Ft. Smith & Western Ry. Co.* v. *Messeck,* 96 Ark. 243, 131 S. W. 686; 1 Wigmore on Evidence, § 664.

It is finally contended that the verdict is clearly against the preponderance of the evidence. This, if true, is not sufficient to warrant this court in setting aside the verdict, for the rule often announced is that, where there is any substantial testimony upon which the verdict might be based, it will not be disturbed. While the testimony in this case is conflicting on many material points, we think there is substantial evidence to sustain the verdict

of the jury. Finding no error on the whole case, the judgment must be affirmed.

HUMPHREYS, MEHAFFY and KIRBY, JJ., dissenting.

WARD *v.* PIPKIN.

Opinion delivered January 13, 1930.

S. S. Hargraves, for appellant.

Otto B. Rollwage, R. J. Williams and *Mann & Harrelson,* for appellee.

BUTLER, J. On the 21st day of February, 1921, Fannie Haskins Pipkin, an unmarried woman, made and executed her last will and testament, devising her property to the appellees in this case. After the execution of the will, she was married to the appellant, H. W. Ward, with whom she lived until the 21st day of January, 1928, when she died, leaving no children. The will was filed for probate, and, from the order admitting it to probate, the appellant, as surviving husband of Fannie Haskins Pipkin, filed his affidavit and appeal, and from an adverse decision in the circuit court he has appealed to this court.

The appellant bases his right of action on act No. 149 of the Acts of the General Assembly of the State of Arkansas of 1925. Section 1 of that act reads as follows: "That, upon the death of a married woman intestate, her husband shall be entitled to one-third of her real property for life, and one-third of her personal property in fee, where she leaves descendants; and to one-half of the real property for life, and to one-half of the personal

property in fee, in case she leaves no descendants; but the rights of the husband shall be limited to such proportionate share of the estate, after the payment of her debts."

The only question presented for our determination is whether a will executed by an unmarried woman is revoked by her subsequent marriage. By § 8 of c. 157 of the Revised Statutes of Arkansas, now § 10503 of Crawford & Moses' Digest, it is provided: "A will executed by an unmarried woman shall be deemed revoked by her subsequent marriage." It was, and is, a contention of the appellees that this section was impliedly repealed by § 7, article 9, of the Constitution of 1874, which section reads as follows: "The real and personal property of any femme covert in this State, acquired either before or after marriage, whether by gift, grant, inheritance, devise, or otherwise, shall, so long as she may choose, be and remain her separate estate and property, and may be devised, bequeathed, or conveyed by her the same as if she were femme sole, and the same shall not be subject to the debts of her husband."

We cannot agree with the appellees in this contention, but think the statute, by reason of § 1 of the schedule of the Constitution of 1874, is still in force, and not in conflict or inconsistent with § 7, article 9, *supra.* Section 1 of the schedule is as follows: "All laws now in force, which are not in conflict or inconsistent with this Constitution, shall continue in force until amended or repealed by the General Assembly * * *." By reason of this, many of the provisions of our present statutes on wills, which were parts of the Revised Statutes, are still the law, as well as § 10503, C. & M. Digest. That section does not prevent a married woman from reexecuting a will, which she might have made before the marriage, and the Legislature, in failing to repeal it, has recognized the fact that her changed social status might have made a will, perfectly proper when executed, inequitable and unjust by reason of the new ties established by the marriage. The testator in this case must be presumed to have known of

the existence of a law by which her marriage worked the revocation of her will, and it must be further presumed that the fact that she did not re-execute it evidenced the intention on her part to assent to the revocation of the will by the force of the staute. As we have seen, the statute in question is not in conflict or inconsistent with a married woman's right to convey her property by devise or bequest. We conclude that, by virtue of § 10503, *supra,* Mrs. Ward died intestate, and therefore the appellant would be, and is, entitled to the benefits conferred by act No. 149, *supra.*

The judgment of the circuit court is therefore reversed, and the cause is remanded for further proceedings, in accordance with the declarations of law herein expressed.

MISSOURI PACIFIC RAILROAD COMPANY *v.* CHASE.

Opinion delivered January 20, 1930.

Thomas B. Pryor and *Harvey G. Combs,* for appellant.

W. U. McCabe, for appellee.

HART, C. J. Appellant prosecutes this appeal to reverse a judgment of $150 against it in favor of appellee for running over and killing with one of its trains, two hunting dogs owned by him.

The first assignment of error is that the evidence is not legally sufficient to support the verdict. According to the testimony of John Tilley, he lived near Shipp's Ferry in Baxter County, Arkansas, in November, 1928. He heard a train whistle, and went to his door. He saw what he took to be a couple of yearlings on the railroad track, running ahead of the train. He could see them in the light of the train, and they were running about forty or fifty yards ahead of the train. The train went behind some timber, and he could not see them any more. He went over to the railroad track the next morning and found the two hounds, which appeared to have been killed by a running train. One of them was a black and tan hound, and the other was white with red ears. The physical condition of the dogs indicated that they had been run over by a train. They appeared to have been dragged along the track for some distance after the train struck them. Trained hunting dogs are worth all the way from $75 to $100 each.

According to the testimony of the appellee, Joe Chase, he owned the dogs which had been killed by the train. One of them was a fox hound, and the other was a tree dog. He had refused $75 for each of the dogs. They were trained dogs, and he had owned them for about six months. One of them was two years old, and the other was five.

According to the testimony of W. N. Reeves, the fireman on the train of appellant, on the 28th day of November, 1928, he saw a couple of dogs run square in front of the engine just below Shipp's Ferry, in Baxter County, Arkansas. They passed in front of the engine, so close that it was impossible to stop the train to avoid striking them. The fireman had been putting coal in the engine, but was up in the cab when the dogs were killed. The engineer had called for a signal, and was looking back to answer the signal when the dogs were killed.

Appellee having shown that the dogs were killed by a train, a presumption of negligence arises, and the burden of proof was upon the railroad company to show that it was guilty of no negligence. *Mo. Pac. Rd. Co.* v. *Bain,* 170 Ark. 594; and *Mo. Pac. Rd. Co.* v. *Sloan,* 176 Ark. 179.

This is conceded by counsel for appellant, but they contend that the statutory presumption of negligence was overcome by the testimony of the fireman, which they claim was undisputed. It is true that the fireman testified that the two dogs ran in front of the engine, so close to it that it was impossible to stop the train, but we do not think that his testimony can be said to be undisputed. According to the testimony of Tilley, he saw the dogs running forty or fifty yards ahead of the engine on the track. He said that he heard the whistle of the train, and upon going to his door and looking out, he could see the dogs running ahead of the train by the light of the engine. It was late in the afternoon at the time the dogs were run over and killed by the train. His testimony, if believed by the jury, shows that the dogs were running ahead of the train, instead of going upon the track immediately in front of the engine. If they were running along the track, forty or fifty yards ahead of the engine, the jury might have believed that the train could have been checked enough to have avoided running over the dogs or, at least, if the whistle had been blown, the dogs would have been scared off the railroad track. Therefore, it cannot be said that the evidence is not legally sufficient to warrant the verdict.

The next assignment of error is that the evidence as to the value of the dogs was not sufficient upon which to base a verdict of $150. John Tilley testified that good hunting dogs were worth from $75 to $100 each. The appellee testified that they were good hunting dogs, and that a short time before they were killed, he had refused $75 each for them. This was sufficient evidence upon which to base a verdict and judgment for $150. *Mo. Pac. Rd. Co.* v. *Edwards,* 178 Ark. 736.

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

SEAMAN STORES COMPANY *v.* PORTER.

Opinion delivered January 20, 1930.

[redacted]

[redacted]

A. M. Dobbs, for appellant.

Partain & Agee, for appellee.

HART, C. J., (after stating the facts). The first assignment of error is that the court erred in giving instruction No. 2 at the request of the appellant. It reads as follows:

"2. If you find for the plaintiff, you will fix his damages at such a sum as you may find from the evidence will fairly compensate him for damages sustained, if any, as a direct result of the breach of the contract by the defendant, if you find that there was such a breach; in determining the amount of damages, if any, you may take into consideration the present value of the amount of compensation that the plaintiff would have received during the year 1929, if he had been permitted to perform his contract, if you find that he was wrongfully prevented from performing same, less any and all amounts that you may find from the evidence he may have received since his discharge, or that you may find that, by diligent efforts upon his part, he may be able to earn or receive during the remainder of the year 1929."

The court erred in giving this instruction. The record shows that the complaint was filed on the 14th day of February, 1929, and a trial was had, and judgment rendered in favor of appellee on the 14th day of March, 1929. There was a verdict and judgment for $1,200. According to the appellee's testimony, he was employed by the corporation for the year 1929, at a salary to be paid monthly in the sum of $125. According to the evidence for appellant, appellee was employed by the month. That question was properly submitted to the jury, but the court erred in giving instruction No. 2, copied above, on the measure of damages.

In *Van Winkle* v. *Satterfield,* 58 Ark. 617, 25 S. W. 1113, 23 L. R. A. 853, it was held that an employee, who has been wrongfully discharged before the expiration of his term of employment and brings suit at once for breach of the contract, is entitled to recover compensation for the injury suffered by the loss of wages down to the day of trial.

It was further held that, in estimating the damages for the wrongful discharge of a servant, such sums as he, by reasonable diligence, might have earned in a similar business, making allowance for the expense of obtaining employment, should be deducted from the wages he might have earned under the broken contract; but, in such case, the burden of proof is on the employer to show that the servant might have obtained similar employment.

Also, it was held that, to entitle an employer to reduce the damages recoverable for wrongful discharge of his servant, by showing that the servant has performed work on his own account, he must prove that the work was incompatible with the performance of the service stipulated to be performed under the violated contract.

The principles of law declared in that case control here. Appellee, upon his discharge in February, 1929, had a right to bring an action upon the alleged ground that he had been discharged without cause. The instruction complained of was erroneous in entitling him to recover the value of the compensation that he would have received during the year 1929, if he had been permitted to perform his contract. This was not his measure of damages. He might have died long before the time of his services under the contract expired. Under the rule announced in the case above cited, he would only be entitled to recover damages suffered at the date of the trial. As we have already seen, the date of the trial was March 14, 1929, just a month after he was discharged. Therefore, without proof of special damages of some kind, he was not entitled to recover the sum of $1,200, which was the amount of the verdict. The only damages proved by

appellee at the trial was the loss of his salary for a period of time, not longer than one-half of a month.

Inasmuch as the judgment must be reversed for the error indicated, and the cause will be remanded for a new trial, we will lay down the rule governing the elements of damages upon a new trial of the case. The time of service for which appellee was hired has now expired. Under the case above cited, if the employer desires to mitigate the damages by showing that the employee had employment, or could have obtained employment of a similar kind by reasonable diligence, during the whole, or any portion of the contract period, he may do so, but the burden of proof in this respect is upon him.

On the other hand, in the case cited, it was held that, where the servant sues at once for the breach of the contract of employment upon his discharge, he can recover the damages which he has sustained down to the day of trial, which is limited to a compensation of the injury suffered by the breach of the contract. The court said that the loss of wages, which his employer agreed to pay him, constitutes the injury, and that what he has suffered by reason of the loss of wages, as a rule, is the amount of damages he is entitled to recover.

As said in *Everson* v. *Powers,* 89 N. Y. 527, 42 Am. Rep. 319, where the cause of action is commenced during the term, but the trial occurs after the expiration of the term of service, we can see no reason why the plaintiff may not be permitted to recover the same damages that he would have been entitled to recover if the action had been commenced after the expiration of the term.

In *Wilkinson* v. *Black,* 80 Ala. 329, the court held that, where the suit is brought after the expiration of the term of service, or such term has expired at the day of trial, the measure of damages, *prima facie,* would be the wages agreed to be paid, according to the terms of the contract.

In *The Mount Hope Cemetery Association* v. *Weidenmann,* 139 Ill. 67, 28 N. E. 834, the court said that a servant, upon notice of his discharge, may immediately

bring his action for a breach of the contract, or he may wait until the expiration of the term of employment. It was further said that, if the servant sued before the termination of the contract, and the action was not tried until after the period of service stipulated for had expired, the plaintiff would be entitled to recover for the whole time, less payments made, and such sums as he had, or might by reasonable diligence, have earned subsequent to the breach. This is a clear and comprehensive statement as to the measure of damages.

In *Howay* v. *Going-Northrup Co.,* 24 Wash. 88, 64 Pac. 135, it was held that the immediate bringing of an action by a servant wrongfully discharged, during the term for which he was engaged, will not prevent a recovery for the whole unexpired term, if the trial does not take place until the term has expired.

To the same effect see *Roberts* v. *Rigdon,* 81 Ga. 440, 7 S. E. 742; and *Roberts* v. *Crowley,* 81 Ga. 429, 7 S. E. 740.

For the error in giving instruction No. 2 on the measure of damages, as copied above, the judgment must be reversed, and the cause will be remanded for a new trial.

WARD *v.* JACKSON.

Opinion delivered January 20, 1930.

W. E. Beloate, for appellant.

Smith & Blackford, for appellee.

SMITH, J. This suit was filed by T. W. Jackson on December 10, 1928, to foreclose a mortgage which W. E. Ward had executed on a forty-acre tract of land owned by him, and a default decree was rendered on January 3, 1929, in which a commissioner was appointed to sell the land, in satisfaction of the debt secured by the mortgage.

The complaint alleged that, the conditions of the mortgage had not been performed, and that the property was insufficient to pay the mortgage debt, and upon these allegations a receiver was appointed, with directions to take charge of the land and rent it for the year 1929, and J. A. McClusky was appointed receiver.

In September, 1928, Ward rented about twenty-five acres of the land to Joe Wilson for the year 1929. Wilson was then a tenant on the place, and had been for several years. Pursuant to the contract between Ward and Wilson for the cultivation of the land in 1929, Wilson sowed about four acres in oats in September, 1928, and made other preparations and arrangements to cultivate the land in 1929. Wilson was not a party to the foreclosure suit in which the receiver was appointed.

On March 6, 1929, the receiver filed with the court a report, in which he recited that pursuant to his appointment he had entered into a contract with Clarence Jackson as a tenant to cultivate all the land in 1929, and on March 1, 1929, Clarence Jackson gave Wilson notice that he would apply on March 6 to the court for a writ of assistance, under which he might be put in possession of the land. Testimony was taken on the hearing of this application, and the court ordered the writ to issue dispossessing Wilson, and placing Clarence Jackson in possession, and this appeal is from that order. Wilson gave a supersedeas bond, and remained in possession. Before this order directing that Wilson be dispossessed was made, but after the appointment of the receiver, Ward obtained a loan on the security of the land, and the 1929

rent, with which to pay the mortgage debt, and the mortgage was canceled.

The rights of a mortgagee under conditions alleged in the complaint are well-defined, and are fully stated in the following cases: *Gailey* v. *Ricketts,* 123 Ark. 18, 184 S. W. 422; *Oliver* v. *Deffenbaugh,* 166 Ark. 118, 265 S. W. 970; *Osborn* v. *Lindley,* 163 Ark. 260, 259 S. W. 729; *Bank of Weiner* v. *Jonesboro Trust Co.,* 168 Ark. 859, 271 S. W. 952; *Deming Investment Co.* v. *Bank of Judsonia,* 170 Ark. 65, 278 S. W. 634; *Wood* v. *Bigham,* 170 Ark. 253, 279 S. W. 779; *O'Connell* v. *St. Louis Joint Stock Land Bank,* 170 Ark. 778, 281 S. W. 385.

It is unnecessary to review these cases, and it will suffice to say that the appointment of a receiver was not improper, and his right to collect the 1929 rent, under the allegations of the complaint, was clear, if this had been necessary to discharge the mortgage debt. But the instant case does not involve the right to collect the 1929 rent. There is involved only the question of the right of possession. There would have been no question about the receiver's right to collect the rent from Wilson for 1929, had this been necessary to pay the mortgage debt. But this is not necessary, the debt had been paid and the mortgage satisfied before Wilson was ever made a party to the proceeding. There was therefore no occasion to continue the receivership. There may have been some question as to costs of suit, but that question is not presented by the record before us.

In the case of *Deming Investment Co.* v. *Bank of Judsonia, supra,* it was said: "In the case at bar there was no mortgage of the rent. Consequently the rents and profits were not pledged by a mortgage on the land, and they belonged to the mortgagor, or third person claiming under him, subject to the rights of the mortgagee in the premises. In equity a mortgage of lands is only security for the mortgage indebtedness. Hence, the mortgagor has a right to lease, sell, and in every respect to deal with, the mortgaged premises as owner, so long as he is permitted to remain in possession, and so long as it

is understood and held that every person taking under him takes subject to all the rights of the mortgagee unimpaired and unaffected." (Citing authorities).

So, here, in accordance with farming usage, Ward, who had given no mortgage of the rents, was in possession of the land, and, in accordance with custom, rented it in the fall of 1928 for the year 1929, and his tenant Wilson had sowed his oats. There is no intimation of any collusion between Wilson and Ward, the mortgagor, to impair the security of the mortgage. Wilson was in possession, and of this fact all parties had notice, both constructive and actual. His presence on the land, and his rights there, should have been taken into account, yet he was not made a party to the litigation until after the mortgage debt had been paid. Under these circumstances, it was error to award the writ dispossessing Wilson. *McLain* v. *Smith,* 4 Ark. 244; *Jett* v. *Cave,* 5 Ark. 254; *Fletcher* v. *Hutchison,* 25 Ark. 30; *Buckner* v. *Sessions,* 27 Ark. 219; *Smith* v. *Moore,* 49 Ark. 100, 4 S. W. 282; *Theurer* v. *Brogan,* 41 Ark. 88; *Choctaw O. & G. R. Co.* v. *McConnell,* 74 Ark. 54, 84 S. W. 1043; *Thompson* v. *Grace,* 91 Ark. 52, 120 S. W. 397; 19 R. C. L., § 336, p. 533.

In 3 Jones on Mortgages (8th ed.), pages 264 and 265, it is said: "A tenant in possession of mortgaged premises under lease from the mortgagor is a proper party to foreclose, in order to control his possession, and he has been held a necessary party, in order to affect his rights." Our own case of *Buckner* v. *Sessions, supra,* is cited to support this text.

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

TAYLOR *v.* JOINER.

Opinion delivered January 20, 1930.

McKay & Smith, for appellant.

Coulter & Coulter, for appellee.

HUMPHREYS, J. This appeal involves the question whether appellant is entitled to recover on his cross-complaint against appellee $534.30, with interest from April 3, 1928. The suit, out of which this question arises on appeal, was brought on June 2, 1927, in the circuit court of Columbia County, by J. K. Reed against appellant and appellee for a balance due of $550 and 8 per cent. interest on a promissory note, executed by them to Reed on July 23, 1925. It developed in the testimony that $534.30 was the net amount appellant paid on the note.

Appellant and appellee filed separate answers, admitting their several and joint liability to J. K. Reed upon the note, but joining issue between themselves as to whether appellant was entitled to recover from appellee, on his cross-complaint, the balance due upon the note to Reed. The gist of the cross-complaint was, that said note was executed to J. K. Reed for money with which to pay a judgment obtained by the Turner Hardware Company on July 24, 1923, against G. A. Dunn, the appellee and others.

Appellee interposed the defense to the cross-complaint of appellant that the money was borrowed from J. K. Reed to pay a judgment of the Turner Hardware Company against G. A. Dunn as principal, and himself

and others as sureties, which judgment was superseded during the pendency of the appeal to the Supreme Court in that case, by an appeal bond signed by G. A. Dunn as principal, appellee, himself, and others as co-sureties.

The pleadings disclosed that appellee had paid about one-half of the face of the note, and interest, to J. K. Reed, so the court required appellant to pay the balance due thereon to the clerk, who paid the same to J. K. Reed; and, on motion of appellee, transferred the cause to the chancery court to try the issue of contribution presented by the pleadings between appellant and appellee. On the trial of that issue in the chancery court, it was found and decreed that appellant and appellee were not co-sureties for the payment of the Turner Hardware Company judgment, and that appellant was not entitled to contribution from appellee for the amount he had paid on the note. Appellant's cross-complaint was accordingly dismissed, and appellee was permitted to recover on the cross-complaint all his costs.

The following facts are undisputed: The Turner Hardware Company recovered judgment in the chancery court of said county in the sum of $1,000 for the wrongful detention of a building occupied by G. A. Dunn against him, J. W. Rushton and appellee on a retaining bond executed by them to hold the possession of the building. An appeal was taken to the Supreme Court, and the judgment superseded by an appeal bond, prepared by appellee and signed by G. A. Dunn, as principal, and M. J. Dunn, J. W. Rushton, appellee and appellant as sureties. The judgment of the lower court was affirmed by the Supreme Court, and a judgment rendered in the Supreme Court upon the supersedeas bond against G. A. Dunn, as principal, and the other signers as sureties. Appellant and appellee then executed a bond to stay the judgment for six months, and when it became due they jointly executed the note sued upon herein to procure money from J. K. Reed with which to pay the judgment, interest and costs due the Turner Hardware Company.

The record reflects a conflict in the testimony in practically all other particulars.

Appellant testified that appellee requested him to sign the supersedeas bond. Appellee denied this, and was corroborated by G. A. Dunn, who testified that he requested appellant to sign it. The trial court specifically found that appellant signed the bond at G. A. Dunn's request, and it cannot be said that the finding of the trial court, in this respect, was contrary to the clear preponderance or weight of the testimony. It is reasonably inferable, however, as a fact, that the bond had been signed by G. A. Dunn and appellee before Dunn took it to appellant, as appellant's name appears last in the body of the bond as well as in the signatures thereto.

This case presents no question of the liability of Taylor and Joiner to Reed, who has been paid his money, and is out of the case. The question is that of the relation of Taylor and Joiner to each other.

It clearly appears that, although Joiner denominated both himself and Taylor as sureties on the appeal bond which they signed, Joiner was, in fact, a principal, in the sense that he was already liable. He became liable originally as a surety, but, at the time of the execution of the supersedeas bond, he was then liable, and his liability had been adjudicated, and Taylor's connection with the transaction did not begin until after Joiner's liability had been adjudicated. Joiner was then interested in an appeal to the Supreme Court, while Taylor was not, and Taylor enabled Joiner to have the adjudication of this liability reviewed on the appeal, and certainly enabled Joiner to delay the enforcement of this adjudged liability in a matter in which Taylor had not previously been concerned. Taylor—and not Joiner—was the surety on the supersedeas bond, although they were both denominated as sureties by Joiner in preparing the bond, because Joiner was under a subsisting liability for the debt superseded, while Taylor was not.

It may be true, as the court found, that Dunn, and not Joiner, requested Taylor to sign the supersedeas bond; but Joiner prepared the bond and signed it, and delivered it to Dunn to obtain the signature of some person who was, in fact, a surety only, and Taylor became that person. This was for the benefit of both Dunn and Joiner, and we think Taylor was not a mere volunteer.

Joiner had the same interest in this bond which he later had in the execution of the note to Reed, who loaned the money with which the judgment in favor of the hardware company was paid. Reed required an indorser on the note, and Taylor became that person, and while, by signing the supersedeas bond, Taylor had become liable for the debt, which was discharged with the proceeds of the note given to Reed, the fact remains that the basis of this liability was Taylor's suretyship for Joiner.

The doctrine of contribution is founded upon principles of equity, and that relief is granted only when the equities are equal, and we think they are not equal as between Joiner and Taylor, for the reasons stated.

In the chapter on Principal and Surety, 32 Cyc. 277, it is said: "Co-sureties are entitled and subject to contribution among themselves. Conversely, the right or liability to contribution does not attach to one who is not a co-surety with a surety. Thus a person who, although appearing to be a surety on an instrument, is in fact the principal, having received a part or all of the sum borrowed, or who has subsequently become the principal by assuming the indebtedness, cannot have contribution from a surety for the debt."

It is argued, in support of the decree appealed from, that it was decided in the case of *Dunn v. Turner Hardware Co.*, 178 Ark. 486, 12 S. W. (2d) 13, that the situations of appellant and appellee were equal. The equities between those parties were not determined in the case cited. The extent of the ruling was that all were liable upon the supersedeas bond to the Turner Hardware Company.

The writer and Mr. Justice McHaney do not agree with, or concur in, the opinion of the majority.

On account of the error indicated, the judgment is reversed, and judgment is directed to be entered here in favor of appellant against appellee for $534.30, with interest at the rate of 6 per cent. per annum from April 3, 1928.

Robinett *v.* State.

Opinion delivered January 20, 1930.

Earl Blansett, for appellant.

Hal L. Norwood, Attorney General, and *Pat Mehaffy,* Assistant, for appellee.

HUMPHREYS, J. Appellant was indicted, tried and convicted in the circuit court of Benton County for the crime of manufacturing mash, and, as a punishment therefor, was adjudged to serve a term of one year in the State penitentiary, from which judgment an appeal has been duly prosecuted to this court.

Appellant's first assignment of error for a reversal of the judgment is that there is no substantial evidence to support the verdict and judgment. The testimony introduced by appellee was entirely circumstantial and, viewed in its light most favorable to the State, is in substance as follows: At the time of his arrest appellant had resided for two weeks upon a place leased from the owner by his father, Oscar Robinett. The sheriff, Edgar Fields, learned that a still was being operated thereon by him, and in company with Jack Walker, the constable of the township, and several others, went on to the place and found a distilling outfit complete and several barrels of mash about ready to be cooked, in a thicket near a spring about 150 yards from the house in which appellant resided. A cooker with ashes under it was near the mash. Also two jugs containing a little whiskey. A plain pathway led from the still to the house, and in following it the officers found two other jugs which had contained whiskey, another cooker and holes in the ground where kegs or barrels had apparently been buried. At the house they found a lot of bottles of different sizes and four or five jugs which had contained whiskey. They arrested appellant who neither denied or affirmed that he had any connection with the still. Although appellant testified that he was not the owner of the still and had no knowledge

of its existence and no connection with its operation, and showed by other witnesses that plain pathways led from the still to the home of appellant's father about one-half mile distant and to other homes in the neighborhood, the circumstances detailed above are sufficient to support the verdict of the jury and consequent judgment of the court. It cannot be said, as argued, that these facts did not tend to connect appellant with the operation of the still. It is hardly conceivable that a still could have been operated on appellant's place within a few hundred yards of his house without his knowledge of its existence and without any complicity on his part in the operation thereof, especially in view of the fact that a well-beaten pathway led from the house, where bottles of various sizes and whiskey jugs were found, to the still which had been recently operated and where four barrels of mash were ready to be run or cooked. The whole situation strongly tended to connect him with the still and the operation thereof and was sufficient to sustain the jury's verdict to that effect.

Appellant's second assignment of error for a reversal of the judgment was the refusal of the trial court to grant him a new trial because, after the trial, it was ascertained by measurement that the still was found to be 380 2/3 yards from appellant's home instead of 150 to 160 yards as testified to by the State's witnesses. This assignment of error is untenable for several reasons.

First, the assignment of error was set out in the motion for a new trial without being accompanied by an affidavit. It was not a part of the bill of exceptions and could not be incorporated therein by merely including it without proper affidavit in the motion for a new trial.

Second, no diligence was shown to discover the exact distance of the still from the house before the trial. By proper diligence the measurement could have been made before the trial began. It is argued that appellant did not know that the distance of the still from the house would become a material issue until it was made in the course of the trial. This did not excuse him from mak-

ing the measurement in reasonable anticipation that the nearness of the still to his house might become an issue.

Appellant's third and last assignment of error for a reversal of the judgment is that on cross-examination of Oscar Robinett, the father of appellant, the prosecuting attorney, over appellant's objection, was allowed to ask him whether he had not made the following statement to Jess Mutrey, a lad who wanted to pick blackberries on the place in question: "My business is my business and your business is your business, and you can only go a certain distance down there. I will get the rest of the berries." The witness, Oscar Robinett, answered this question in the negative. The prosecuting attorney then introduced Jess Mutrey who testified that Oscar Robinett made such a statement to him. The prosecuting attorney asked the question and introduced Mutrey to contradict Robinett for the purpose of testing his credibility as a witness. We think it was admissible for that purpose. Appellant argues, however, that in admitting this testimony the court's remark in doing so was prejudicial to appellant. The court said, in admitting the evidence, over appellant's objection, that "You should not consider it against the defendant (appellant) in any shape, form or fashion unless you believe from the proof that his father was mixed up with him in the manufacture of the liquor." It is argued that the remark was gratuitous, without any evidence upon which to base such a remark and necessarily prejudicial as indicating that the court believed that appellant's father had perhaps been a party to operating the still in connection with appellant. Learned counsel for appellant is mistaken in his statement that there was no evidence tending to show that Oscar Robinett was connected with the manufacture or making the mash. The still was located on a place which Oscar Robinett had leased from the owner and the proof reflected that a well-defined pathway led from the still to his home, anywhere from one-fourth to one-half mile distant from the still. In view of this testimony we do not think the remark of the court was improper. It was really a cautionary remark to the jury not to consider the testimony

of Oscar Robinett at all unless they should find that he was associated with appellant in the manufacture of mash, and was favorable to appellant.

No error appearing, the judgment is affirmed.

COTTON STATES LIFE INSURANCE COMPANY *v.* TANNER.

Opinion delivered January 20, 1930.

Sheffield & Coates, for appellant.

W. G. Dinning, for appellee.

MEHAFFY, J. Appellee filed suit in the circuit court of Phillips County, alleging that an insurance policy had been issued to Saborn D. Pruitt; that Pruitt died, and that he, Tanner, was the administrator of the estate of said Pruitt. The policy was for $2,000. He alleged that the policy was in force at the time of Pruitt's death, and that due notice of his death was given to the appellant.

Appellee alleged that Pruitt had given a note for the first year's premium of $73.40, and that there had been paid on the said note $28.32; that payment had been demanded of said insurance company, and had been denied. The insurance policy was filed, and appellant filed a demurrer on the ground that the complaint alleged that, at the time of the delivery of the said policy the assured executed and delivered to the appellant his note for $73.40 as payment for his first annual premium, and thereafter made payment of the sum of $28.32 to be applied toward the satisfaction of said note, while the policy itself provided that the same should not take effect until the first premium had been paid in cash to the company, and the policy actually delivered to the insured, during his lifetime and in good health.

The court overruled the demurrer, and the appellant filed answer, denying all the material allegations in the complaint. Appellant alleged in its answer that proof of death had not been made, and also that the policy was issued to Pruitt upon the regular monthly plan for a cash premium, and that the policy lapsed for nonpayment of premiums prior to the death of Pruitt.

There was a verdict and judgment in favor of appellee, and appellant filed a motion for a new trial,

which was overruled, and an appeal prosecuted to this court.

The appellant contends that the court erred in permitting witnesses, Tanner and Gatchell, to testify as to statements made by Green in their attempt to show that Green was appellant's agent. There is no principle better established than the principle that you can neither prove agency, nor the extent of an agent's authority by his declarations. *American So. Trust Co.* v. *McKee,* 173 Ark. 147, 293 S. W. 50; 1 Mechem on Agency, § 285.

This evidence, however, could not have been prejudicial because the appellant introduced the contract of agency. This contract, made on the 8th day of May, 1925, shows that H. C. Green is the district agent of appellant, and that the district of Green embraced several counties. There was therefore no question about his agency, unless the agency contract had been terminated. The appellant contends that the contract had been terminated by giving the agent notice, as required by the contract. The contract is quite lengthy, but it is claimed that it was terminated as provided in paragraph 23. That paragraph reads as follows:

"Unless otherwise terminated, this agreement may be terminated by either party, by a notice in writing, delivered personally, or mailed at the last known address at least thirty days before the date therein fixed for such termination."

It is contended that notice under the provisions of the above paragraph was given by telegram of September 7, 1926. The telegram, addressed to H. C. Green, Helena, Arkansas, is as follows:

"Write no more business Cotton States Life, as we are withdrawing from that section of Arkansas. Please instruct all your agents. We are writing you today. A. H. Hammons, Agency Manager."

The letter, dated the same day as the telegram, and addressed to H. C. Green, Helena, Arkansas, reads as follows:

"I was instructed at a meeting this morning to write you this letter. We had our actuary with Mr. McCabo, Dr. Dailey, Mr. Binkley, and myself, and went over the Arkansas business, figuring the drive you had last year, and, figuring the excess mortality, the company has been at a great deal of loss in your section of Arkansas. All of the applications that you all have sent in, in the last ten days, have been carefully examined, and worked over, and we find that it will be impossible for us to issue this business. Please instruct your agents not to write any more business for the Cotton States Life, and I am inclosing all applications to date that were sent in. Please send in your contract and all supplies, as we are going to withdraw from that section of Arkansas at this time. I am, naturally, very sorry that we have had to take this action, but we feel that now is the best time to withdraw from that part of the State. Experience has shown us that we have constantly lost money in Arkansas. You can mail your supplies and your contract back to us express, C. O. D. Be sure and instruct your agents not to write any more business for the Cotton States Life, as we do not want the medical expense of having them examined, and then return the applications. When do you think you will be able to settle your account, as we have been severely criticised by the way we have handled it?

"With kindest regards, I am, Yours very truly, Agency Manager."

This letter and telegram purported to be copies found in the files among the papers of the appellant. E. O. Binkley, the witness, who testified for appellant, stated that he resided in Louisville, Kentucky, and is connected with the Inter-Southern Life Insurance Company, and, as a part of his duties, handles the records of the Cotton States Life Insurance Company; that he had, in his possession, all of the records pertaining to the policy of Saborn D. Pruitt; that from the 8th day of May, 1925, until September 7, 1926, one H. C. Green

was acting as their agent in this territory. Witness then identified the agent's contract, and it was introduced in evidence. How this witness got possession of the records of Cotton States Life Insurance Company, is not shown. He does not testify as to having any connection with that company, except that a part of his duties with the Inter-Southern Life Insurance Company is that he handles the records of the Cotton States Life Insurance Company.

There is no evidence that either the telegram or the letter was ever mailed, nor is there any evidence that either of them was ever written. The only testimony is that this witness, Binkley, says, he found them in the files. He did not hear either the telegram or letter dictated; he never saw either one, and did not know that they were sent. He could not have known that either of them was sent, because he never saw either one of them, and never saw the letter mailed, or the telegram sent. He testifies that they never heard from Green; he did not respond to either the telegram or the letter, and he does not know that he ever received either.

The contract provides that the notice shall be either delivered in person or mailed, and there is no proof that either was ever done. Therefore, there is no evidence that any notice was ever given to Green terminating the contract. But, if the letter and telegram had both been sent, this would not have terminated the agency contract. The paragraph relied on provides that at least 30 days' notice must be given before the date therein fixed for such termination. Necessarily, to give a proper notice under this contract, the notice would have to fix the date for the termination. Even if these had been sent, they would not do that. Moreover, it did not say the contract was terminated, or would be at any particular time, but simply stated to him to not write any more business.

Appellant's witness testifies that they never heard from Green after the date of the telegram and letter, and, so far as the record shows, they had no communica-

tion whatever with him. He does not know whether he sent in his contract and supplies or not.

Appellant introduced the contract, showing the agency of Green, and showing the manner in which it might be terminated, and the total absence of any evidence, tending to show that it was terminated, justifies the conclusion that Green was, at the time, the agent of the appellant.

Appellant contends that the court erred in refusing to instruct the jury to find for the defendant at the close of plaintiff's testimony. It is true that the contract had not, at this time, been introduced, but the evidence shows that Green occupied an office, and the sign on the office was, "Cotton States Life Insurance Company"; that he acted as the agent; that he procured applications for insurance, and that policies were issued on said applications, and appellant alleges in his answer that the policy delivered to Saborn D. Pruitt had lapsed for nonpayment of premiums due. The application was made to Green, as agent of the company, and the policy issued. The evidence showed that the policy was issued; that $28.32 had been paid, and, in fact, the policy itself was filed at the request of the appellant. This, together with all the evidence with reference to the payment of premiums, and the death of Pruitt, was sufficient to justify the court in refusing to direct a verdict at the close of plaintiff's testimony. But, when the court refused to do this, the appellant then introduced evidence, and the court did not err in its refusal to direct a verdict for the appellant.

It is also contended that the court erred in refusing to direct a verdict for appellant, because of plaintiff's failure to show that proof of death had been filed, as required by the policy. One answer made by appellee to this contention is that Green, the agent, denied liability, and, liability having been denied, no proof of death was necessary. Green was a district agent, his agency embracing several counties.

This court recently said: "It is first contended that the decree should be reversed, because the proof of loss was not filed within the time prescribed by the policy. The compliance with this provision of the policy was expressly waived by the local agent of the insurance company, who issued the policy and delivered it to the insured. The local agent had authority to issue fire insurance, write and deliver policies and collect premiums, and to notify the insurance company of loss. Having been clothed with these powers, he had *prima facie* authority to waive presentation of proof of loss." *London & Lancashire Ins. Co., Ltd.,* v. *Payne, ante* p. 638; *National Union Fire Ins. Co.* v. *Wright,* 163 Ark. 42, 257 S. W. 753; *Globe Ins. Co.* v. *Payton,* 128 Ark. 528, 194 S. W. 503; *National Union Fire Ins. Co.* v. *Crabtree,* 151 Ark. 561, 237 S. W. 97; and *Citizens' Fire Ins. Co.* v. *Lord,* 100 Ark. 212, 139 S. W. 1114.

In the instant case, it seems that neither party undertook to show just what authority Green had, and, for that reason, we are unable to say whether he had the right to deny liability or not. Green did not testify. The evidence also shows that notice was sent to the company, but this evidence was insufficient, for the reason that it does not show to what place the letter was addressed, and, in order to show that proof was made by a letter, it would be necessary to show that it was mailed to the company at some place where the company had a place of business. The evidence on these issues does not seem to have been developed, but upon another trial the parties can either present this evidence, or find out that they are unable to do so.

The evidence in this case fails to show either the date of the note or the amount of it. It may have been given when the application for insurance was made, or it may have been given when the second payment was made, if given at all. One witness testifies that Green told him he took a note, and another one testified that he saw the note, but he could not tell the date of the note

or the amount of it. If a note was given and never sent to the company, there is probably no witness, except Green, who could testify about it. That is, there is no other witness who would know when it was given, and the amount of it, and the circumstances under which it was made, except Green.

Appellant also contends that the court erred in giving written instruction No. 1 requested by appellee. That instruction, if the case was fully developed, might be proper, but, with the evidence as it was developed at the trial, it was error to give this instruction. The agent himself was entitled to 75 per cent. of the first premium. And, under this instruction, the jury may have thought that, if the company received the $28.32, this was more than it was entitled to receive, and therefore that a sufficient sum was paid to pay the amount due. The appellant, however, in its evidence, explains that all the money was sent in, and then in the settlement with Green the company would retain the 25 per cent. of the amount received and remit to Green 75 per cent. We think this instruction was confusing to the jury, and, under the state of proof, should not have been given.

Appellant also contends that instruction No. 2, given at the request of the appellee, was erroneous. But that instruction simply told the jury that, if he paid by note, which was accepted by the company, it would be their duty to find for the plaintiff. Of course, it ought not to have said that it was the duty to find for the plaintiff, because the entire premium might have been paid in cash, and still plaintiff would not be entitled to a verdict, if proof of death had not been made or waived, and this instruction ignored this requirement of the policy.

The appellant also complains about the modification of its instruction No. 5. The court added to that instruction, the following: "Unless you further find that the defendant denied liability before the filing of this suit." Of course, whether that would be proper or not would depend upon whether the agent, Green, had

authority to deny liability. If he had, the modification would be proper; otherwise, it would not.

It would serve no useful purpose to set out the testimony in full. The judgment must be reversed for the errors mentioned, and on a new trial whether this modification, and the other instructions given by the court are proper will depend upon the evidence at the trial.

For the errors indicated, the judgment is reversed, and the cause remanded for new trial.

EASON *v.* SIMON.

Opinion delivered January 20, 1930.

Mahony, Yocum & Saye, for appellant.

Powell, Smead & Knox, for appellee.

MEHAFFY, J. On the 24th day of January, 1928, Sol Simon, one of the appellees, entered into an agreement with certain landowners in Union County, Arkansas, for the purpose of drilling for oil and gas on certain lands, and the landowners, above mentioned, executed leases to the oil, gas and mineral to Sol Simon. Simon agreed

to begin actual drilling on some part of the land described in the leases within 40 days.

On the 4th day of April, Simon entered into an agreement with A. A. Eason, leasing from Eason a drilling rig. This contract provides that Simon was to pay Eason $500 at the setting of the surface casing, and he was to have the use of the rig for 45 days, after the 24th day of April, 1928. Simon agreed to make a further payment of $500 when the casing had been set, and when a depth of 1,000 feet had been reached. The contract provided that, if the sums were not paid promptly, under no consideration should the rig be held by Simon without the payment of said moneys. The contract also provided that, if drilling operations were not completed within 45 days from the 24th day of April, 1928, all of said payments would be due and payable, and that the rig should be returned to Eason. The contract, however contained the following additional paragraph:

"As an additional consideration, the said first party herein obligates himself, and hereby agrees to execute to the second party herein, an assignment of an oil and gas lease covering the N½ of the NW¼ of the SE¼ of section 21, township 17 south, range 14 west, being land now owned by Davidson, now held by J. K. Mahony and Asa Morrison, in escrow, pending the drilling of said well; the second party giving, however, as a consideration, back to the first party herein, an oil payment of $10,000 out of 7/32 of the first oil when, as, and if, produced from said lease. The assignment of said lease to be made by the second party herein to the first party herein as quickly as the same shall be released from escrow."

Simon was unable to drill the well, and, on the 26th day of April, 1928, entered into a contract with the Root Refineries, Inc., whereby the Root Refineries, Inc., undertook to drill the well, and carry out the contract with Eason. The Root Refineries, Inc., however, did not complete the well within the time specified, but kept the drill-

ing rig some days longer, and Eason claimed that he had entered into a contract with the Root Refineries, Inc., whereby he let them have the drilling rig for a certain number of days, but that they had kept it a longer time, and that its rental value, during the time they kept the rig in excess of the time specified, was $750.

After the Root Refineries, Inc., entered into the contract with Simon, it paid Eason the $1,000. Eason seeks to recover in this suit against both the Root Refineries, Inc., and Simon, $20,000 for failure to assign to him the lease of the land, described in the last paragraph of the contract, between Simon and Eason. That is, the N½ of the NW¼ of SE¼ of section 21, township 17 south, range 14 west.

The only controversy is about the one-fourth interest in said lease owned by W. G. Grace. W. G. Grace was one of the landowners that had executed a lease to Simon. Grace was the owner of one-fourth interest in the 20 acres, above described.

There was a great deal of evidence introduced, both documentary and oral, but it is unnecessary to set it out, because there are only two questions involved in this appeal. The first is, whether appellant was entitled to have the Root Refineries, Inc., and Simon to convey to him or assign to him the lease from Grace, and the other question is, whether Eason is entitled to recover from the Root Refineries, Inc., for keeping the drilling rig longer than the time specified in the contract. As to whether Eason is entitled to recover for the failure of the other parties to convey to him, or assign to him, the lease above mentioned depends upon a consideration of the contract. This is not at all free from doubt.

The cardinal rule in the interpretation of contracts, as this court has many times held, is to ascertain the intention of the parties, and give effect to that intention, if it can be done consistently with the legal principles. It is a well established rule that parties should be bound for what they intended to be bound for, and no more.

To hold any one bound further would be to impose on him an obligation which he never assented to, never intended to take upon himself, and would be unjust and unwarranted. The intention of the parties, however, and the meaning of the contract, is determined from the contract itself, if unambiguous.

The leases by Grace and other landowners had already expired before the contract was entered into between Simon and the Root Refineries, Inc., and no one had any rights under these contracts or leases at all. Eason and Simon both knew this, and the Root Refineries, Inc., knew it. All of them knew that, to proceed with the drilling, it was necessary to obtain from the landowners an extension of time. All of them agreed to this, and granted the extension, except Grace, who owned a one-fourth interest in the 20 acres. Grace did not agree.

It is the contention of the appellant that his contract called for the absolute conveyance of the mining lease on the above-described property, and he also contends that he is entitled to receive a conveyance, or title, that he can hold against all adverse comers, and without reasonable apprehension of its being assailed. There is no dispute about this principle of law, but the question here is the proper interpretation of the contract entered into between Eason and Simon. The parties knew that leases had been made by the landowners, because the contract between Eason and Simon showed that the land was owned by Davidson and held by J. K. Mahony and Asa Morrison, and all of the parties knew of the condition of said leases, and the paragraph providing for an additional consideration recites that, the assignments are held by Mahony and Morrison in escrow, pending the drilling of said well. That means, of course, that they are held in suspense during the pendency of the drilling of the well, or while awaiting, or until the conclusion of, the drilling of said well. It was known at the time the contract was entered into between Simon

and the Root Refineries, Inc., that the conveyance by Simon to Eason of the Grace lease was impossible. That could not be done, and a contract will not be so construed as to impose an absurd or impossible condition on either of the parties. It will be so construed and interpreted as the parties must be supposed to have understood the conditions at the time. All of the contracts and leases must be taken into consideration, and all the circumstances, and, when they are all considered, as they must be, we think the conclusion that it was not the intention of the parties to require this impossibility is proper.

The contract entered into between Simon and Eason was subject to the agreement between the landowners and Simon, and our conclusion is that the decree of the chancery court, holding that Eason was not entitled to recover against Simon or the Root Refineries, Inc., because of the failure to convey the property described, is correct.

Appellees have prosecuted a cross-appeal, and contend that the decree of the chancellor for $750, in favor of Eason against the Root Refineries, Inc., should be reversed. We do not agree with appellees in this contention. There is no controversy about the Root Refineries, Inc., using the drill longer than the time specified in the contract; but it is contended by appellees that Eason sold the rig to another party, and that the other party gave the Root Refineries, Inc., the right to use it, without paying anything therefor. The evidence is in conflict. The Root Refineries, Inc., if it made an agreement with the party who purchased from Eason, did it after it had made the agreement with Eason. Then Eason testifies that when he sold it he was to have the rental from the Root Refineries, Inc. The finding of the chancellor on this proposition is not contrary to the evidence.

We have carefully considered all of the evidence, both oral and documentary, and it would serve no useful purpose to set it out here. We have reached the

conclusion that the chancellor's findings are correct, and the decree is affirmed, both on direct and cross-appeal.

PARKER *v.* VAUGHN.

Opinion delivered January 20, 1930.

John M. Parker & Son, for appellant.

Hays, Priddy & Rorex, for appellee.

McHANEY, J. Appellant sued appellee in unlawful detainer, and in attachment for rent for the year 1928. There was a verdict and judgment on both causes of action for appellee for $27.85 on appellee's cross-complaint. The facts, briefly stated, are substantially as follows: Appellant rented appellee her farm in Yell County for 1928, containing about 66 acres, under a written contract of lease providing for payment of money rent of a stipulated sum per acre, on or before October 15, 1928. The lease further provided that, if appellee

complied with all the terms of the lease contract, and paid all his rent by November 1, he should have the option to rent the same property on the same terms for 1929.

In the spring of 1928, an overflow came, destroying a portion of the crops, and the parties mutually agreed to modify the contract, so as to provide for the payment of rents in a portion of the crops, instead of money rent. Appellee delivered to appellant her portion of the crops, as same were gathered, but failed to completely harvest his crops by November 1. In December, he was notified to surrender and deliver up possession of the land on January 1, 1929, which he refused to do, on demand. This demand to quit was made on the ground that he had not paid all his rent by November 1, and that he was not, therefore, entitled to exercise his option to hold over for 1929.

The case depends almost entirely on a question of fact, and the facts were in dispute. The jury has settled this question against appellant. Had the jury accepted her testimony she would have been entitled to possession. They chose, however, to accept the testimony of appellee, as reflected in the verdict. This court is not at liberty to set aside a verdict on a disputed question of fact, even though it should find it to be against the preponderance of the evidence.

Some considerable complaint is directed against the instructions given by the court, as well as those refused.

The record discloses that 23 instructions were given, a majority of which were at appellant's request, and ten more requested by her were refused. We think the court fully instructed the jury as to the law, and that the instructions were as favorable to her as she was entitled to. The court correctly told the jury that, if they found that the written contract was afterwards verbally modified so as to substitute a part of the crop for money rent, then the rent would be due as the crops were gathered, according to custom of the country. Of course if

the crop was not gathered by November 1, the rent could not be paid in kind by that time. We do not think this had the effect of destroying the option for 1929. We cannot take up and discuss each instruction, about which complaint is made, as it would take too much space and serve no useful purpose.

Judgment affirmed.

CARTER MOTOR COMPANY *v.* DAVIS.

Opinion delivered January 20, 1930.

Roy D. Campbell, for appellant.

Ross Mathis, for appellee.

MCHANEY, J. This is an action in replevin, brought by appellant against appellee, in the Woodruff Circuit Court to recover one Buick roadster automobile, or its value. On motion of appellee, the cause was transferred to the chancery court, over appellant's objections. No motion appears to have been made in the latter court

to remand, but the cause was there tried, and proceeded to judgment for appellee. The facts are substantially as follows: Appellee purchased the car from appellant, under a written contract, which referred to it as a new automobile. The purchase price was $1,100, of which $350 was paid in cash. The remainder, $750, was to be paid in ten equal monthly installments of $75 each, and title was retained in appellant, until all deferred payments had been made. Failure to pay any installment when due made all future installments immediately due and payable. One provision was that there were no warranties made by the seller, unless same were indorsed on the contract, and none were so indorsed. While the contract referred to the car as "new," as a matter of fact it was a used automobile, having previously been sold to another, and been driven 432 miles, and had stood some eight or ten days in the overflow water at Dixie. After it was retaken by appellant from the first purchaser, a new top was put on it, all mechanical parts, including the motor and body, were thoroughly cleaned and washed out. Appellee knew these facts, and had ample opportunity to, and did, examine the car before buying it. The appearance of the car was good, and the motor was in perfect condition. Appellee paid two of the $75 installments, and defaulted on the third. In the meantime, he discovered that the right door was out of adjustment, or that the handle on this door was loose, because the screws had pulled out of the wood frame, either from strain or from the decayed or rotten condition of the wood, and that there was a small split or break in the steel or turtle back over the rumble seat. The car was, at appellant's direction and at its expense, taken to the Buick agency in Memphis, and there repaired, apparently to the satisfaction of appellee.

Appellee defended on the ground that he was induced to purchase by the false and fraudulent representations of appellant, to the effect that said car was a new car,

and without defects; that the defects were hidden, and not open to ordinary observation by a person without experience; and that he would not have purchased but for such representations. He further alleged that the car was not worth more than he had paid, and prayed a cancellation of the contract. The court took appellee's view of the matter, denied a recovery, and dismissed appellant's complaint with costs.

Without determining whether the circuit court erred in transferring the case to equity, we think the appellant waived objection to the jurisdiction by proceeding to trial there, without moving to transfer back to the law court, and without making any other objection to the jurisdiction of the chancery court. *Hemphill* v. *Lewis,* 174 Ark. 225, 294 S. W. 1010, and cases cited.

We are of the opinion, however, that the court erred in not granting appellant the relief prayed. No fraudulent representations by appellant were proved. Appellee was fully advised, and knew the entire history of the car; that it had been sold to another; that it had stood in the water some days, that it had been cleaned up, and a new top put on, and that it had been repossessed after use. He is therefore in no position to insist on a contract referring to the car as new, and especially when the contract specifically provides that no warranties are made regarding it. *Mitchell Mfg. Co.* v. *Kempner,* 84 Ark. 349, 105 S. W. 880.

Appellee says appellant's agent, Hopkins, represented the car to be as good as new, and, conceding this to be true, it is also true that Hopkins told him all he knew about the car that would tend to lessen its value, or show deterioration from a new car. There is nothing to show bad faith, or a lack of good faith. Appellee sought appellant, and desired to purchase the car, and was given all the facts regarding its condition. He purchased at a reduced price on favorable terms. The proof shows the car was worth $600 at the time suit was brought. Appellee gave bond and kept possession of

the car. At the time of trial, some two years later, it had been run about 19,000 miles, and was still running. Under these circumstances, we think appellee should be required to pay appellant the value of the car at the time replevin was instituted, which was $600.

The judgment will be reversed, and judgment ordered here for $600.

SUPREME LIFE AND CASUALTY COMPANY *v.* WALLS.

Opinion delivered January 20, 1930.

John A. Hibbler, for appellant.

H. B. Mixon, for appellee.

BUTLER, J. The appellant company, on the 17th day of January, 1926, issued to David Wall a life insurance policy, insuring his life for the sum of $1,000, to be paid at his death to Chas. Wall, Rosa Wall and Louisa Wall, jointly. Chas. Wall was the father, and Rosa and Louisa were the sisters, of David Wall, who, at the time of the issuance of the policy, was an unmarried man. Later David Wall married the appellee, Carrie Wall.

The insurance policy in controversy contained the following clause: "If there is no existing assignment of this policy made as herein provided, the insured at any time during its continuance may designate a new beneficiary by filing written notice at the home office of the company, accompanied by the policy for a suitable indorsement thereon."

The testimony introduced on behalf of the appellee tended to show that John Gay, who had at one time been the agent of appellant company, and who took the application of the insured, David Wall, and procured for him the policy sued on, at the request of the said Wall on December 10, 1928, wrote a letter addressed to the appellant company at its home office, in which letter it was stated that the insured desired to change the beneficiaries in his policy from those originally named to the appellee, Carrie Wall, wife of the insured, and Charles Wall, his father, the proceeds of the policy to be paid one-half to each of the two persons substituted as bene-

ficiaries; that in this letter was inclosed the policy; that it was sent by registered mail and was delivered to the appellant at its home office on December 15, 1928. One or more witnesses testified that, the insured had stated that it was his intention to give his wife an interest in his insurance. At the time the above letter was written, Wall was in good health, but shortly thereafter he sickened, and died on the 4th day of January, 1929.

On March 23, 1929, a letter was written at the instance of Carrie Wall, notifying the company of her claim as one of the substituted beneficiaries. On May 14th, following, the appellant company, ignoring the letter of March 23d, paid the proceeds of the policy to Rosa Wall, Chas. Wall, and to J. F. Hunter, administrator of the estate of Louisa Wall, deceased. On July 3, 1929, Carrie Wall gave notice to the appellant company that, she would move the court to require it to produce the original letter written by Gay, as agent of David Wall, on December 10, 1928, signed, "David Wall by John R. Gay," and on the 8th day of July, 1929, filed this suit. On the 9th day of July, 1929, the court made an order directing the appellant company to produce the life insurance policy involved in this case, and the letter of December 10, 1928, signed by David Wall by John R. Gay, his agent. The appellant filed the original policy, on which no notation of change of beneficiary had been made, but did not file the original letter, but a purported copy of the same. No explanation was made by any one in the home office, as to why the original letter was not produced, but a witness for the company, one Luther W. Moore, a resident of Little Rock, and State manager of appellant for Arkansas, testified that he was familiar with the files and correspondence relative to the policy in question, and identified the purported copy of the letter of December 10, 1928, as a true copy of the letter sent to him, together with the policy. This copy was offered in evidence, with the explanation that he did not get the original letter, because the home office

kept few of the originals, as they were written by illiterate people, and were very hard to decipher, so that it was the system of the company to make copies of same, and to file them. This is all witness appeared to know about the matter. The court refused to permit the introduction of the purported copy of this letter, and we think properly.

At the hearing of the case on July 15, 1929, the chancellor found that on the 10th day of December, 1928, David Wall caused a letter to be written by his agent, John R. Gay, to the appellant company, and in said letter requested the company to change the beneficiaries named in his policy, so that, at his death, the proceeds should be paid to Carrie Wall and Chas. Wall jointly, and that said letter was delivered to the company at Columbus, Ohio, on December 15, 1928; that proof of death was duly given, and that the company refused to pay any part of the proceeds of the policy to Carrie Wall, but paid the sums of $333.33, respectively, to Chas. Wall, Rosa Wall, and the administrator of the estate of Louisa Wall, deceased; that such administrator, by order of the probate court, had paid the plaintiff, Carrie Wall, the sum of $111, as her dower interest in the sum paid to such administrator, and the court found for the plaintiff, Carrie Wall, in the sum of $500, less $111, received by said plaintiff, as aforesaid, and judgment was entered against the defendant company for the sum of $389, with twelve per cent. penalty and attorney's fee of $50, together with costs.

It is argued by the appellant company that there was no proof that Carrie Wall was the widow of David Wall, deceased, and that such allegation in the complaint was specifically denied in the answer. We think the evidence is sufficient to show that the appellee was the wife of David Wall, as reference to her, as such, is made from time to time in the testimony.

Appellant also assigns as error the refusal of the court to permit the introduction of the purported copy

of the letter of December 10, 1928. As we have seen, there was no explanation given as to why the original letter could not be produced by any one who had the matter in charge, and, we think the court properly excluded the purported copy from the consideration of the jury.

The third assignment of error, pressed by the appellant, is for alleged error in the court's finding that the letter of December 10, 1928, requesting change of beneficiaries, was received by the home office of the company. The appellee proceeded for the production of the original letter as provided in § 4142 of Crawford & Moses' Digest, which section is as follows: "The court, in an action by equitable proceedings, shall have power, on sufficient cause shown by affidavit, due notice of the application having been given to the adverse party, to require the parties, or either of them, to produce books, deeds or other writings in their power, which are alleged to contain evidence pertinent to the matter in controversy." Having made the required affidavit, after appellee had given notice of its application, she was entitled to the order made by the court on July 9, 1929. As we have seen, the appellant failed to comply with that order, and gave no explanation for its failure to do so.

Section 4143 of Crawford & Moses' Digest provides that, where the party fails to produce the document called for, without satisfying the court that it is not within its power, "the court may take the allegations in regard to the books, deeds and writings not produced, as confessed." It follows, therefore, that the court was justified in making the finding in accordance with the allegation of the complaint filed in this action.

There is no merit in appellant's fourth contention, namely, that John R. Gay was not the agent of David Wall, for the purpose of writing the letter of December 10, 1928. The evidence is sufficient to show that the writing of the letter must be considered as the direct act

of David Wall, for he was present directing how the letter should be written, and the letter was signed, "David Wall per John R. Gay," in Wall's presence, and at his direction. "The rule is well settled both in England and in the United States that an act done by one person in the presence of another, and by his direction or with his consent, as the signing or execution of a written or sealed instrument, for example, is not regarded as an act of an agent, but is the direct act of the person by whose direction it was done." 21 R. C. L. 1 (Principal and Agent). See also *Clark* v. *Latham,* 25 Ark. 16; *Chipman* v. *Perdue,* 135 Ark. 559, 205 S. W. 892.

It is lastly contended by the appellant that the court erred in assessing penalties and attorney's fee against the appellant, because the judgment was for less sum than the sum demanded by the appellee before suit was filed. The rule is well settled that, where demand is made under an insurance policy which upon a trial is found to be unjust, no penalty can be exacted or attorney's fee assessed against the insurance company. This is the effect of the statute and our decisions, but from the testimony in this case it is conclusive that $500 was demanded in March, and that the demand at that time was correct. That was the amount for which suit was brought on July 8, 1929, and, if nothing had been paid to the appellee before that time, certainly, in view of the holding of the chancellor that was the sum to which she was entitled. The evidence shows that appellee had been paid $111 by the administrator of the estate of Louisa Wall, but in no place does the record disclose when such payment was made. If it had been made before July 8, 1929, of course, the appellee sued for more than she was entitled to, but, if payment was made after that date, then she only demanded what was her just due. Since the chancellor has determined that the statutory penalty and attorney's fee should be assessed against the appellant, indulging the presumption that his judgment was sup-

ported by the evidence, when the record is silent, we must conclude that the payment of the $111 must have taken place between the date of the filing of the suit and that of the decree.

On the whole case, we think the findings of the chancellor are not against the preponderance of the evidence, and that the conclusions reached are justified. The decree is therefore affirmed.

[redacted]

O'NEAL *v.* BANK OF PARKDALE.

Opinion delivered January 20, 1930.

[redacted]

Y. W. Etheridge, for appellant, O'Neal.

BUTLER, J. Mrs. Laura D. Fitzhugh and her two sons, Davis and Thomas B. Fitzhugh, conveyed by their warranty deed to M. M. O'Neal a farm owned by them situated in Ashley County, Arkansas, in which deed there was the following reservation: "The grantors reserve a one-sixteenth interest in all oil, gas and other mineral rights and properties in said lands for a period of ten years from this date." After the execution of

this deed, O'Neal and his wife executed an oil and gas lease on said lands to Howard W. Morris; Laura D. Fitzhugh, Davis Fitzhugh and Thomas B. Fitzhugh, joining in the execution of this lease. The same was the ordinary "unless" lease used in this State, by the terms of which the usual one-eighth royalty was reserved by the lessors, the lessee agreeing to begin drilling operations on the land for oil and gas on or before February 16, 1929; a failure to begin operations within that time working a forfeiture of the lease "unless" the lessee, on or before that date, should pay to the lessor's credit in the Parkdale Bank the sum of $400, which sum, when paid, should operate as a rental, and confer the privilege of deferring the commencement of a well for twelve months from said date. In like manner, and upon like payments, the commencement of a well might be further deferred for the same period for a given number of years.

The Texas Company, assignee of Howard W. Morris, having failed to begin the drilling of a well upon the land on or before the date named, paid to the designated depository $400 for an extension of time as stipulated. The bank being doubtful to whom the money should be paid, M. M. O'Neal instituted this action claiming the entire sum. The Texas Company and Bank of Parkdale were made parties, and the Fitzhughs answered, claiming a one-half interest in the funds deposited. The case was heard by agreement of the parties on the complaint, its exhibits, and the other pleadings filed therein, which were the answer of the Fitzhughs, the separate answer of the Bank of Parkdale and a demurrer of the Texas Company. The court sustained the demurrer of the Texas Company, directed the Bank of Parkdale to pay the sum in its hands into the exchequer of the court, saving it harmless of costs, and decreed that the clerk of the court pay out of said funds the cost incurred, and one-half of the balance to O'Neal and one-half to the Fitzhughs. O'Neal has appealed from that part of the decree

awarding one-half of the funds to the Fitzhughs, and the Fitzhughs have appealed from that part of the decree taxing one-half of the costs against them.

Since petroleum is the only mineral for which exploration has been made in Ashley County and southern and southeast Arkansas, and one-eighth of that mineral produced is the customary royalty retained, it is clear that this was the mineral in the minds of the parties at the time of the execution of the deed from the Fitzhughs to O'Neal. No oil has as yet been produced and discovered in the locality in which the demised premises are situated, and the territory is what is denominated by oil prospectors as "wild-cat" territory. In such territory the cost of drilling oil wells is much larger than in proved territory, and the discovery of oil in paying quantities is a mere possibility only. As has been well stated by the learned chancellor, "To employ the idiom of the oil fields, this part of the State is 'wild-cat' territory, as distinguished from proved fields. The explorer hazards as much, or more, financial outlay in his efforts to discover oil or gas in an unproved field as one who wagers his money on a hundred-to-one shot in a horse race, and the agony of suspense is much greater prolonged. To induce one to expend the money and labor incident to sinking a well in search of oil and gas, the explorer exacts a contract of the owner of the prospective or hoped for mineral, whereby the explorer takes seven-eighths of all he discovers, with one-eighth to the owner. This should fix the value of such minerals in place to both explorer and owner, and furnish a basis for transactions therein. Of course, in the first instance, all of such mineral in place belongs to the owner, but it has no actual value while in place, and costs seven-eighths in volume and value to produce it."

It is therefore reasonable that one having only the right of one-sixteenth of the oil discovered on a farm in wild-cat territory could have no intention of exploring same, but could only hope for the exploration to be made

by another. This, when it appears from the language used in the deed that there was not an exception of the oil and gas, or any portion thereof, from the conveyance of the fee simple estate, but a reservation only of an interest in the same for a limited time, makes it apparent that the right reserved was not an estate in fee, but in the nature of a chattel real to become vested when the oil and gas has been discovered and reduced to possession. Therefore, the extent of appellee's right under the reservation in her deed would be one-sixteenth of the oil and gas, whenever discovered and the product secured, providing, such discovery and production should be made within the time limit named in the reservation.

Attorney for the appellant cites the case of *Jackson* v. *Dulaney,* 67 W. Va. 309, 67 S. E. 795, as applicable to the instant case. In that case it is held (quoting syllabus): "The legal effect of a provision in a deed excepting and reserving out of and from the grant at all times thereafter and forever unto the grantor, his heirs and assigns, one-tenth of all the mineral oil that may be obtained by the grantee, his heirs and assigns from the land granted, * * * is to except and reserve in such grantor, his heirs and assigns, to be delivered as stipulated, a royalty of one-tenth of all the oil produced. * * * If the owner of the land subject to such an exception and reservation lease the same for oil and gas reserving a one-eighth royalty, without stipulating how the one-tenth of all the oil reserved in such prior grant is to be discharged, his lessee will be entitled to deduct the same from the one-eighth royalty oil reserved in the lease."

The distinction between that case and the instant case is that in that case the exception from the original conveyance was an interest in the fee, whereas, in the case at bar, there was a reservation for a limited time of an interest therein. The chancellor, in his precedent for a decree, used the expression, "when the Fitzhughs and O'Neal, joint owners of the real value of the pros-

pective mineral property supposed to lie beneath the Ashley County property, leased the land for exploration, they became co-adventurers in an operation designed to yield to each of them one-sixteenth of any production, or one-eighth between them," so that he doubtless inferred that said parties were joint owners in the mineral property. In this we think he was mistaken. By virtue of the deed O'Neal became the owner of the title in fee simple to the property conveyed, and included in the lease thereafter executed, subject only to the limited reservation of a one-sixteenth interest in the mineral. He was the unconditional owner, when the lease was executed, of fifteen-sixteenths of the mineral, and of the entire surface of the land, and he could only be injured by entry upon the surface, and had the right to grant on any terms he might choose and for any purpose the privilege to enter thereon. The joining of Mrs. Fitzhugh and her sons in the lease was therefore unnecessary, as her rights were limited to a one-sixteenth interest in the minerals below the surface to become her property, when any such might be discovered and raised to the surface.

The Texas Company, present owner of the lease, in consideration of seven-eighths of the total production, has obtained the privilege of entering upon the lands with the necessary equipment and drilling wells for the discovery of oil. Not having begun its operations within the time agreed, it has, as provided in the lease, paid $400 for an extension of the privilege.

In an analogous case, *Caruthers* v. *Leonard,* 254 S. W. (Tex.) 779, one Evans made an "unless" lease, similar to the one in the instant case, in which the lessor agreed, if drilling was not begun within a stipulated time, to pay a certain sum for the privilege of deferring operations for twelve months, and, after the execution of the lease, Evans conveyed to Leonard an equal one-half undivided interest in and to all the oil and gas and other minerals in the property contained in the lease. In a suit by Leonard against Caruthers, who had suc-

ceeded to the rights of Evans for one-half of the rent paid to defer the privilege as stipulated in the lease, the court held that Leonard had no right to any part of the money because "this money was paid for the privilege of drilling anywhere on the surface of the land; it did not arise from gas, oil, or other mineral."

The case of *Guess* v. *Harmonson,* 4 S. W. (2d) 124, was a case where the plaintiff, the owner of a tract of land, executed an "unless" oil and gas lease reserving one-eighth of the oil as royalty. As is customary, there was a stipulation that, if drilling should not be commenced on or before a certain date, the lease should terminate unless the lessee on or before that date should pay to a designated trustee a fixed sum of money, but upon the payment of which the lease should be extended for a period of six months, and that thereafter, upon payment of same amount, the time limit might be further extended for an additional six months, for a period of five years. During the life of this lease, the plaintiff sold a one-half interest in the oil and gas interest reserved by him to the defendant. The lease above mentioned having expired and having been terminated, plaintiff and defendant executed another lease of like character, which by assignment became the property of another and different company than the one to which the first lease was made. The lessee, not being able to begin drilling within the time limit first named, paid to the designated trustee the sum agreed upon for extending the period for drilling operations. Suit was instituted by the plaintiff against the defendant and the depository to determine the rights of the parties, the contention of plaintiff being that he was the owner of the fee simple title to the land, and the conveyance to the defendant was only for a one-half interest in the royalties to be obtained from oil and gas, when and after they were severed from the land, and did not entitle him to share in any of the rentals arising from the lease made at any time. The defendant on his part claimed

one-half of the rentals from the lease made any time on the lands. The court held that the defendant was not entitled to any rent, but only to his part of the royalties.

As we have seen, the reservation in this case is a one-sixteenth interest in all oil, gas and other mineral rights and properties in said lands for a period of ten years from the date of the execution of the deed. Our conclusion is that this reservation could not avail the Fitzhughs anything unless and until oil and gas might be discovered and reduced to possession, and that the rentals in no sense arise from the oil and gas, but are in payment for the privilege to enter upon the surface and drill for oil, which surface, being the exclusive property of O'Neal, entitles him only to the rent money. The chancellor properly sustained the demurrer of the Texas Company, and that part of the decree as to the Bank of Parkdale is correct. But we are of the opinion that the chancellor erred in ordering the payment of one-half of the $400 to the Fitzhughs, and think he should have found and decreed that O'Neal was the owner of the entire sum.

The decree of the Ashley Chancery Court is reversed, and the cause remanded with directions to enter a decree ordering that said $400 be paid to O'Neal, and the costs of the case adjudged against the Fitzhughs. The decree in all other respects is affirmed.

ROGERS *v.* SANGSTER.

ROGERS *v.* FAIRLEY.

Opinion delivered January 27, 1930.

A. F. Barham, for appellants.

L. P. Biggs, and *Coleman & Riddick,* for appellees.

HART, J., (after stating the facts). The chancellor held that the ordinance whereby the mayor and a majority of the board of aldermen were authorized to take over the waterworks plants and the electric light plant and operate and maintain the same was void, because they were interested parties. The decision of the chancellor was correct, and the contract was void as against public policy. The rule is of general application, and is based upon principles of reason and of public policy.

In 2 Dillon on Municipal Corporations, (5th ed.), § 773, a clear and comprehensive statement of the rule is made, which reads as follows:

"At common law, and generally under statutory enactment, it is now established beyond question that a contract made by an officer of a municipality with himself, or in which he is interested, is contrary to public policy, and tainted with illegality; and this rule applies whether such officer acts alone on behalf of the municipality, or as a member of a board or council. Neither the fact that a majority of the votes of a council, or board, in favor of the contract are cast by disinterested officers, nor the fact that the officer interested did not participate in the proceedings, necessarily relieves the contract from its vice. The facts that the interest of the offending officer in the invalid contract is indirect, and is very small, is immaterial. The statutory prohibition is frequently so wide in its terms as to prohibit any officer from contracting with the municipality, whether he takes part in the making of the contract or not."

To the same effect see McQuillin on Municipal Corporations (2d ed.), vol. 2, §§ 531, 629, and vol. 3, § 1354.

Municipal officers are held by the courts to a strict accountability in their dealings with or on behalf of the

municipal corporation; and in recognition of their incapacity to serve two masters, as an incident to the frailty of human nature, public policy has placed a disability to make a contract for the city where they are interested in it in any degree. The rule is so inflexible that no inquiry into their good or bad intention or to the fairness or unfairness of the contract is permitted. Our own court has sustained the principle in the following cases: *People's Savings Bank* v. *Big Rock Stone & Construction Co.,* 81 Ark. 599, 99 S. W. 836; *Tallman* v. *Lewis,* 124 Ark. 6, 186 S. W. 296; *Gould* v. *Toland,* 149 Ark. 476, 232 S. W. 434; and *Sloss* v. *Turner,* 175 Ark. 994, 1 S. W. (2d) 993.

Section 7520 of Crawford & Moses' Digest reads as follows:

"Nor shall any alderman or member be interested, directly or indirectly, in the profits of any contract, or job, or services, to be performed for the corporation."

The statute is merely declaratory of the common law, and the reason for it is well stated in 13 Cyc. p. 425, as follows:

"It is perhaps correct to say that public policy is that principle of law which holds that no person can lawfully do that which has a tendency to be injurious to the public, or against the public good, which may be designated, as it sometimes has been, the policy of the law, or public policy, in relation to the administration of the law. Where a contract belongs to this class, it will be declared void, although in the particular instance no injury to the public may have resulted."

Some reliance is placed by counsel for appellants on act 322 of the Acts of 1923, which authorizes the lease or sale of waterworks, gas or electric works belonging to, or operated by, municipal corporations or improvement districts. General Acts of 1923, p. 252.

In the first place, under the provisions of that act, the sale could be made by the officers of the municipal corporation in cases only where that corporation owned the

plant. Even in such cases, it would be contrary to public policy for the officers of the municipal corporation to lease or sell the plant to themselves.

In this case, however, the improvement districts own the plants themselves, and, under the statute just referred to, the sale of them would have to be made by the board of commissioners of the district.

Therefore it follows that the decree of the chancery court in each case was correct, and it will be affirmed.

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

Opinion delivered January 27, 1930.

[redacted]

Thos. S. Buzbee, H. T. Harrison, Geo. B. Pugh and *Hays, Priddy, Rorex & Madole* and *Hill, Fitzhugh & Brizzolara,* for appellants.

D. H. Howell, for appellees.

HART, C. J., (after stating the facts). It is earnestly insisted by counsel for appellant, Central Railway Company, that the judgment against it should be reversed, and the cause of action as to it dismissed. In this contention we think counsel are correct. The shipment of potatoes was an interstate one, and the Central Railway of Arkansas was the initial carrier. It issued a bill-of-lading to plaintiffs for the two cars of sweet potatoes consigned from Plainview, a station on its line, to shipper's order at Kansas City, Missouri. Thirty-five hours after the potatoes reached their destination at Kansas City, plaintiffs applied for and received a reconsignment or diversion order from the agent of the Rock Island Railway Company at Dardanelle; but the Central Railway

Company did not have any knowledge of the reconsignment or the diversion order issued by the Rock Island Railway Company. Shipment was made and bill-of-lading issued by the Central Railway of Arkansas, on the 12th day of December, 1925; and, the shipment being an interstate one, the case is ruled by the provisions of the Carmack amendment and the decisions of the Supreme Court of the United States construing it.

The rights of the parties in the present case accrued before the Carmack amendment to the Interstate Commerce act was amended by the Cummins act in 1926.

In *Gulf, Colorado & Sante Fe Ry. Co.* v. *Texas Packing Co.*, 244 U. S. 31, 37 S. Ct. 487, it was held that, by request of the shipper and by action of the carriers in dealing with the freight accordingly, a shipment governed by the Carmack amendment and bills-of-lading thereunder might be diverted from the original destination, and the original bills-of-lading be continued in force as applicable to the new destination. There, however, the poultry which was the subject of the shipment was sold while it was in transit to Chicago, and, while the cars were in St. Louis on the side track, the shipper called upon the agent of the initial carrier to divert the shipment to Chicago. It promised to do so, and its agent told the shipper that he would wire a representative of the railway company in St. Louis to divert the cars. No new bills-of-lading were issued, and the shipper was told that the carrier would make proper notification on the original bills-of-lading. Hence the court said that it was fairly inferable from this evidence that the bill-of-lading originally issued was continued in force by action of the parties changing the destination and remained a binding contract when the initial carrier accepted the diversion of the shipment from St. Louis to Chicago. Here the initial carrier did not accept the diversion or reconsignment of the shipment of sweet potatoes from Kansas City, Missouri, to Ogden, Utah. The initial carrier was not consulted in the matter, and did not know anything about the diversion or re-

consignment of the sweet potatoes until sometime after it had been made. The purpose of the Carmack amendment was to create in the initial carrier unity of responsibility for transportation to destination. For the purpose of fixing the liability, the several carriers must be treated, not as independent contracting parties, but as one system; and the connecting lines become, in effect, mere agents, whose duty it is to forward the goods under the terms of the contract made by their principal, the initial carrier. *Missouri, Kansas & Texas Ry. Co.* v. *Ward,* 244 U. S. 383, 37 S. Ct. 617.

The initial carrier's liability arises out of its own bill-of-lading; and, while the connecting carriers are the agents of the initial carrier, they do not continue to be so when the transportation has been completed and the shipment reaches its destination. There is nothing in the law as to interstate shipments which would justify the holding that the Rock Island Railway, as connecting carrier, was the agent of the Central Railway Company, as initial carrier, in the making of a new and different contract of transportation, after the original contract had been performed. So far as we are advised or have been informed, at the time the contract of shipment was made there was nothing in the tariff or rules of the Interstate Commerce Commission which required the initial carrier to divert the shipment after it had reached its destination; and certainly, if it could not have been required to divert the shipment, a diversion or reconsignment by one of the connecting carriers would not create a new or binding obligation on it. *Southern Produce Co.* v. *Norfolk Southern Rd. Co.*, (Supreme Court of Appeals of Virginia) 144 Va. 422, 132 S. E. 360; *Clark* v. *Louisville & Nashville Rd. Co.,* 216 Ala. 637, 114 So. 295; *Wilson* v. *American Railway Express Co.,* 204 App. Div. 59, 197 N. Y. Supp. 600; affirmed in 239 N. Y. 562, 147 N. E. 196; *Rice* v. *Oregon Short Line Co.,* 33 Idaho 565, 198 Pac. 161; *Yazoo & M. V. R. Co.* v. *Norman,* 125 Miss. 636, 88 So. 174; and *Barrett* v. *Northern Pacific R. Co.,* 29 Idaho

139, 157 Pac. 1016. See also Roberts' Federal Liabilities of Carriers, (2d ed.) vol. 1, § 389.

While the statutes of the United States and the construction of the same by the Supreme Court of the United States are conclusive, we think it is clear from the authorities cited above that, when the shipment in question was made, appellant, Central Railway Company, was only required to carry the shipment of sweet potatoes to the destination named in the contract, and, on their arrival there, could not be required to divert the cars of sweet potatoes to another point, and that it was not bound by a new contract reconsigning them to a point made by one of its connecting carriers without its knowledge or consent.

Upon the question of damages against the Central Railway Company, but little need be said. The evidence of the employees of the initial carrier shows that the two cars of sweet potatoes were properly loaded, and were in good condition when received by the initial carrier. The evidence of the conductor of the train, on which they were carried from Plainview to Ola, shows that there was no delay or negligence in handling the train or in delivering the potatoes at Ola to the Rock Island, as a connecting carrier. The evidence of the employees of the initial and connecting carriers shows that the potatoes were carried from Ola to Kansas City, Missouri, without delay, and without any negligence in the handling of the train in which they were carried. They were carried promptly and were placed on the side-track at Kansas City, subject to the shipper's order. They were allowed to remain there thirty-five hours before the shipper attempted to divert or to reconsign them. There is no evidence in the record tending to show that there was any damage to them thus far. The testimony of the operatives of the train as to how the train was handled, and as to there being any delay in the carriage to the point of destination, was reasonable in itself. It was not contradicted in any respect, and no attempt was made to

contradict it by either evidence of facts or circumstances which would tend to show that it was untrue. Hence the case seems to have been fully developed as to the Central Railway Company, and the judgment will be reversed, and the cause of action as to it will be dismissed here.

The appeal of the Rock Island Railway Company stands on a different footing. When it made the contract of diversion or reconsignment of the two cars of potatoes from Kansas City, Missouri, after their arrival there, to Ogden, Utah, this was tantamount to a new contract by it, and it became liable, as initial carrier, from Kansas City, Missouri, to the point of destination. The diversion of the two cars of potatoes from Ogden, Utah, to points farther west was made two days before the shipment arrived at Ogden. Hence, the transportation under the new bill-of-lading or reconsignment by the Rock Island had not been completed before the diversion at Ogden was requested by the shipper. This request for a diversion, from Ogden to points further west was made by telegram, and, having been made before the cars of sweet potatoes reached their destination at Ogden in written form, and having been accepted and the cars diverted by the Union Pacific, the Rock Island, the initial carrier, under its new contract, would be liable for all damages accruing by the negligence of any connecting carrier until the cars of sweet potatoes reached their final destination.

In its motion for a new trial, the Rock Island Railway Company claims that the court erred in not directing a verdict in its favor. For the reasons above given, the court did not err in this respect. By the issuance of a new bill-of-lading which reconsigned the two cars of potatoes from Kansas City, Missouri, to Ogden, Utah, the Rock Island became the initial carrier, and became liable as such. The diversion having been requested before the two cars of sweet potatoes arrived at Ogden, the shipper had a right to have them diverted to other points upon the payment of the proper tariff rate.

The only other ground assigned as error in the motion for a new trial by the Rock Island Railway Company

is to the form of verdict returned against it, and in this contention we think it is correct. The verdict of the jury found for the plaintiffs against both the defendants for damages caused while the shipment was on the Rock Island Railroad in the sum of $760. As we have already seen, under the testimony of the trainmen there was no damage done to the potatoes while they were being carried on the line of the Rock Island Railway Company. According to the evidence of the trainmen, the train was handled carefully, and there was no delay in the shipment. The ventilators on the cars were kept in such condition as was required by the weather. Hence there was no evidence upon which to base a verdict for damages against the Rock Island caused while the shipment was being carried over its own line. The judgment against it will be reversed, and the cause will be remanded for a new trial.

It follows that the judgment as to the Central Railway Company is reversed, and the cause of action is dismissed, and the judgment against the Rock Island Railroad Company is reversed, and the cause of action is remanded for a new trial. It is so ordered.

DAVIS *v.* PATTERSON.

Opinion delivered January 20, 1930.

[redacted]

McKay & Smith, John Bruce Cox and *C. E. Wright,* for appellants.

G. Earl Shaffer, Alvin D. Stevens and *Joe Joiner,* for appellees.

KIRBY, J. (after stating the facts). Appellants insist that the court erred in limiting the terms of the drilling contract between Haskell and Hoffman, assigning one-half of seven-eighths of the oil produced to the payment of the specified consideration for drilling the wells to a period of two years. The provisions of the contract relating to the payment of the consideration are as follows:

"In consideration of the drilling of the above described wells, and each of them, the party of the first part agrees to assign, and does hereby assign, to the party of the second part one-half of seven-eighths of all the oil that may be produced and saved from the wells to be drilled under this contract, except the well located in the E½ of E½ of SE¼, section 23, township 15 south, range 20 west, to this extent, to-wit:

"In consideration of the drilling of the above described wells, except the two wells located in section 22, township 18 south, range 19 west, and in section 19, township 14 south, range 22 west, the party of the first part agrees to pay the party of the second part the sum of $10,500 for each of said wells, and agrees and binds himself to furnish and deliver at the location of said wells all necessary 10-inch and 6 5/8-inch, and all other necessary casing, and to erect the derricks for wells, for which he shall have credit upon the price of any such wells, the sums thus accruing to P. L. Hoffman for each of said wells to be paid out of one-half of seven-eighths of the first oil produced and saved from said wells, and the party of the first part agrees to assign to the party

of the second part, and does by these presents assign to the party of the second part, one-half of seven-eighths of all oil that may be produced and saved from said wells located in section 24, township 15 south, range 20 west, until the said party of the second part shall have been paid out of such oil $10,500 for each of said wells, less any amount credited to the party of the first part for casing and derricks furnished under this contract."

"As a further consideration for the drilling of said wells, the party of the first part agrees that, in the event the party of the second part has not received full payment for all wells drilled under this contract out of one-half of seven-eighths of the first oil produced and saved from said wells, as above provided, within two years from this date, to pay to the party of the second part the amount then remaining due or unpaid on the price of said wells under this contract."

Appellant Davis, assignee of the drilling contract, took the place of, and succeeded to, all Hoffman's rights to receive the compensation agreed to be paid for drilling the wells. There is no need for the application of rules of construction for ascertaining the intention of the parties from the contract made, when the meaning of the contract is clear and unambiguous. This contract provides the amount that shall be paid for the drilling of the wells, makes an assignment of one-half of seven-eighths of the oil produced for the payment of the amount of the consideration specified for drilling the wells, and in its last clause provides: "As a further consideration for the drilling of said wells, the party of the first part agrees that in the event the party of the second part has not received full payment for all wells drilled under this contract out of one-half of seven-eighths of the first oil produced and saved from said wells, as above provided, within two years from this date, to pay to the party of the second part the amount then remaining due or unpaid on the price of said wells under this contract."

It is conceded that full payment had not been made to Hoffman of the amount agreed to be paid for drilling the wells out of the part of the oil produced and saved within two years from the date of the contract, as provided therein, and it is not claimed that he or his assignee had been paid the amount earned for drilling the wells under the terms of the contract, but only that his right to payment out of the production of such oil was limited to two years, and thereafter he could only recover the balance due from the party of the first part in the contract, or his successors to the leasehold. There is no expression in the contract disclosing the intention to limit the payment for the wells out of specified portions of the oil produced and saved to any particular time, the contract providing only for payment of one-half of seven-eighths of all the oil produced and saved from the wells drilled, until the said party of the second part shall have been paid out of such oil $10,500 for each of said wells.

The last clause of the drilling contract provided no forfeiture or limitation of the right of the contractor to the consideration agreed to be paid, but only an additional method for payment of the balance due him for drilling the wells, as a further consideration for the drilling, if the full amount earned had not been received or paid by one-half of seven-eighths of the oil produced and saved from the wells at the end of two years. It is true that the party of the first part, the owner of the leases, had the right to pay the contractor or his assignee the amount remaining due on the price of the wells under the contract, if it had not been paid out of the oil produced and saved at the end of the two years, and the contractor could have insisted upon such payment at that time without losing his right to continue to receive one-half of seven-eighths of the oil produced from the wells drilled until he was fully paid the amount still due. It was the payment of the consideration for the wells drilled as agreed that terminated the con-

tractor's right to receive payment under the contract, in accordance with its terms, and the undisputed testimony shows that the balance had not been paid.

Neither do we find anything in the record to support appellee's contention that the conduct of Hoffman, or his assignee, had given the contract a particular construction inconsistent with or different from its plain meaning, as expressed therein. Nor is there any merit in appellee's claim that the chancery court had construed the contract in accordance with their contention here as a limitation on the contractor's right to receive the portion of oil in payment for the drilling of the wells to a period of two years, or that the question is concluded or *res judicata* by the decree not appealed from. He recites the decree rendered on another judgment of that court, appointing another receiver as follows:

"And it appearing to the court that under the terms of said contract that said P. L. Hoffman was to receive one-half of seven-eighths of the oil produced and saved from certain lands described in said contract for a period of two years, and said two years have already expired, and there still being an indebtedness due the said Hoffman under said contract, it is hereby adjudged and decreed by the court that the said P. L. Hoffman shall continue to receive one-half of seven-eighths of the oil produced and saved from the premises and leases described in said contract until he has received the amount adjudged to be due him by the court, or until further orders of this court."

The decree does recite that under the terms of the contract that it appeared that Hoffman was to receive one-half of seven-eighths of the oil produced and saved from certain lands described in the contract "for a period of two years, and said two years have already expired," but it also recites, "and there still being an indebtedness due the said Hoffman under said contract,

it is hereby adjudged and decreed by the court that the said Hoffman shall continue to receive one-half of seven-eighths of the oil produced and saved from the premises and leases described in said contract until he has received the amount adjudged to be due him by the court or until further orders of this court." The court did not, however, indicate, and certainly did not hold in this statement, that the contract provided the contractor should only receive one-half of seven-eighths of the oil produced and saved from the lands for a period of two years, but did say the two years had already expired. It also finds an indebtedness still due Hoffman under the contract, and adjudged and decreed that Hoffman shall continue to receive one-half of seven-eighths of the oil produced and saved from the premises and leases described in said contract until he has received the amount adjudged to be due him by the court. There is not only nothing inconsistent in this decree with the contractor's right to receive the oil in payment of the amount due for drilling the wells, but it is an express adjudication that he shall continue to receive the oil produced and saved from the premises until he receives the amount adjudged to be due him, regardless of the fact that the two years had already expired, being an adjudication, in fact that the two years was not a limitation of his right to continue to receive the oil until he was fully paid for the drilling. It follows that the court erred in construing this contract otherwise than in accordance with its plain meaning, as expressed therein, adjudging that the contractor's assignee had no right to receive the consideration due under the contract after the two years had expired, nor any right of preference in the disposition of the proceeds of the lands sold for payment of the debts. The parties all being before the court, it had the right to order a sale of the property, free of all claims, liens and incumbrances, for disposition of the proceeds among the parties entitled thereto upon proper

adjudication of their rights. Then, too, appellant Davis asked a sale of the property, subject to his rights however. 2 Tardy's Smith on Receiver's, 1798; *State* v. *Superior Court of King County,* 128 Wash. 253, 222 Pac. 492; *Pilliod* v. *Angola R. & Power Co.,* 46 Ind. App. 719, 91 N. E. 829; *First Natl. Bank* v. *Powell Bros.,* 128 La. 961, 55 So. 590; *In re Gimbel,* 294 Fed. 883.

The court erred also in holding the balance of the compensation due under the Hoffman contract to be a common claim and not entitled to preference. He had the right to receive under the terms of the contract, of which he was assignee, one-half of seven-eighths of all the oil produced and saved from the wells drilled until he was fully paid the amount agreed to be paid as consideration therefor, and this without deduction for any expense of producing and saving the oil, so far as is disclosed by the record. He was entitled therefore to have the property sold to satisfy his claim, if the appellees had ceased to operate the leases and produce oil, and to the satisfaction of this indebtedness against the property of the appellees, from which the oil was produced by the drilling of the wells under the terms of the contract, and, necessarily, the right to preference in payment of his claim out of the proceeds realized from the sale of the property free from all other claims, liens and incumbrances, and the court erred in holding otherwise. The appellant, Davis, could have protected his rights by bidding on the property sold enough to provide for payment of his claim, or have received the whole property from which the oil was to be produced, if others had not increased the bid, and would in no wise have suffered injury from the sale order.

The decree will be reversed for the errors designated, and the cause remanded with directions to render a decree for payment first of appellant's claim for balance of compensation due for drilling the wells under the driller's contract assigned to him, and for distribution of the remainder of the proceeds of the sale in ac-

cordance with the principles of equity and not inconsistent with this opinion. It is so ordered.

PHILPOT CONSTRUCTION COMPANY *v.* DANAHER.

Opinion delivered January 27, 1930.

Wooldridge & Wooldridge, for appellant.

A. F. Triplett, for appellee.

SMITH, J. An improvement district was organized to pave and resurface a portion of Barraque Street in the city of Pine Bluff. It was believed by the property owners and the commissioners of the district that the portion of the street which they sought to improve would be made a part of one of the State's roads running through the city, and that if this were done a contribution on the part of the State Highway Commission would be made under the authority of act No. 184 of the Acts of 1927 (Acts 1927, p. 645), and it was determined to make the construction of the improvement contingent upon this contribution being made.

With this end in view, the chairman of the board of commissioners of the improvement district submitted the matter to the State Highway Commission, and, on July 20, 1928, the State Highway Engineer wrote the chairman of the board a letter, in which there was inclosed a copy of the resolutions adopted by the commission, defining the policy of the Highway Commission

under act 184. This act is entitled, "An act to provide for the permanent improvement of continuations of State highways within the corporate limits of cities of the first and second class." This act authorized State aid, to the extent of fifty per cent., of the cost of improvements which should be designated as extensions of State highways through cities of first and second class.

The resolutions of the Highway Commission referred to contained a preamble, which recited that act 184 was ambiguous, and contained no appropriation to meet the expenditures there authorized, and that, as many cities were seeking to take advantage of the provisions of the act, an amount of money so large would be required that the finances of the department would be embarrassed if these payments were made within a two-year period, and that the Highway Commission would advise the Legislature at its 1929 session why it had not complied with act 184. This resolution further recited that "The State Highway Commission will recommend amendments to act No. 184 or a substitute act that will carry out the purposes of act No. 184, but provide for the payment over a period of years by issuing certificates of indebtedness of the Highway Department to such district on completion of the work, so as to give the same relief as was intended under act No. 184 and at the same time not cripple the finances of the Highway Department at the very time when roads are most in need. Such certificates of indebtedness to bear 4½ per cent. interest, to be payable jointly to the district, and the trustee named in the bond issue of such town or city paving district, and to be non-negotiable, so as to prevent any district discounting same at higher interest rate."

In the letter from the State Highway Engineer to the chairman of the board of commissioners, transmitting a copy of these resolutions, the engineer stated: "You understand that it is not practical for us to desig-

nate a street as a highway prior to the issuance of your bonds, as the bond attorneys would refuse to approve your bonds. We will, however, designate this street after the bonds are sold and the money is in your hands."

With this assurance, proper steps were taken to complete the organization of the improvement district, and betterments were assessed, against which bonds were issued in the sum of $17,500. These bonds were negotiated and sold under a contract, which constituted the Merchants' & Planters' Bank & Trust Company of Pine Bluff, as trustee, and gave the improvement district the right to repurchase all of the bonds in excess of the amount required to pay one-half of the cost of the improvement, and this option was exercised, and the trustee now holds for the benefit of all parties in interest the bonds so repurchased.

Competitive bids were invited under the circumstances stated, and the Philpot Construction Company, hereinafter referred to as the company, became the successful bidder, and the improvement was constructed under the contract let to it, and this suit was brought to enforce payment of the balance alleged to be due under this contract.

The cause was submitted to the court sitting as a jury, and a general finding of facts was made, upon which the court declared that there was no right to recover, and this appeal is from that judgment. This finding of facts was based largely upon an agreed statement of facts filed by the parties, and is fully supported by the testimony as to facts found, but not agreed upon.

After the completion of the work, the improvement district paid the company the amount which the district admitted was due, and there was received from the State Highway Commission a certificate for the balance, which was made payable in installments extending over the same period of time required for the maturity and payment of the bonds issued by the improvement district, the amount thereof being payable in equal annual in-

stallments, with interest on the deferred installments at 4½ per cent. per annum. The first installment was paid by a voucher drawn by the State Auditor, which the bank, as trustee, placed to the credit of the account of the company, whose commercial account was carried at this bank. When the company was advised of this action, it repudiated this payment on the ground that, having completed its contract, the balance due should be paid in cash out of the proceeds of the sale of the district's bonds, and it was insisted that the improvement district was required to accept the certificate of the Highway Commission and use the proceeds thereof, as the installments matured, in the payment of these bonds. There was written upon this certificate the indorsement that it was nonnegotiable and nontransferable.

The court found the facts to be that all parties were advised that the improvement district was unwilling to enter into any contract, obligating itself to pay more than approximately one-half the total construction cost of the improvement, and that it was not the intention of the parties, in entering into the contract, to place any obligation upon the district in excess of the difference between the total construction cost and the anticipated aid, and that the contractor had been paid the difference between the construction cost, as shown by the final estimate of the engineer of the district, and the amount of State aid, figured at the time of such final estimate, and agreed upon at such time, as the amount of State aid to be anticipated, according to the rules and regulations of the State Highway Commission.

This finding appears to be sustained by the express terms of the construction contract, from which we copy as follows: "It is understood and agreed between the parties hereto that said Paving District No. 101 is anticipating aid from the State Highway Department of the State of Arkansas under the provisions of act No. 184 of the General Assembly of 1927 and the act of the Special Session of 1928 amendatory of said act No. 184,

which aid, if given, will be in the form of certificates issued by the State Highway Department in an amount equal to approximately one-half of the cost at above prices of the improvement above required to be done on the portion of Barraque Street, which would lie between Walnut Street and Mulberry Street, and between the curb lines on the north and south sides of Barraque Street, if said curb lines should be extended straight through the entire district across the intersecting streets, such portion being parallelogram 32.5 feet in width, and extending from Walnut Street to Mulberry Street in length, which amount is hereby stated to be $7,790.42. These certificates, so expected to be issued by the State Highway Department, will hereinafter be called highway certificates. The expectation on the part of the district for such State aid is based solely upon a letter dated July 20, 1928, addressed to M. Danaher, chairman of said board of commissioners by C. S. Christian, State Highway Engineer, which letter has been read to the party of the first part.

"The commissioners are unwilling to enter into a contract for the making of the improvement embraced herein, unless they know that the total cost thereof to be paid by the district out of assessments to be collected from its property owners will not exceed the difference between the total construction cost of such improvement according to the proposal of the contractor accepted by the board and the face value of the highway certificates above referred to, which difference is hereby stated to be $7,475.96. The contractor is willing to, and hereby does, assume all risk of failure of the district to obtain such State aid, and agrees that, if such State aid be not given to the district, then the total amount to be paid to the contractor for all work done and materials furnished in making the improvement hereby contracted for shall be the difference between its worth, figured at the unit prices in the contractor's proposal, and said sum of $7,790.42, anticipated State aid.

"The contractor hereby agrees to construct the improvement completely, even if no aid be given to the district by the State Highway Department, at the net cost to the district set out above.

"If such State aid be given to the district in the sum now expected, or in a lesser sum, the commissioners may turn over to the said contractor the certificates of indebtedness issued to it by the said State Highway Commission, or may assign to the contractor all of its rights and interest in said certificates, or, if it prefers to do so, may pay the said contractor the amount of said aid in cash."

The act No. 8, here referred to, was passed at the Extraordinary Session of the General Assembly in 1928 (Acts Special Session 1928, page 31), and is entitled, "An act to amend act No. 184, approved March 22, 1927."

This act amends the defects which were thought to exist in act No. 184, and by § 5 of the act No. 8 it is provided that "Said commission shall determine the amount to be refunded to the (improvement) district, and the installments into which it shall be divided, and shall issue certificates of indebtedness for the respective installments, payable to the district, if the district has no outstanding bonds, or payable jointly to the district and to the trustee for the bondholder, if the district has outstanding bonds. The certificates shall be nonnegotiable, and shall so state on their face, and shall bear interest at the rate of four and one-half per cent. per annum, payable semi-annually."

It appears from the facts stated, that the improvement districts were required by the State Highway Commission to proceed as if no State aid were expected; indeed, the street could not be designated as a part of the State Highway system until it had been improved, in accordance with plans approved by the Highway Commission. It was in accordance with this requirement that the district issued bonds in an amount equal to the cost of the improvement, and the bonds were not

issued to provide a fund to pay the contractor anything more than one-half of the cost under any condition. It appears, therefore, that the extent of the interest of the contractor in the proceeds of the bond sale was to receive from this source one-half of the contract price of the cost of the improvement.

It appears from the agreed statement of facts that the "total payments to be made under the State Highway certificate, including interest, is the sum of $11,430.65. To provide the amount of the State certificate in cash, the defendant district would have to sell not less than $8,200 of five per cent. bonds, and such bonds matured in the same amount per year, as provided for the maturities of the State Highway certificate would total the sum of $12,555.47, including interest, or $1,124.82 more than the total principal and interest payments under the State Highway certificate bearing four and one-half per cent. interest."

We think the court below was fully warranted in finding that the payment of this sum of $1,124.82 was an obligation which the improvement district did not assume.

In regard to this certificate, the answer alleged: "And such district again hereby tenders such certificate to plaintiffs, offers to assign or transfer to the plaintiffs all of its right, title, interest and claim thereunder, or to leave said certificate in the said Merchants' & Planters' Bank & Trust Company to be collected for the use of plaintiffs, or to take such other steps as plaintiffs may desire to vest the legal title of such certificate, or the proceeds therefrom, in plaintiffs."

It is contended, in effect, that the contract should be construed to mean that the company was to do the work for half price in the event only that the State aid was not forthcoming, and that, while it was in fact given, yet, when given, it was in a form not available in the manner contemplated by the parties, and that, as the aid was received, the district should be required to pay

in money, as it cannot pay in the manner contemplated. We think this risk was not assumed by the district, but was, on the contrary, expressly imposed on the company, and that it was not the intention of the district to be liable for more than one-half the cost under any circumstance. The language of the contract is that the commissioners, contracting for and on behalf of the district, "are unwilling to enter into a contract for the making of the improvement, unless they know that the total cost thereof to be paid by the district out of assessments to be collected from its property owners will not exceed the difference" between the total construction cost and the anticipated State aid, and it has already been stated that, if the district were required to pay the entire cost of the improvement and take the highway certificate, a loss of $1,124.82 would be sustained, which would, of course, have to be repaid by the district out of assessments to be collected from the property owners in excess of the difference between the total construction cost and the anticipated aid, and it was expressly provided in the contract that this should not occur.

It is argued that the contract imposes the alternative obligation to either transfer the certificate or pay in cash, and that, as one alternative has become impossible, the other is obligatory; but such is not, in our opinion, the effect of the contract. The district does have the right to pay in cash, but this was at its option, and it has not elected to exercise the option. It could also pay by the use of the State aid in whatever form it might be received, and this it has elected to do. All parties were familiar with the resolutions of the State Highway Commission and the statute pursuant to which the resolutions were passed, and these were expressly taken into account in the construction contract, and the company must be held to have known that the State aid would not be payable in cash, but in a nonnegotiable certificate made payable to the joint order of the improvement district, and the trustee for the bondholders, and that such

certificate would be issued for such amounts of annual maturities as would be equivalent to approximately fifty per cent. of the annual bond maturities of the district, and that such certificate would bear interest at the rate of only 4½ per cent.

It is true the certificate, when issued, was not only nonnegotiable, as the statute provides it should be, but was also made nontransferable, but upon this subject the court declared the law as follows: "That it was not the intention of the board of commissioners to guarantee the form of the certificate or that the same should be negotiable or transferable; that the fact that as it is such certificate is marked on its face nontransferable is not due to any act, neglect or default on the part of such district, and that any loss occasioned thereby must be borne by the plaintiffs as one of the risks assumed by them in agreeing without qualification to accept such certificate, and that even if it should be conceded, which, however, is not necessary to a determination of this case, that the commissioners are now prohibited by law or regulation of the State Highway Department from transferring such certificate, this cannot affect the obligation of the district to the plaintiffs."

We do not inquire by what authority the State Highway Commission made the certificate nontransferable, or whether such authority exists. It suffices, so far as the district is concerned, to say that it was the State aid given, and if the Highway Commission has, in fact, exceeded its power in making the certificate nontransferable, that action would not enlarge the obligation assumed by the district. The contract required it to pay only one-half of the cost, if State aid had been entirely withheld.

The contract contained the provision that "payments will be made the contractor between the first and tenth days of each month, upon estimates rendered by the engineers for work done during the preceding month. Eighty-five per cent. of the amount of work done accord-

ing to such estimates will be paid at the time such estimates are approved, and the remaining fifteen per cent. will be retained by the board pending the faithful completion of the contract."

It is argued that this provision shows the intention of the parties to be that the contractor should be paid in cash upon completion of the contract, provided State aid was awarded. This appears, however, to be a stipulation found in contracts of this character, and we think it should be construed with reference to other provisions of the contract in regard to payments, and that, when so construed, it means only that the district obligated itself to pay as the work progressed, the stipulated eighty-five per cent. of the amount which it had agreed to pay at all. Certainly, this provision would not require the district to pay the entire cost of the improvement in view of the other provisions on the subject if no State aid had been received.

It is earnestly insisted that the contract, when construed as a whole, means that the company should be paid in cash, or its equivalent, if State aid was obtained; but we think that such was not its meaning. And it is also insisted that, if such is not the meaning of the contract, the last paragraph of the contract is void as being unilateral and without consideration. This is the paragraph which authorizes the commissioners to turn over to the company the certificate of the Highway Commission, or to pay in cash. Upon this question the trial court declared the law as follows: "Such provision is not void for lack of mutuality by reason of the option thereby conferred upon the commissioners, since the law does not require that every clause of a contract shall contain reciprocal obligations, and it is sufficient if there was a consideration for the promise, which consideration is plainly evident in this case in the award of the contract to the plaintiffs with the obligation imposed upon the paving district to pay plaintiffs the difference between the construction cost and anticipated State aid. The

wording of the contract to the effect that the commissioners may turn over or assign the certificate to the contractor is but another way of stating that the plaintiffs agree that this may be done."

We think the court was correct in this declaration, and that it is sustained by the following authorities cited in the brief of counsel for appellee: 6 R. C. L. 686-689; 13 C. J. 336; Williston on Contracts, 314-317.

Upon a consideration of the whole case, we are of the opinion that the judgment of the court below, dismissing the suit of the company against the district, is correct, and it is therefore affirmed.

URQUHART *v.* STATE.

Opinion delivered January 27, 1930.

Pace & Davis and *Tom W. Campbell,* for appellant.

Hal L. Norwood, Attorney General, and *Walter L. Pope,* Assistant, for appellee.

SMITH, J. The General Assembly, at its regular 1929 session, passed an act No. 120, entitled "An Act to provide for the quieting of the title of the State of Arkansas to the Cummins and Maple Grove plantations in Lincoln County, and for other purposes." Volume 1, Acts 1929, page 620.

The act is preceded by a preamble which recites: On November 21, 1902, the Board of Commissioners of the Arkansas State Penitentiary entered into a contract with Edmond Urquhart, on behalf of the State, to purchase two adjoining plantations, known as the Cummins plantation and the Maple Grove plantation, to be used as a State convict farm. That all the purchase price except a small balance has long since been paid, and the State is ready and willing to pay the balance upon the execution and delivery to the State of a good and sufficient deed conveying said lands. That Urquhart, since the execution of said contract, has died, leaving his widow and two daughters as his sole heirs and sole devisees, under his last will and testament. That said widow and heirs and devisees, on September 28, 1910, tendered a deed conveying said lands, in which the descriptions of the lands differed slightly from those appearing in the original contract of sale (the difference being stated), and the penitentiary board refused to accept said deed, or to pay the balance of purchase price, on account of this difference in the descriptions of the lands. That, upon the refusal of the board to accept the deed, the Urquhart heirs and devisees brought suit in the chancery court to reform and correct the contract, alleging that a clerical error had been made in the draft of the contract (the error being

recited); that the chancery court, after hearing testimony, granted the relief prayed, and directed the reformation of the contract of sale, and an appeal was prosecuted from this decree to the Supreme Court, where the decree of the chancery court was reversed. *Jobe* v. *Urquhart,* 98 Ark. 525, 136 S. W. 663. That, on account of the failure to hear the matter on its merits, the controversy has never been adjusted, and the State has never received a deed to any of the lands.

After this preamble, it was enacted that the attorney general of the State be authorized and directed to institute suit against the widow and heirs and devisees of Urquhart, to quiet and confirm the title of the State to these two plantations, and the duty was imposed upon the court to find and determine whether there remained unpaid by the State any balance of either principal or interest, and the amount thereof, if any. A right to appeal was given both parties from any decree that the court might enter.

By § 2 of the act, the sum of $27,000, or so much thereof as might be necessary, was appropriated out of the penitentiary fund in the State treasury, to pay the widow and heirs and devisees of Urquhart "any balance, of principal or interest, that the said court may find to remain unpaid under the contract of purchase, * * * according to the terms and tenor of said contract."

Section 3 of the act contains what is declared to be a correct description of the lands, comprising, in the aggregate, 8,136.78 acres, less certain portions of the lands described, which had caved into the Arkansas river, and including the accretions to other lands. This section further provided that, after the court had ascertained the balance of principal and interest due, the widow and heirs and devisees of Urquhart might, at any time after ninety days, but within one year, exhibit to the Auditor of the State of Arkansas a certified copy of such decree, and a deed to the lands described, whereupon the Auditor was directed to draw his voucher upon the State treasurer for the amount of the principal and interest so found due.

Section 4 contained provisions for putting the decree into effect, but barring the widow and heirs and devisees of Urquhart, if they did not, within one year after the rendition of the decree, present the deed as there directed.

Suit was brought by the Attorney General pursuant to the authority of this act; and an answer was filed by the widow and heirs and devisees of Urquhart, in which they tendered a deed conforming to act 120 of the Acts of 1929, upon compliance with the act by the State officials charged with the duty of executing its provisions.

Testimony was heard, and the court found that there remained unpaid a balance on the principal of the purchase money in the sum of $10,416.64, and a balance of interest upon said purchase price of $17,470.53, making an aggregate balance of $27,887.17. Upon this finding of fact, the court held that the balance of the purchase money should be paid in the manner provided by act 120, but that the interest could not be lawfully paid out of said appropriation for the reason "that said act, purporting to make said appropriation, undertook to appropriate money for the purpose of paying any unpaid balance upon the principal of said purchase price of said lands, and also money for the purpose of paying any unpaid balance of the interest upon the purchase price of said lands, said balance of principal being a part of the ordinary expense of the executive department of the State, and the said balance of interest not being a part of the ordinary expenses of any department of the State, for that reason no appropriation for the payment of said interest could have been lawfully made, except in a separate bill, under the provisions of § 30, art. 5, of the Constitution of the State of Arkansas." Upon the court finding that the balance of principal and interest due was in excess of the appropriation, the widow and heirs and devisees of Urquhart remitted the excess, and offered to deliver a deed conforming to act 120, if the amount of the appropriation was paid to them, and they have appealed from so much of the decree as holds the balance of interest upon the

purchase price of said lands cannot be lawfully paid out of the appropriation contained in said act 120.

The legislation and litigation here under review covers a period of time, which began June 4, 1897, when the act was passed under the authority of which the plantations were purchased from Urquhart. The penitentiary board, as then constituted, comprised the chief executive officers of the State, including the Governor, and the Attorney General, and these officers, in the name of, and on behalf of, the State, entered into a contract whereby the State agreed to pay interest on the unpaid purchase money. It is true the court held in the case of *Jobe* v. *Urquhart,* 102 Ark. 470, 143 S. W. 121, Ann. Cas. 1914A, 351, that the agreement to pay interest was in excess of the power conferred by the act under which the lands had been purchased; but it is also true that this agreement imposed a moral—if not a legal—obligation upon the State, for the reason that, had it been known that interest could not be paid on deferred payments, the owner would probably have taken that fact into account in fixing the price for which he would sell his lands.

The case of *Jobe* v. *Urquhart,* 102 Ark. 470, 143 S. W. 121, Ann. Cas. 1914A, 351, arose under act 21 of the Acts of 1909 (Acts 1909, page 1218), which was an act entitled, "An Act making an appropriation to pay the balance owing the estate of E. Urquhart on the State Convict Farm." The Urquhart heirs had, in that case, attempted, by mandamus, to compel the Auditor of State to audit and adjust the account, and the circuit court awarded the writ, but the judgment was reversed on the appeal. In the opinion, while it was held that the act of June 4, 1897, did not authorize the board of penitentiary commissioners to contract to pay interest, it was held that the Legislature had the power to bind the State to pay interest upon a claim which, according to the pre-existing law, bore no interest.

It was also held in that case (to quote one of the headnotes) that "Under Const. 1874, art. 5, § 26, pro-

viding that no money shall be appropriated or paid on any claim, the subject-matter of which shall not have been provided for by pre-existing laws, unless allowed by bill passed by two-thirds of the members elected to each branch of the General Assembly, an act in effect authorizing the Auditor to calculate the amount of interest due by the State to a claimant, not passed by two-thirds of the members of both branches of the Legislature, is void."

It appeared, from the recital of facts in that case, that it was shown by the journal of the House of Representatives that the bill did not receive a two-thirds vote of all the members of the House elected, as required by the Constitution, and it was therefore held that the part of the act attempting to appropriate a sum of money to pay interest, for which the State was not legally bound, was void. But the court expressly recognized this as a claim, for which an appropriation could be made to pay by a vote of two-thirds of the members elected to each branch of the General Assembly.

For a further discussion of the law on this subject, see *Grable* v. *Blackwood, ante* p. 311, 22 S. W. (2d) 41.

Here it is conceded that the act of 1929 received the vote which the court said, in *Jobe* v. *Urquhart,* 102 Ark. 470, 143 S. W. 121, Ann. Cas. 1914A, 351, was required under the Constitution; in fact the vote was unanimous in both House and Senate, except that one negative vote was cast in each body, but it is insisted that the act did not conform to the requirements of § 30 of art. 5 of the Constitution, in that, as the payment of the purchase money was an ordinary expense of government, which might have been passed by a majority vote, the appropriation for interest was not such an expense, and should have been provided for in a bill making a separate appropriation for this purpose only.

Section 30 of article 5 of the Constitution reads as follows: "The general appropriation bill shall embrace nothing but appropriations for the ordinary expense of the executive, legislative and judicial departments of the

State; all other appropriations shall be made by separate bills, each embracing but one subject."

The appropriation here involved was not made in the general appropriation bill, but was in fact made in a separate bill, which embraced but one subject, this being an adjudication of the controversy between the State and the Urquhart heirs. The Legislature itself might have ascertained the amount, both of principal and interest, and have made an appropriation accordingly, but it elected to constitute another agency to make this finding of fact, and made an appropriation in what was assumed to be a sufficient amount to pay both the principal and the interest, and, under the remittitur which has been entered, the appropriation is sufficient.

In the case of *State* v. *Sloan*, 66 Ark. 575, 53 S. W. 47, 74 Am. St. Rep. 406, it was held (to quote a headnote) that "Under the provision of the Constitution that all appropriations, other than for the ordinary expenses of the government, 'shall be made by separate bills, each embracing but one subject' (Const. 1874, art. 5, § 30), the unity of the subject of an appropriation bill is not broken by appropriating several sums for several specific objects, which are necessary or convenient to the accomplishment of one general design, notwithstanding other purposes than the main design may thereby be subserved."

We conclude, therefore, that act 120 does not offend against § 30 of art. 5, and that the court was in error in so holding.

The question is raised here that act 120 is in violation of the amendment to the Constitution, which provides that "The General Assembly shall not pass any local or special act. This amendment shall not prohibit the repeal of local or special acts."

Act 120 is neither a local nor special act within the meaning of this amendment. It is an exercise of the State's sovereignty in settling a controversy with one of its citizens, and such acts are neither local nor special.

State v. *Crawford*, 35 Ark. 237. See also other cases cited in the opinion on rehearing in the case of *Webb* v. *Adams*, *ante* p. 713.

At § 34 of the chapter on States, in 25 R. C. L., page 402, it is said: "The Legislature has a right to appropriate the public funds in discharge of the State's duty, whether the duty be legal or only moral. And the discharge of such an obligation is always regarded as a legitimate exercise of governmental power. An appropriation, made in discharge of a moral obligation resting upon the State, must be regarded as being for a public purpose, and within the constitutional powers of the Legislature, and the fact that a private person may receive the benefit of such an appropriation does not constitute the act of appropriation a private one."

The decree of the court below will therefore be reversed, and the cause is remanded, with directions to enter a decree conforming to the provisions of act 120, which we hold to be valid in all respects.

INTERNATIONAL ORDER OF DANIEL *v.* GREEN.

Opinion delivered January 27, 1930.

Coleman & Riddick, for appellant.

Glover & Glover, for appellee.

SMITH, J. Appellant, a fraternal insurance order, operating through local lodges, issued a benefit certifi-

cate in the sum of $300 to Diana Green, which was payable upon her death to her son Lawrence Green, and upon the death of the insured this suit was brought to collect the amount alleged to be due upon this certificate.

The members were required to pay monthly dues to the local lodge of which they were members, and to pay quarterly assessments to the order itself, hereinafter referred to as the order, but these assessments were collected by the local lodge officers. The quarterly assessments were payable upon the first day of each quarter, and became delinquent if not paid on or before the fifteenth day of the first month of the quarter, and the constitution and by-laws of the order which were made a part of the benefit certificate, provided that, if the dues and assessments were not paid within the time limited, the delinquent member should be suspended until duly reinstated, and the certificate was invalid as a contract of insurance during the suspension. Provision was made for reinstating a delinquent member by paying the arrears, and furnishing the certificate of a practicing physician that the member applying for reinstatement was then in good health.

It is insisted by the order that the undisputed competent testimony shows that the insured was delinquent in the payment of both her dues and assessments at the time of her death, and that the attempt which was made to reinstate her was unsuccessful because she was unable to furnish, and did not furnish, the required certificate as to the condition of her health.

We do not decide this question, for the reason that the right to recover must be denied upon another ground. The order denied liability on the ground that the insured was not a member at the time of her death and was "nonfinancial," as the officers of the order expressed it. Representations were made to the ruling officers of the order by the officers and members of the local lodge of which the insured had been a member to the effect that, on account of her protracted illness, immediately preceding

her death, the insured was in destitute circumstances, and had left no money or property with which the expenses of her burial might be paid, and an appeal was made to the order to provide funds to pay the funeral expenses.

The president and secretary of the order issued a draft upon the treasurer of the order for $50, which recited that it was issued "as donation by request of Local Lodge Diana Green nonfinancial," and the draft itself was a part of the receipt, which reads as follows:

"Receipt

$50 "International Order of Daniel

"Little Rock, Ark., February 7, 1929.

"Received of the International Order of Daniel, fifty and no /100 dollars, as payment in full, which releases the International Order of Daniel of all claims that I now hold, or that may come due hereafter against the International Order of Daniel, and now this amount accepted as a settlement in full on Policy No. 4480 for Diana Green, Guardian of Council No. 111.

"Signed X Lawrence Green,

"Witnessed by Mrs. S. S. Phillips,

"Donation only."

The attesting witness to the receipt, as well as other members of the local lodge, whose only interest in the matter appears to have been to aid in securing the donation, testified, that the transaction was explained to and fully understood by Lawrence Green, who was the plaintiff in the action. The draft was indorsed by the payee, and was collected in due course. The plaintiff admitted that he could read and write, but denied that he had read the receipt, and explained his failure so to do by saying that he supposed the draft was intended to cover what was known in the order as the "burial benefit." Under the constitution and by-laws of the order a burial benefit of $50 was payable to the estate of each member, but this benefit was contingent upon the member being in good standing or "financial," as it was expressed,

at the time of his or her death, so that, if the benefit certificate had lapsed on account of nonpayment of dues and assessments, the burial benefit had also lapsed.

Plaintiff did not testify that he had been induced to sign the receipt through any fraud or misrepresentation practiced upon him, as to the purport and effect of the instrument which he signed, and he seeks to excuse his action in signing it by saying that he supposed he was being paid the burial benefit. He admits, however, that he had an opportunity to read the receipt, and his only excuse for not doing so was that he did not know what it was, and thought it was something else. The receipt is so unambiguous that any one reading it must know its effect, and, as its execution was free from fraud, this effect must be given it. While it was designated as a mere donation, this donation was recited to be in full satisfaction and settlement of any rights under the certificate here sued upon, and as the sum paid was a sufficient consideration for this release and settlement, a verdict should have been rendered in favor of the order. *Bankers' & Planters' Mut. Ins. Assn.* v. *Archie,* 145 Ark. 481, 224 S. W. 950.

For the error indicated the judgment in favor of the plaintiff for the amount of the certificate must be reversed, and, as the case has been fully developed, it will be dismissed. It is so ordered.

ALMAND *v.* ALEXANDER.

Opinion delivered January 27, 1930.

W. R. Donham, for appellant.

Dillon & Robinson, for appellee.

HUMPHREYS, J. This is a suit by appellant against appellee for a balance of $3,100 on account for alleged architectural work and general superintendence of the construction of appellee's residence at Scott, Arkansas. Appellant alleged that the cost of the residence was $70,000 and that, according to the written contract between them, he was entitled to ten per cent. of the cost thereof for his services, and had only been paid $3,900. The written contract was incorporated in the complaint as a part thereof, and is as follows:

"CONTRACT BETWEEN ARCHITECT AND OWNER.

"From John P. Almand, architect, to J. R. Alexander, owner, for a compensation of 10% ten perc., the architect proposes to furnish preliminary sketches, contract working drawings and specifications, detail drawings, and give general superintendence of building operations for a residence to be erected for J. R. Alexander at Scott, Ark.

"Terms of payment to be as follows: '60 per cent. based on the cost of the building, when the contract is let, and the balance on the completion of the building.'

"If the work upon the building is postponed or abandoned, the compensation for the work done by the archi-

tect is to bear such relation to the compensation for the entire work as is determined by the published schedule of fees from the American Institute of Architects. In all transactions between the owner and contractor, the architect is to act as the owner's agent, and his duties and liabilities in this connection are to be those of an agent only. The architect will make visits to the building for the purpose of general superintendence, of such frequency and duration as in the architect's judgment will suffice, or may be necessary to fully instruct contractors, pass upon the merits of material and workmanship, and maintain an effective working organization of the several contractors engaged upon the building. The amount of the architect's compensation is to be reckoned upon the total cost of the building, including all stationary fixtures. Drawings and specifications are instruments of service, and as such are to remain the property of the architect, the owner will be entitled to a full set of the plans and specifications, but not be permitted to let or have let, the privilege of building from the plans and specifications without the superintendence of the architect, or his consent for the use of the plans and specifications.

"John P. Almand, Architect.

"J. R. Alexander, Owner.

"Approved and accepted the 12th day of May, 1925."

Appellee filed the following answer:

"The defendant admits that on the 12th day of May, 1925, he entered into a contract with the plaintiff, whereby the plaintiff was to do the architectural work and give general superintendence of the building operations of a residence to be erected for the defendant at Scott, Arkansas. Defendant states that he and the plaintiff also entered into a contract that the said residence was not to cost more than twenty-five thousand dollars ($25,000). Defendant states that, due to the negligence of the plaintiff, and the unworkmanlike manner of his

architectural work and superintendency of the construction of said residence, and general inefficiency, it cost the defendant a great deal more than twenty-five thousand dollars ($25,000), thereby greatly damaging the defendant, and causing him great financial embarrassment, and causing him to have to abandon all of his plans for the future. Defendant denies that the said residence cost seventy thousand dollars ($70,000), and denies that he is indebted to the plaintiff in the sum of thirty-one hundred dollars ($3,100) or any other amount."

The cause was submitted to a jury upon the pleadings, the testimony introduced by the parties, and the instructions of the court, resulting in a verdict for appellee and a dismissal of appellant's complaint, from which is this appeal.

In addition to the introduction of the written contract between the parties set out above, appellant introduced testimony in chief, to the effect that it cost $70,000 to build the residence; that he fully performed the contract, was entitled to receive $7,000 for his services; that he received $3,900 and was entitled to recover the difference between the amount earned and received.

Appellee introduced testimony, over the objection and exception of appellant, to the effect that, at the time the written contract was entered into between them, it was understood and agreed that the plans and specifications should be drawn for the erection of a residence not to exceed in cost $25,000, whereas plans and specifications were furnished by appellant for a residence which cost, when completed, $60,419.26; and testimony over appellant's objection and exception, relative to several defects in the construction of the residence.

Appellant testified in rebuttal that the written contract was the sole and only agreement between them, and that there was no oral agreement whatever limiting the maximum cost of the residence to $25,000, and that the defects referred to in the construction of the building were not due to his negligence.

Appellant contends for a reversal of the judgment, because the court admitted evidence as to an oral agreement limiting the cost of the residence to $25,000, upon the theory that the parol evidence varied and contradicted the written agreement. There is no better settled rule of law than that unambiguous written contracts cannot be altered or contradicted by parol evidence. The maximum cost of the residence was not fixed in the written contract. Hence the introduction of parol evidence as to the maximum cost thereof would not, and could not, vary and contradict the written contract. If the written contract had fixed the maximum cost of the residence, or had based the fee on the cost, irrespective of the amount, then the rule contended for by appellant would have applied. As the parol evidence did not vary or contradict the written contract, it was admissible in explanation of, and as part of, the contract between the parties. The trial court refused to admit the parol testimony for the purpose of limiting appellant's fee, but admitted it for the sole purpose of showing whether appellant was negligent or inefficient. The court erred in placing such a limitation upon the testimony, but the error was favorable to appellant.

Appellant also contends that the court erred in admitting testimony relative to defects in the construction of the residence. It is argued that none of them were specifically alleged, and for that reason it was error to admit evidence relative to them. The allegation of negligence in the answer was general and very broad. Appellant did not file a motion to make the allegation of negligence and inefficiency more specific; so we think, evidence of any defect in the construction of the residence was admissible.

Appellant's next and last contention for a reversal of the judgment is that the court submitted the case to the jury upon the erroneous theory that, if appellant and appellee contracted orally that the residence should not cost more than $25,000, they should return a verdict for

appellee. According to the testimony introduced by appellant, the residence cost $70,000, and, according to that introduced by appellee, the residence cost $60,419.26. It is undisputed that appellee paid, and appellant received, $3,900 for his services. In view of the testimony as to the cost of the residence and of the amount that appellant received, the jury should have returned a verdict for appellee, if it found that appellant and appellee contracted orally that the residence should not cost more than $25,000. This is true, because the maximum fee he could have charged, if the maximum cost of the house was not to exceed $25,000, would have been $2,500, and he received more than that amount. In this view of the case, it is unnecessary to discuss alleged errors in the refusal to grant certain instructions requested by appellant, and in giving certain instructions requested by appellee. This case turned upon the issue whether the maximum cost of the residence should exceed $25,000, and that issue was submitted to the jury and determined adversely to appellant.

No error appearing, the judgment is affirmed.

COOLIDGE *v.* HOWE.

Opinion delivered January 27, 1930.

W. G. Dinning, for appellant.

Brewer & Cracraft, for appellees.

HUMPHREYS, J. This is an action for damages in the sum of $560, brought by appellant against appellees in

the circuit court of Phillips County, basing same upon § 6570 of Crawford & Moses' Digest, which is as follows:

"If any person shall interfere with, entice away, knowingly employ, or induce a laborer or renter, who has contracted with another person for a specified time, to leave his employer or the leased premises before the expiration of his contract, without the consent of the employer or landlord, he shall, upon conviction before any justice of the peace or circuit court, be fined not less than twenty-five nor more than one hundred dollars, and in addition shall be liable to such employer or landlord for all advances made by him to said renter or laborer by virtue of his contract, whether verbal or written, with said renter or laborer, and for all damages which he may have sustained by reason thereof."

Appellant alleged that appellees interfered with, enticed away, and knowingly employed, his tenant, Will Anderson, with whom he had a contract to occupy and cultivate his farm during the year 1928 for the rental of $800.

Appellees denied that they interfered with, enticed away, or knowingly employed, appellant's tenant.

The issue joined was submitted to a jury upon the testimony adduced by the parties, and the instructions of the court, which resulted in a verdict for appellees, and a consequent judgment dismissing appellant's complaint, from which is this appeal.

The record reflects that Will Anderson leased appellant's farm for the years 1926, 1927 and 1928 for an annual rental of $800, evidenced by three promissory notes; that he occupied the farm, and paid the rent, for the first two years; that in the fall of 1927 he owed the Straub Mercantile Company an account of $645, which they agreed to settle with him in full for $600; that he was unable to pay them that amount, so Straub Mercantile Company refused to advance him supplies for 1928, and that he was unable to get any one else to do so; that, in November, 1927, he notified appellant of his situation, and

asked him to advance him supplies for the year 1928, and, upon his refusal to do so, notified him that he was going to leave his place; that, after making up his mind to quit appellant, and after notifying him to that effect, he entered into a rental contract with appellees to cultivate land on their farm, on condition that they would pay the account he owed the Straub Mercantile Company, and, as security therefor, take an assignment of the chattel mortgage which he had given to the Straub Mercantile Company; that, while still residing upon appellant's farm, they sent their superintendent to inspect the property covered by the chattel mortgage, and, being satisfied with same, paid the account he owed the Straub Mercantile Company by check dated December 21, 1927, and took an assignment of the chattel mortgage; that the check was presented to the bank upon which it was drawn and paid, after appellant had notified appellees of the rental contract or lease he had with Will Anderson; that, at the time appellees rented the land to him, they knew nothing, made no inquiry, and he volunteered no information, relative to the rental contract or lease appellant had with him.

Appellant contends for a reversal of the judgment, because the court sent the cause to the jury upon the theory that, if Will Anderson, appellant's tenant, had resolved in his own mind to break his contract with appellant, appellees were at liberty to deal with him, although they had full knowledge that he was under contract to remain on the place where he was then located. It is argued that this was an incorrect interpretation of § 6570 of Crawford & Moses' Digest, upon which the suit is based. This interpretation was placed upon the statute in question in the case of *Park* v. *De Priest,* 138 Ark. 86, 210 S. W. 777. In that case the court said:

"We think there is nothing in the statute preventing a tenant from breaching his rental contract with his landlord, and *vice versa,* and then seeking employment elsewhere, provided, of course, the subsequent employer or

landlord did not interfere with the original employment, or entice or induce the tenant to leave his first employer or landlord before the expiration of the rental contract.''

Appellant argues, however, that, even though the cause was submitted under the proper interpretation of said statute, the instructions were abstract, because there is nothing in the evidence tending to show that Will Anderson had made up his mind to leave appellant before he entered into negotiations with appellees. We cannot agree with appellant in this contention, for Will Anderson testified that he had made up his mind to quit appellant, and that he so notified him before he went to see appellees about renting from them. It is true appellant testified that Will Anderson never told him he was going to leave, and that the first he heard of it was from Will Straub, who told him on January 3, 1928, that appellees had agreed to pay the account Will Anderson owed it. But this only presented an issue of fact for determination by the jury. In view of the testimony of Will Anderson in this particular, it cannot be said that the instructions complained of were abstract.

No error appearing, the judgment is affirmed.

ANDERSON *v.* SHOUP.

Opinion delivered January 27, 1930.

Elmo CarlLee, for appellant.

W. J. Dungan, for appellee.

KIRBY, J., (after stating the facts). The allegations of the complaint show the items of the account charged against appellant and the amount of interest also, and that the interest charged exceeds the amount allowed by law, and was usurious in the sum of $30, the correct amount alleged to be agreed upon. It was shown, however, that the whole amount of the account had been voluntarily paid by appellant without objection to the payment of the alleged usurious interest, until the final settlement was made, and, although the complaint alleges that the different payments were made under protest, and were not voluntary, the allegations showing the method of payment do not show such payments to have

been otherwise than voluntarily made. According to the allegations, when the last bale of cotton and seed had been sold, the appellant had the check made payable to the landlord, and his account was given to him, and the balance of the amount of the check over the amount shown to be due him by the account was returned to appellant. He objected at this time to the settlement, claiming usury had been charged and exacted to him, and later presented his account to the executor of the estate of the deceased landlord, claiming to be entitled to an allowance for the whole amount of the account he had paid to the landlord, including the interest thereon.

The statute makes no express provision for the recovery of the money paid on usurious accounts or contracts, although it prohibits the taking of excessive or usurious interest, and declares void all notes and obligations providing therefor. The payments made on the account under the allegations of the complaint should, we think, be treated as having been voluntarily made, the amount of the account and lawful interest, and held not recoverable, under the doctrine of our cases. *Kendall* v. *Davis,* 55 Ark. 318, 18 Ark. 185; *Murphy* v. *Citizens' Bank,* 82 Ark. 131, 100 S. W. 891, 11 L. R. A. N. S. 616, 12 Ann. Cas. 535. See also 39 Cyc. 1030, paragraph H.

The complaint alleged that the tender of the amount agreed to be the amount of excessive or usurious interest exacted had been duly made, and the court correctly sustained the demurrer; and the judgment of the court sustaining the demurrer and dismissing the complaint is correct and must be affirmed. It is so ordered.

SHELTON *v.* SHELTON.

Opinion delivered January 27, 1930.

Miller & Yingling and *Tom W. Campbell,* for appellant.

F. E. West, Geo. W. Emerson, W. R. Donham and *Culbert L. Pearce,* for appellee.

KIRBY, J., (after stating the facts). Appellant insists that the court erred in holding that the probate court of White County was without jurisdiction to appoint appellant administrator of the estate of Elmer Shelton, deceased, and also in adjudging him not a suitable person to act as administrator, and his removal as such and revocation of his letters on that account. Our statutes, § 5, C. & M. Digest, providing where letters of administration shall be granted, reads:

"Letters testamentary and of administration shall be granted in the county in which the testator or intestate resided; or, if he had no known residence, and the lands be devised in the will or the intestate die possessed of lands, such letters shall be granted in the county where the lands lie, or one of them if they lie in several coun-

ties; and, if the deceased had no such place of residence and no lands, such letters may be granted in the county in which the testator or intestate died, or where the greater part of his estate may be."

This court held in *Groschner* v. *Winton,* 146 Ark. 520, 226 S. W. 162, letters issued by the probate clerk of Sebastian County appointing an administrator of decedent, who had not resided nor died in that county, void. In *Krone* v. *Cooper,* 43 Ark. 547, the terms "resident" and "nonresident," used in the provisions of our statute governing attachments, were defined. In that case the court held, notwithstanding the fact that the debtor had a home or domicile in St. Louis, Mo., where his family resided, and which he was in the habit of speaking of as his home, that he was a resident of Walnut Ridge, this State, where he spent about three-fourths of his time conducting a partnership contract business in connection with his partner. It was there 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 purposes, although there may be an understanding 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." See also *Jarrell* v. *Leeper,* 178 Ark. 8, 9 S. W. (2d) 778.

In *Smith* v. *Union County,* 178 Ark. 540, 11 S. W. (2d) 455, this court held, in construing the statute providing for the listing of property for taxation, (§ 9890, C. & M. Digest): "Residence, as used in § 9890, Crawford & Moses' Digest, means the place of actual abode, and not an established domicile or home which one expects to return to and occupy at some future time." The same construction was placed upon the word "residence" under the taxation laws as had been given it under the attach-

ment laws of the State. It will be seen from these cases, residence and domicile are not to be held synonymous; that a man may have a residence in one State or county, and he may be a nonresident of the State of his domicile in the sense that the place of his actual residence is not there. Conceding without deciding that decedent's residence followed that of his mother, into whose custody he was committed upon the divorce granted their parents, the undisputed facts show that he left this residence about two years before his death following his employment, wherever it required his residence and presence; that he afterwards married in Arkansas County, and, after his marriage and coming of age, continued to follow his employment and reside with his wife wherever it required his presence. That he had resided at Brinkley, in Monroe County, in a boarding house, it is true, for 4 or 5 weeks, where his presence was required by his services to his employer, and that he died in that county. He had not established any other residence or home after he in fact left the home of his mother and was married, except as stated; nor did he thereafter return to his old home to reside, and from which his mother, who owned a life estate therein and the right to possession thereof, had removed before his death.

The court correctly held that the decedent resided at Brinkley, in Monroe County, at the time of his death, consequently the probate court of White County was without jurisdiction to issue letters of administration upon his estate, and the court did not err in holding said letters void.

This case is not like *Easterling* v. *Farrell,* 178 Ark. 937, 12 S. W. (2d) 889, relied upon by appellant as in point and controlling here. There the undisputed testimony showed that decedent had married and established a domicile, or home, in another county after leaving the home of his father, and it was held that, for the purpose of administration on his estate, the home so established was his residence, in the absence of proof of his having estab-

lished another residence in a different State, and that the burden of proof rested upon the one who sought to have the letters of administration granted to show that he was not a resident thereof when he died.

Having come to this conclusion, it is unnecessary to determine the other point raised relative to the correctness of the court's holding upon the unfitness of the administrator.

Finding no error in the record, the judgment is affirmed.

CONNELLY *v.* LAWHON.

Opinion delivered January 27, 1930.

E. R. Parham, for appellant.

Robinson, House & Moses and *Dillon & Robinson,* for appellee.

MEHAFFY, J. The city of North Little Rock, wishing to have repairs made on its streets, through its city council, instructed Harvey Brown, who was chairman of the street committee, to make investigation, and secure estimates and bids for doing the work.

P. F. Connelly submitted his bid to Harvey Brown, and it was reported to the council, and the city council referred the matter to the street and finance committee with power to act. Connelly was directed by the mayor to commence work, and the work was done and completed under the direction and supervision of the mayor and street committee of North Little Rock.

After the completion of the work, the city, by ordinance, authorized the payment to Connelly of $8,960.16 for the work which had been accepted by the city. The mayor vetoed the ordinance, and the council passed same over his veto. The mayor of the city of North Little Rock then resigned, and, as a citizen and taxpayer, brought this action, asking for an injunction to prevent the officers of the city from paying the amount alleged to be due Connelly.

The city of North Little Rock, through its attorney, filed a demurrer to the complaint, which was overruled by the court. Connelly filed an intervention, alleging that he had entered into an agreement with the city of North Little Rock, through its duly authorized agents, to furnish it with patching, material and labor to do certain street work contemplated by the city of North Little Rock. He denied that the contract was void, as alleged in plaintiff's complaint, and denied that it was entered into with Harvey Brown as an individual member of the city council. He stated that he had in all things performed the agreement; that the work and labor was approved and accepted by the city of North Little Rock, and it was indebted to him in the sum of $8,960.16. He alleged that

the city council, by ordinance, had authorized the payment; that the ordinance was vetoed by the mayor, and later passed over his veto. He filed a substituted intervention, alleging, in addition to the facts in his former intervention, that at the time of the execution of the contract Ross L. Lawhon, the plaintiff, was the mayor of North Little Rock; that he entered into the agreement with the city of North Little Rock by submitting his bid and schedule of prices to Brown, a member of the city council of North Little Rock, who had, by proper resolution of the council, been empowered to solicit the bid for furnishing material and labor to do the street work for the city; that the bid was accepted by the council, and he was directed to perform the work and furnish the materials set out in his offer; that he was directed by the plaintiff to commence the work, and that the work was done under the supervision and inspection of the plaintiff, Ross L. Lawhon, who was the mayor of the city of North Little Rock, a street commissioner and a member of the board of the city of North Little Rock; that the material, work and labor were approved and accepted by the city, and that it was indebted to him in the sum of $8,960.16.

He alleged that the city of North Little Rock and Ross L. Lawhon were estopped from pleading the invalidity of the contract, and that the action was not instituted in good faith. He also alleged in his intervention that Pulaski County had contributed $1,000 and the Missouri Pacific Railway Company $350.

Plaintiff then filed an amendment to his complaint, and filed a demurrer to the intervention of Connelly. The court sustained the demurrer of plaintiff to the intervention of Connelly, and Connelly prosecutes this appeal.

The appellee first contends that the contract is void, and, among other things, relies on § 7715 of Crawford & Moses' Digest, which reads as follows: "The board shall have the exclusive power to make purchases of all sup-

plies, apparatus, materials and other things requisite for public purposes in such city, and to make all necessary contracts for work or labor to be done, or material or other necessary things to be furnished for the benefit of such city, or in carrying out any work or undertaking of a public nature therein; but where the amount of expenditure involved therein may exceed three hundred dollars, said board shall transmit to the city council an estimate thereof, and an ordinance authorizing such expenditure, with their recommendation in relation thereto, and, upon the passage of such ordinance, it shall be the duty of said board to advertise and let the work or contract to the lowest responsible bidder."

Section 7715 of Crawford & Moses' Digest, above set out, is a part of section one of the act of March 21, 1885. One paragraph of § 3 of the same act reads as follows, referring to the additional powers conferred upon cities of first class:

"Second, to alter or change the width or extent of streets, sidewalks, alleys, avenues, parks, wharves and other public grounds, and to vacate or lease out such portions thereof as may not for the time being be required for corporate purposes, and where lands have been or may be acquired or donated to such city for any object or purpose which has become impossible or impracticable, the same may be used or devoted for other public or corporate purposes or sold by the city council, and the proceeds applied therefor."

The section of the act last quoted is a part of § 7684 of Crawford & Moses' Digest. Section 7607 of Crawford & Moses' Digest reads as follows: "The city council shall have the care, supervision and control of all the public highways, bridges, streets, alleys, public squares and commons within the city; and shall cause the same to be kept open and in repair, and free from nuisance."

The last section quoted is a part of the act of March 9, 1875. Unless the act of 1875 was repealed by the act of 1885, the board of public affairs would have nothing

to do with contracts of the kind involved here. And it is not expressly repealed, and we do not think it is repealed by implication, because there is no necessary conflict between it and the act of 1885. The act of 1885 provides that the board of public affairs shall have exclusive power to make purchases of all supplies, apparatus, materials and other things requisite for public purposes in such city, and to make all necessary contracts for work and labor to be done or material or other necessary things to be furnished for the benefit of the city, or in carrying out any work or undertaking of the public nature therein. Nothing in the part of the section just quoted refers to streets, but it refers to purchases and contracts made for labor and material. And, after the word "therein" above quoted, there is a semi-colon, and the rest of the section reads as follows: "But where the amount of the expenditure involved therein may exceed three hundred dollars, said board shall transmit to the city council an estimate thereof, and an ordinance authorizing such expenditure, with their recommendation in relation thereto, and, upon the passage of such ordinance, it shall be the duty of said board to advertise and let the work or contract to the lowest responsible bidder."

Section 7568 of Crawford & Moses' Digest confers authority on the city council with reference to streets, and, among other things, gives them the power to improve, keep in order and repair them.

It has been uniformly held by this court that the repeal of a statute by implication is not favored.

"In a recent decision we undertook to cover this subject in the following statement: 'It is a principle of universal recognition that the repeal of a law merely by implication is not favored, and that the repeal will not be allowed unless the implication is clear and irresistible, but there are two familiar rules or classifications applicable in determining whether or not there has been such repeal. One is that, where the provisions of two statutes are in irreconcilable conflict with each other, there is an

implied repeal by the later one, which governs the subject, so far as relates to the conflicting provisions, and to that extent only. * * * The other is that a repeal by implication is accomplished where the Legislature takes up the whole subject anew, and covers the entire ground of the subject matter of a former statute, and evidently intends it as a substitute, although there may be in the old law provisions not embraced in the new.' " *England* v. *State Highway Commission,* 177 Ark. 157, 6 S. W. (2d) 23; *Cordell* v. *Kent,* 174 Ark. 503, 295 S. W. 404; *Ouachita County* v. *Stone,* 173 Ark. 1004, 293 S. W. 1021; *State* v. *White,* 170 Ark. 880, 281 S. W. 678.

There appears to be no necessary conflict between the acts of 1875 and 1885, and there is, therefore, no repeal of the act of 1875 by implication.

Another rule of construction well established is that all the new legislation must be construed with reference to existing legislation on the same subject. The act of 1875 especially mentioned the repair and improvement of streets, and provided that the city council should have power to lay off, open, widen, straighten and establish; to improve and keep in order and repair, etc. Section 7568, Crawford & Moses' Digest. And § 7607 of Crawford & Moses' Digest expressly gave to the city council the care, supervision and control of all public highways, bridges, streets, etc., and provided that the city council should cause the same to be kept open and in repair.

Section 7715, a part of the act of 1885, does not mention streets, but it provides for letting contracts, and we think the contract mentioned in the act of 1885 are contracts other than those for the improvement and repair of streets.

Our conclusion is that the city council had the authority to make the contract involved in this suit. The chancery court therefore erred in sustaining the demurrer to Connelly's intervention.

The decree of the chancery court is reversed, and the cause remanded, with directions to overrule the demur-

rer, and to take such further proceedings as necessary to dispose of the case, not inconsistent with this opinion.

DAVIDSON *v.* STATE.

Opinion delivered January 27, 1930.

Coleman & Reeder and *Theo R. Wilson,* for appellant.

Hal L. Norwood, Attorney General, and *Pat Mehaffy,* Assistant, for appellee.

MEHAFFY, J. Appellant was indicted by the grand jury of Izard County for selling liquor. He was convicted, and his punishment fixed at one year in the penitentiary. The case is here on appeal. The appellant insists that the evidence does not show a sale, and that the case should be reversed for that reason. No other error is assigned.

D. O. Johnson, sheriff, testified that a report came to him that a negro, George Earnest, was drunk at Violet Hill, and he and another witness followed him to the road camp. George Earnest told them they had been wanting to catch Rom Davidson so long, he would take them to him. They put George Earnest in Mr. Harris' car, and followed him in the sheriff's car to near the defendant's home, but did not take the sheriff's car up

to the house. They walked up near to the car George Earnest was driving. Earnest got out of the car, and went into the house and came back with two jars of whiskey.

The plan was for this negro to turn on the lights of the car when he went to pay for the whiskey, and the sheriff was to get Davidson while Davidson was getting the money. They set the liquor on the running board, and turned on the lights. Earnest paid him six dollars, and was getting out two dollars when the sheriff stepped from behind the car and said: "Stick 'em up." Davidson broke one of the jars, and ran with the other one. Harris hit him, and he fell and broke the other jar. He delivered the whiskey to the negro by setting it on the fender of the car. Earnest never did get the whiskey. Davidson ran off with it.

Witness says he has the six dollars. Davidson did not keep the money or deliver the whiskey. He broke the whiskey. Witness said the money is his. He gave it to the negro to buy whiskey with. Witness did not get any whiskey, but furnished the money to buy it with; took the negro to buy whiskey, and caused the sale to be made; doesn't know what Earnest told Davidson when he went in the house that night. Four dollars was on the ground there, and he found the other two dollars where the first jar was broken, about 15 or 20 feet from the car. Defendant had both jars in his hands. George Earnest did not take any home brew there in his car. The two negroes went off somewhere. It was a dark night. Witness did not hear any of the conversation in the house, and does not know where George Earnest is now. He has been gone about two months.

Harris testified to substantially the same facts told by the sheriff.

All the evidence on the part of the State was contradicted by appellant's witnesses. The evidence of appellant's witnesses is not set out, because the only question for this court to determine is the sufficiency of the

State's evidence. We do not pass on the weight of the evidence nor the credibility of the witnesses. The 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. *Southwestern Bell Tel. Co.* v. *McAdoo,* 178 Ark. 111, 10 S. W. (2d) 503; *Arkansas Power & Light Co.* v. *Orr,* 178 Ark. 329, 11 S. W. (2d) 761; *Mo. Pac. Rd. Co.* v. *Juneau,* 178 Ark. 417, 10 S. W. (2d) 867; *Mo. Pac. Rd. Co.* v. *Edwards,* 178 Ark. 732, 14 S. W. (2d) 230; *Western Union Tel. Co.* v. *Downs,* 178 Ark. 933, 12 S. W. (2d) 887; *Hyatt* v. *Wiggins,* 178 Ark. 1085, 13 S. W. (2d) 301.

The jury having found against appellant, its verdict must stand if there is any substantial evidence to sustain it. It is earnestly insisted that there was no delivery, and therefore no sale. The sheriff testified: "Earnest got out of the car and went into the house, and came back with two jars of whiskey. They sat the liquor on the running board, and turned on the lights. He paid him six dollars."

This testimony shows that Earnest went to appellant's house, and came back to the car with two jars of whiskey. If this is true, the whiskey had already been delivered by appellant. This evidence also shows that Earnest had already paid appellant six dollars. After this was done, the appellant broke one of the jars, and ran off with the other one.

The sheriff also testified that Earnest did not take any home brew there in his car. Earnest, at the direction of the sheriff and Harris, took Harris' car, and they knew whether there was any home brew in the car, and whether Earnest had any home brew or other liquor when he went up to appellant's house.

The evidence was sufficient to submit the question to the jury as to whether there was a sale, and the court instructed the jury: "To constitute a sale there must have been an agreement on the part of the seller to sell, and, upon the part of the buyer, to buy; and there must

have been a delivery of the article sold, and there must have been something paid for it."

On cross-examination, the sheriff testified that appellant delivered the whiskey to Earnest by setting it on the fender of the car. He also said that Davidson did not keep the money or deliver the whiskey. Putting the whiskey on the running board for Earnest would have been a sufficient delivery, and the fact that he returned the money and ran off with the whiskey would not affect the sale already made.

"It has been uniformly held by this court that delivery is a question of intention of the parties, as manifested by overt acts, and that a sale of chattels will be treated as complete, where any act has been done which was intended by the parties as a delivery." *Liveoak* v. *Hopper,* 172 Ark. 362, 288 S. W. 887; *Elgin* v. *Barker,* 106 Ark. 482, 153 S. W. 598; *Hodges Bros.* v. *Bank of Cove,* 119 Ark. 215, 177 S. W. 925; *Vance* v. *Bell,* 153 Ark. 229, 240 S. W. 8.

The jury found against the appellant, and there is substantial evidence to support the verdict, and the judgment is affirmed.

ROYAL *v.* MCVAY.

Opinion delivered January 27, 1930.

Cravens & Cravens, for appellant.

A. M. Dobbs, for cross-appellant.

Hays, Priddy & Smallwood, for appellee.

McHaney, J. On December 17, 1928, George McVay, Ida Johns, Ruby Wilson, Pearl Royal, Ella Harley, N. P. Neindam, David Barnes, and Rufus McVay, by his guardian and next friend, George McVay, and Raymond Carpenter, by his guardian and next friend, Ida Johns, filed their *ex parte* petition in the chancery court of Logan County, Northern District, for partition of certain real estate consisting of town lots and acreage property inherited by them, as all the heirs at law of David McVay, deceased. The petition was filed by Judge Cochran of the firm of Cochran and Arnett, and properly traced the ownership of the property, the relationship of all the petitioners, their respective interests in the real estate sought to be partitioned, and alleged that, by reason of the kind and character of the property and the smallness of the interests of some of the petitioners, the land could not be divided in kind without great prejudice to the owners, but would have to be sold and the proceeds divided. As above stated, the land consisted of lots and houses in the town of Paris, and coal and mineral rights under certain lands, the surface rights of which had been sold to other persons. On February 18, 1929, the court heard the petition for partition, and entered a decree reciting that "the court, being well and sufficiently advised, doth find" all the facts set out in the petition, detailing them, to be true, including a finding that the "lands cannot be divided equitably, justly and fairly in kind because of the great number of shares, and the small interest of some of the petitioners." The court thereupon decreed a sale of the land, and that the peti-

tioners be paid their respective shares as determined by the court after the payment of costs. On March 21, 1929, a sale was had pursuant to the order and direction of the court in which the town lots were sold to one Joe Beshoner, the sale approved and deed made to the purchaser. The country property consisting of farm lands, coal and mineral rights, were sold to appellee, George McVay, appellants, Ida Johns and Pearl Royal, and Ruby Wilson, for the sum of $9,000, to secure which bond was given by the purchasers, and a certificate of purchase issued to them. Thereafter, on April 15, the commissioner filed a report of sale, reporting the sale as above mentioned and praying confirmation. Thereupon, appellee, Ella McVay Harley, and Rufus McVay, a minor, by his mother and next friend, filed exceptions to the sale, and asked that same be rejected, and confirmation refused on the grounds that the sale was made for a grossly inadequate price, and that two of the purchasers, George McVay and Ida Johns, were guardians respectively of Rufus McVay and Raymond Carpenter, and therefore could not purchase at such sale. The court sustained the latter exception, holding that "George McVay and Ida Johns, under the law of this State, cannot purchase or be interested in the purchasing of their wards' land, although said George McVay and Ida Johns have a one-eighth interest each in the land sold and purchased." Another sale was ordered, and thereafter on May 9 the farm lands, coal and mineral rights were sold by the commissioner to Ella McVay Harley for $10,060. On June 18, during the regular June term of court the commissioner filed his report of sale, prayed confirmation thereof, and approval of the deed. Before confirmation the appellants entered their appearance only for the purpose of filing a motion to vacate and set aside the decree of partition made on February 18, and all proceedings had thereunder. They alleged in the motion, which was verified by them, that they were made parties to the *ex parte* petition for partition without their knowl-

edge or consent and without their authority, that no service was had upon them, either personal or constructive; that neither of them authorized Judge Cochran to represent them, and that they had no knowledge concerning the petition, its filing, nor of the decree until about two weeks prior to filing their motion. There was a hearing on this motion, testimony taken on behalf of appellants and appellees, but the appellants themselves did not testify. Judge Cochran testified that he had no directions from the appellants who are nonresidents to file the suit for them, and, so far as he knew, neither of them had knowledge of it; that he was employed by other of the heirs, and that George McVay told him he knew it would be all right with appellants, and would write them and get their consent. McVay testified that he did not do this, and that, so far as he knew, they did not know anything about the bringing of the suit until May; that the property was bid in at the first sale by Mr. Anthony Hall on his instructions for himself and his sisters, but that he had no authority from his sisters to do so, and that appellants were not at the sale. Appellee, Mrs. Harley, testified that she and George McVay consulted Judge Cochran about the partition suit, and that he advised them that all the heirs should be made parties; that immediately after this conference, she wrote to appellants and advised them what Judge Cochran had said, and that he would file the petition; that these letters were written in December, 1928, before the petition was filed, and that both appellants answered these letters; that she wrote them many letters while the matter was pending, and before the sale regarding this matter. She kept no copies of the letters she wrote, and was able to find only two letters she received from her sisters, one signed by Ida Johns and the other by Ida Johns and Ruby Wilson, both written from Atlanta, Georgia, where Mrs. Johns lived, and while Pearl Royal was visiting Ida Johns in Atlanta when these letters were written. In the letter of March 18, Ida Johns said among other things: "I do

hope that everything will be all right when the sale comes up, and that everything can be settled for the best. I feel that George is doing all he can for all of us. I am glad that you and George can be there. Lovingly, Ida." The other letter signed by Ruby and Ida said in part, "I am so sorry that I can't come to Paris for the 21st. * * * We will be anxiously waiting to see what transpires this week, and I do wish that we could be there to help you all." The first sale was held on March 21.

The court overruled the motion to set aside the decree of partition, confirmed the sale, and this appeal was prosecuted. George McVay has appealed from the order setting aside the first sale, and cross-appealed against Mrs. Harley.

We take it for granted that the property is not susceptible of division in kind. It was so alleged in the petition, found to be so in the decree, and neither appellants nor cross-appellant now contend that the decree is erroneous in this particular. In fact, George McVay, who was admittedly a party to the petition, so charged in the petition and was in court ready to so testify when the decree was granted, and the appellants, in their motion to vacate the decree, say the land sold for an inadequate consideration, and they stand ready to bid a higher amount. This is tantamount to saying the land cannot be divided in kind, but should be sold.

Appellants say in their brief: "The real question, raised by this appeal, is whether or not it is necessary, in a partition suit, to make all of the owners parties to the suit, either by personal or constructive service." We think the evidence sufficient to support the finding of the court that all the owners were in fact parties to the petition. The evidence in this regard has already been substantially stated. Their verified motion alleged that they were not parties, and had no knowledge of the proceeding, and they offered the testimony of Judge Cochran and George McVay to support the allegation. But they did not testify themselves, nor submit to cross-examination.

The testimony of Judge Cochran and George McVay was negative in character, that, so far as they knew, appellants were not notified. But the positive testimony of Mrs. Harley that they were notified by her, and that they knew that they were parties, supported by the two letters from them heretofore mentioned, stands undisputed, and, when taken in connection with all the other facts and circumstances in the case, preponderate in support of the holding of the court.

But, conceding for the sake of argument, that they were not parties to the petition, had no knowledge of the proceeding, and that all the allegations in this regard in their motion to vacate are true, still the partition decree is not void, but voidable only, and the decree cannot be vacated or set aside after the lapse of the term except on compliance with the provisions of the statute in this regard (§§ 6290-6292, C. & M. Digest), and then only by setting up a meritorious cause of action or defense. Section 6293. *Martin* v. *Gwynn,* 90 Ark. 44, 117 S. W. 754; *Hare* v. *Ft. Smith W. Ry. Co.,* 104 Ark. 187, 148 S. W. 1038; *Horn* v. *Hull,* 169 Ark. 463, 275 S. W. 905; *Ingram* v. *Raiford,* 174 Ark. 1127, 298 S. W. 507. It has been frequently held by this court that mere inadequacy of consideration is not sufficient ground to set aside a judicial sale, unless the price at which it was sold is so grossly inadequate as to raise a presumption of fraud or unfairness. *Horn* v. *Hull, supra.* In *Ingram* v. *Raiford, supra,* the court, speaking through Mr. Justice Wood said: "By the decree of this court in the case of *Ingram* v. *Wood,* above, it is shown that the interest of all the parties named had been adjudicated and determined by the decree of the Union Chancery Court, May 25, 1925. That decree was final as to all the parties in the original action, except Charlie Ingram, who, to be sure, under the law, had a right, if she were an infant when the decree was rendered, to have the same set aside if no defense was made for her by natural guardian or guardian *ad litem;* but the decree so rendered against her was not

void, but only voidable." The court then held that, before she could set aside the decree, she would have to follow the procedure prescribed by the statute. The court also quoted from *Ryan* v. *Fielder,* 99 Ark. 374, 138 S. W. 973, with reference to a judgment rendered against an infant who was not represented by guardian as follows: "But, if a judgment is rendered against an infant without such defense, it is only voidable under our decisions, and it may be vacated or modified after the expiration of the term of the court in which it was rendered, where the condition of such defendant does not appear in the record nor the error in the proceedings. The proceedings to vacate the judgment for this cause must be by complaint, verified by affidavit setting forth the judgment, or order, the ground to vacate or modify it, and it will not be vacated until it is adjudicated that there is a valid defense to the action in which the judgment was rendered, the court first deciding upon the grounds to vacate before trying the validity of the defense."

Therefore, not having followed the procedure provided by the statute for setting aside judgments and decrees after the lapse of the term, appellants must fail. They not only did not follow § 6290, by alleging one or more of the grounds therein, but failed to allege any defense as provided by § 6293.

With reference to the appeal and cross-appeal of George McVay, it appears that his prayer for appeal was from the order setting aside the first sale. Yet, in the very beginning of his argument in the brief filed by his counsel, it is conceded that the court did not commit "reversible error in setting aside the first sale to four of the tenants in common," and it is further said "that the sale was not void on account of the fact that two of the purchasers in that sale were guardians of minors," as the court held. Whether the reason given by the court in making the order vacating the first sale is right or wrong, if it be conceded that the court did not err in making the order, the question becomes academic, for this

court does not reverse where the order, judgment or decree is right, although the wrong reason may be given therefor. What we have already said regarding the decree not being void, but voidable only, if the infant parties were not represented, applies with equal force to the argument of McVay thereon. Here, on the face of the record, both minors by their statutory guardians were joined as petitioners, in accordance with § 8095, C. & M. Digest, and the statute appears to have been complied with in all particulars, so far as the face of the record is concerned.

Cross-appellant also contends that the court erred in confirming the sale to Mrs. Harley. What we have already said disposes of this question, although a different argument is made. We think the case of *Frazier* v. *Frazier,* 137 Ark. 57, 207 S. W. 215, cited by him, does not support the argument made. It would unduly extend this opinion to follow the argument further, if it is not already too long. Suffice it to say, that we have examined all the points urged in this regard, and find that we cannot sustain them.

The decree is accordingly affirmed.

GRAVES *v.* JEWELL TEA COMPANY.

Opinion delivered January 27, 1930.

[redacted]

Melbourne M. Martin, for appellant.

A. L. Barber and *Roscoe R. Lynn,* for appellees.

McHaney, J. Appellant and one Joe Murphy brought separate actions against the appellees to recover damages for personal injuries received by them in an automobile accident, which occurred on January 9, 1929, at 18th and Taylor streets, in the city of Little Rock, Arkansas. Appellant was riding in the automobile of Joe Murphy as his guest, traveling south on Taylor street, while the truck of appellee, Jewell Tea Co., was being driven west on 18th street by the appellee, Hewitt. The truck entered the intersection of the two streets, traveling at a very moderate rate of speed, at a time when the car driven by Murphy was some distance north of the intersection, and was struck by the Murphy car about the right rear wheel, with such force as to practically demolish the truck, and painfully injured appellee Hewitt. Murphy's car, after striking the truck, ran some distance beyond, knocked down a fence post and turned over, severely injuring appellant. Appellees filed answers, denying any negligence on their part, and alleging that the injury was caused by the negligence of Murphy by driving his car at

a reckless rate of speed, and without same being properly equipped with proper brakes and good working condition. Appellees also filed a cross-complaint against said Murphy, praying damages received by them because of said collision. The case was tried to a jury, which resulted in a verdict and judgment for appellees. Mary Graves only has appealed.

It is first insisted that the verdict is contrary to the law and the evidence, and this raises the question of the sufficiency of the evidence to support the verdict. The evidence was in dispute relative to the negligence of the respective drivers of the automobiles. In determining this question in this court, we must view the evidence in the light most favorable to the appellees, in whose favor the verdict was rendered. According to the testimony of appellant and Murphy, they saw the truck about three-quarters of a block away, and thought it was stopped on the east side of Taylor street, on 18th, and that Murphy blew his horn; that they continued to approach 18th street, and when they had got within 25 to 50 feet of the intersection, Hewitt drove the truck into the intersection in front of their car, and that Murphy swerved his car to the east in an effort to avoid a collision, but failed to do so. According to the evidence of appellees, Murphy was driving his car south on Taylor at a very rapid and dangerous rate of speed, from forty to eighty miles an hour; that Hewitt was driving west on 18th street at a very ordinary rate of speed, from five to ten miles an hour, as testified to by Murphy, and that he did not stop his car at the intersection to proceed west; that he saw Murphy's car about three-quarters of a block away, did not know he was driving so rapidly, thought he had ample time to cross the intersection, and that Murphy had his car under such control as he would be able to stop without hitting him. We think this testimony is sufficient to support the verdict for the appellees, even as to Mary Graves, an invited guest in the Murphy car. While it is true that the negligence of Murphy cannot be imputed to

appellant riding with him as his guest, it was the duty of appellant to exercise ordinary care for her own safety, and a failure to exercise such care, which contributed to her injury, would constitute contributory negligence on her part, barring a recovery. *Carter* v. *Brown,* 136 Ark. 23, 206 S. W. 71; *Pine Bluff Co.* v. *Whitlaw,* 147 Ark. 152, 227 S. W. 13. The court correctly instructed the jury at appellant's request in this regard in instruction B, as follows: "The court tells the jury that, even though you believe from a preponderance of the evidence, that both Joe Murphy and C. J. Hewitt were negligent, that Mary Graves is entitled to recover against defendants, unless she contributed to her injuries by some act on her part of omission or commission."

By returning a verdict for appellees, the jury must have found either that Hewitt was not negligent or that "she contributed to her injuries by some act on her part of omission or commission." The evidence was sufficient to support the verdict, and appellant's contention in this regard must be overruled.

It is next said that the verdict is not responsive to the pleadings, because it does not state whether it is for the defendants on the complaints, and that no verdict was returned for or against appellant on her complaint. The verdict of the jury was, "We, the jury, find for the defendants." The court instructed the jury very carefully on the form of verdict they should return, giving them five different forms, depending upon their findings: (1) for Murphy, (2) for appellant, (3) for appellee Hewitt on his cross-complaint, (4) for Jewell Tea Company on its cross-complaint, and then the court told them in the 5th form, "If, in your deliberations, you find that neither of the parties are entitled to recover, you will say, 'We, the jury, find for the defendants'." By the finding of the jury, in accordance with the instructions of the court, it is evident that in their opinion neither of the parties was entitled to recover, and therefore they followed the 5th form. Appellant made no objections to the forms of the

verdict provided by the court. Moreover, the record reflects that the jury, after it deliberated some hours, came into court and stated they were unable to arrive at a verdict, and that, if the counsel did not object, they would give their reasons therefor, which was agreed to. A member of the jury then stated that they would like to know whether they could find damages for Mary Graves and not find any damages for Murphy and Hewitt, and requested further instructions from the court thereon. The court then read all the instructions, and about fifteen minutes later the jury returned a verdict for the defendants on the 5th form. We therefore cannot see that the verdict rendered was the result of a misapprehension in the forms of the verdict submitted. Appellant made no objection to the action of the court in reading the instructions again, and did not insist on the court answering the question. She is therefore in no position to complain.

It is next said that the court erred in permitting a certified copy of the judgment of conviction of Murphy for reckless driving in the Little Rock municipal court to be offered in evidence, on the ground that evidence of a previous conviction in a criminal matter is not admissible in a civil action, and because the pleading alleged "speeding" and not reckless driving. If this might be said to be error, it was invited. A witness for appellant, Leonard Roberts, had testified that Murphy was arrested as a result of the accident. On cross-examination, he was questioned further about the arrest and trial, when counsel for appellant objected on the ground that "the record is the best evidence—he can introduce that."

"Mr. Lynn: Can I introduce a certified copy?"

"Mr. Martin: Yes, sir, re bob."

Hewitt was also cross-examined regarding this matter by appellant's counsel, as was also appellant's witness, Barber. Therefore appellant cannot complain.

Appellant next says that the court erred in permitting the introduction in evidence of the photographs of the scene of the accident, and of Hewitt's damaged car.

The witnesses, who made the kodak pictures and who made the enlarged photographs, were introduced and identified them, and many others who testified that the photographs were exact reproductions of the situation, with the exception of Murphy's car, which had been removed. No effort was made by appellant to show that the pictures did not correctly represent the situation. In *Sellers* v. *State,* 91 Ark. 175, 120 S. W. 840, this court quoted with approval from 9 Enc. of Ev., 771, as follows: "As a general rule, photographs are admissible in evidence when they are shown to have been accurately taken, and to be correct representations of the subject in controversy, and are of such a nature as to throw light upon it." In that case the court held: "It was error in a murder case to admit in evidence a photograph which purports to show the situation of the parties, and the place and conditions connected with the final rencounter, unless such photograph is verified by some witness in the case." Here the photographs admitted were sufficiently identified and verified, and were proved to be correct representations of the scene of the accident.

The next error appellant relies on relates to instruction No. 3, given at the request of appellees over appellant's objections. That instruction is as follows: "If you find from a preponderance of the evidence that, at the time the defendant, Hewitt, entered the intersection, the car in which the plaintiffs were riding was some distance away from the intersection, then Hewitt had a right to assume that the plaintiff's car was being driven at a rate of speed that would not be dangerous, and that he had his car under such control that he would be able to stop his car in time to prevent the accident, and, if you so find, your verdict will be for the defendants."

Only a general objection was made to this instruction, and it is now argued that it authorized the jury to impute the negligence of Murphy, assuming that he was negligent, to her. Conceding that this may be the effect of this instruction, standing alone, still, when considered

in connection with instruction B, above copied, we do not think the jury was so misled. If appellant had considered the two instructions to be in conflict in this regard, it was the duty of appellant to make this specific objection to it. Therefore the general objection was not sufficient.

Appellant next complains of appellee's instruction No. 13, given over her objections. This instruction is as follows: "Section 7426 of Crawford & Moses' Digest of the statutes of Arkansas provides that no person shall drive a motor vehicle upon any public highway in this state at a speed greater than is reasonable and proper, having regard to the traffic and use of the highway, or so as to endanger the life or limb or injure the property of another person, and that, if the rate of speed of any motor vehicle operating on any public highway outside of the closely built up or business section, or residence portion of any inhabited city, town or village, exceeds twenty miles an hour for a distance of one-fourth of a mile, such rate of speed shall be *prima facie* evidence that the person operating such motor vehicle is running at a rate of speed greater than is reasonable and proper, having regard to the traffic and use of the way, or to endanger the life or limb of any person. If you find from a preponderance of the testimony that the plaintiff, Murphy, was driving his car in excess of the speed limit as set out by this law, and that such speed was the proximate cause of the collision, then your verdict must be for the defendants."

A specific objection was made to this instruction on the ground that it was not the statute in force at that time, and because the statute relates to speed within the city, and that the collision occurred outside the city. The applicable statute is act 223 of 1927, page 721. By comparing the latter act with § 7426, C. & M. Digest, it will be seen that the provisions are substantially the same. There is nothing in the record to show that the collision occurred outside the city of Little Rock, and the parties in the trial of the case appear to have assumed as a fact

that the intersection of 18th and Taylor streets is in the city. It is also argued that this instruction failed to protect the rights of Mary Graves, and precluded a recovery by her, as it had the effect of imputing Murphy's negligence to her. What we have said with reference to appellees' instruction No. 3 applies with equal force here. No specific objection was made to this instruction on this latter ground. We therefore overrule appellant's contention in this regard.

Another ground suggested for reversal is the argument of one of the attorneys for appellees, based on the record of Murphy's conviction of reckless driving in the Little Rock municipal court. The record does not show what this argument was, or that it was objected to at the time, but is referred to for the first time in the motion for new trial. This was insufficient to present the question to the lower court, or to this court on appeal. *Sanderson* v. *Marconi,* 149 Ark. 97, 231 S. W. 554. Moreover, as we have already shown, the certified copy of the record of conviction was properly admitted as invited, and, having been properly admitted, it was subject to proper comment in argument of counsel.

The remaining assignments of error argued cannot be considered, as they were not included in the motion for a new trial, but were set out in an amendment to the motion for new trial filed out of time. Section 1314, C. & M. Digest; *Spivey* v. *Spivey,* 149 Ark. 102, 231 S. W. 559; *Field* v. *Waters,* 148 Ark. 325, 229 S. W. 735; 20 R. C. L., p. 302, § 83. In the last citation it is said: "To invoke the jurisdiction of the court to entertain a motion for a new trial, the motion must be made within the time allowed by the statute or enlarged by the court. * * * If the motion is filed out of time, it may be either stricken from the files or overruled, and all matters included therein will be unavailing on appeal or review. After the expiration of the time limited, the court is without authority to permit the filing of another motion upon different grounds, or even to permit an amendment of a notice of

motion for a new trial by adding thereto a new and independent ground therefor.''

The trial was concluded March 16, 1929. The motion for a new trial was filed March 28, 1929, the court having given thirty days for this purpose. It was overruled April 2, 1929, and appeal prayed and granted. Thereafter, on June 13, 1929, appellant filed what is called amendment to motion for a new trial, containing additional grounds of alleged error, and on June 14, the judge made this indorsement thereon:

''This amendment to motion for a new trial was filed on this June 13, 1929, and the court having previously adjourned until court in course, and, the court having no authority under the law to consider the motion in vacation at said time or after, the said motion is rejected or overruled. Exceptions saved. Done in vacation, this June 14, 1929. Thomas E. Toler, Judge.''

This action of the judge was correct, and this amendment presents nothing to this court for review.

Judgment affirmed.

WEAS *v.* MONTGOMERY.

Opinion delivered January 27, 1930.

Rodney Parham and *Carmichael & Hendricks,* for appellant.

Robinson, House & Moses and *W. H. Holmes,* for appellee.

BUTLER, J. The appellant, J. A. Weas, at the April election, 1923, was elected to the office of judge of the municipal court of North Little Rock. He held the office without further election until the city election in April, 1926, when he again ran for said office against two opponents, and received a majority of the votes cast at that election. At the April election, 1927, he again ran for the office and was again elected. Before the April city election, 1929, the appellee, R. L. Montgomery, became a candidate for said office to be voted on at the election following, and the appellant again offered for election at the general election to be held on April 2, 1929, but at the time he made the decision to enter the race, he filed with the board of election commissioners of Pulaski County a letter in which he claimed that the term of office which he was then serving would not expire until April, 1931, and expressed the belief that the election commissioners would not place the name of any one on the official ballot for the office of municipal judge unless required to do so by some court of competent jurisdiction. At this election appellant was defeated by R. L. Montgomery, who thereafter qualified and was inducted into office to succeed the appellant. The appellant thereupon brought action in the circuit court of Pulaski County to oust appellee from said office.

On the trial of the case the court found that the election for judge of the municipal court of North Little Rock was properly held in 1929, that the appellant's term had expired at that election, and that the appellee was duly elected, qualified and legally acting judge of said court. To reverse that judgment, the appellant has appealed to this court.

There are a number of questions presented by the parties to this action in their respective briefs which it will be unnecessary to consider or determine, for a decision of this case must rest upon the interpretation of act No. 702 of the Acts of 1923, approved March 27, 1923. Section 2 of that act provided that the term of the municipal judge should be fixed at four years. The act also contained other important provisions, one being that the salary of the judge should be increased from two thousand to three thousand dollars per annum; another, for the appointment by the judge of a clerk with an increase in salary from $1,200 to $1,950 per annum, and prescribed the powers and duties of such clerk. To this act no emergency clause was attached, and in the last section there was a clause for the repeal of conflicting laws, and directing that the act "shall take effect and be in force from and immediately after the general city election of 1923." The term of office for the municipal judge for the city of North Little Rock, prior to the passage of this act, was two years, as fixed by act No. 221 of the Acts of 1917, and therefore the term for which the appellant was elected will depend upon which of the two acts was in force at the time of the April election, 1923. To determine the intent and meaning of a statute, it will be considered as a whole, giving the language used its ordinary and sensible meaning. Applying these cardinal rules to the construction of the act of 1923, *supra,* it is certain that the act did not become effective until after the city election in that year. This is the only interpretation of which the language of § 5 of that act is susceptible: "This act shall be in force from and immediately after the gen-

eral city election of 1923." If it had been the legislative intent that the act should be in force when that election was held, surely the language used would have been different, as "shall take effect and be in force from and after its passage," or take effect and be in force before" or "at" such general election.

The act could not have been in force at the 1923 election for another reason. The act was without an emergency clause, and therefore did not become effective until ninety days after March 8 the date of adjournment of the Legislature, and until June 6 following. *Gaster* v. *Dermott-Collins Road Imp. Dist.*, 156 Ark. 507, 248 S. W. 2. When appellant was elected in 1923, he was elected for two years, which term expired in April, 1925. Indeed, counsel for appellant seems to concede this, for in his argument presented to this court he says: "Appellant was elected at the general election of 1923 for a two-year term, because the act did not go into effect until after that election." If then the appellant was elected at the 1923 election to the office of judge of the municipal court for a term of two years, the question arises, When did the four-year term created by act No. 702, *supra*, begin? Upon the answer to this question depends the correctness of the judgment of the trial court. Appellant argues that, since the concluding section of the act provides that it shall be in force from and immediately after the city election in 1923, the term of four years prescribed therein began at the time appellant took office under that election. If this is true, we have this peculiar and unusual situation—that of a judge of the municipal court serving for two terms during one and the same period of time, namely, for a term of two years, and one for one of four years by virtue of the same election, one term ending in 1925 and the other in 1927. Appellant contends that the four-year term of office began in 1923, because the statute makes the specific provision that it should begin then. We are of the opinion that counsel for the appellant has confused that part of the act relating to the term

with the other portions of the act, which, as we have seen, are important; *i. e.*, that part providing for the salary of the judge of the court, and increasing same over that received by him previous to the passage of the act of 1923, and, also for the appointment by the judge of a clerk of the court, and the increase in salary of said clerk. As to these provisions, the Legislature intended and so specified that the judge and clerk of the court should receive the benefits immediately after they were inducted into office, and doubtless they have drawn these salaries at the increase named in said act over the salaries previously provided. The record does not say so in so many words, but we can reasonably presume that the officers took advantage of this manifest intention of the Legislature. But, as to the term provided by the act of 1923, we do not see how it could have begun immediately after the election, because the judge was elected for a different term, and the reasonable inference is that the four-year term provided did not begin until the term for which the judge had been elected had expired. This would have been in 1925, and that election was the proper one at which the appellant should have offered himself for re-election, and, if then elected, he would have held office for four years therefrom. For some reason, there was no election held in 1925, and a vacancy therefore would have occurred in the office of municipal judge but for the provision of the Constitution that the incumbent in office should continue until his successor should have qualified. By virtue of said constitutional provision, appellant continued in office during the year 1925 and until April, 1926, and at the general election held in April, 1926, he became a candidate for the office of municipal judge, and was elected, receiving a majority of the votes cast at that election. The record is not clear as to just what was the nature of that election—whether or not it was a special election called to be held at the time of the general election to fill the vacancy in the office of judge of the municipal court, as provided by § 50, art. 7, of the

State Constitution. However, as the appellant continued to hold office after the election of 1926, we think it makes no difference whether he was holding by virtue of a special election, or by virtue of his right to serve until his successor was duly elected and qualified. At the general election in 1927, appellant again offered as a candidate for the office of municipal judge and was again elected. He contends that the term of office under which he had previously been holding expired, and that the 1927 election was the proper time at which the municipal court judge should be elected for another term. In this he was clearly mistaken; in 1925, appellant's two-year term having expired, if the new four-year term began, whether the election of 1926 be treated as a special election to fill a vacancy or whether the 1927 election was such, the practical result is the same, for, no matter how he was holding, he was, and could, only have been holding for the four-year term beginning with the April election, 1925. As the four-year term began in 1925, the election of April, 1929, was the proper time to elect the appellant's successor in office, and the appellee, having received a majority of the votes cast at that election, is now the legally elected judge of the municipal court.

The trial court was correct in so holding, and the judgment is therefore affirmed.

FARMERS' & MERCHANTS' BANK OF BEARDEN *v.* STATE USE CALHOUN COUNTY.

Opinion delivered January 27, 1930.

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[redacted]

[redacted]

[redacted]

Gaughan, Sifford, Godwin & Gaughan, for appellant.

Compere & Compere and *Joe Joiner,* for appellee.

BUTLER, J., (after stating the facts). The appellee, Calhoun County, predicates its right to recovery from the appellant bank on the theory that there was a wrongful conversion by the county treasurer of the funds in his hands belonging to the county, and that the appellant bank, with knowledge of such facts, or knowing facts from which such knowledge could be imputed, when it accepted and appropriated the proceeds of the $2,000 check unlawfully drawn by the county treasurer on the funds of the county in the Calhoun County Bank, became liable jointly with the county treasurer for such wrongful conversion; and that appellee, Goodwin, although he might himself not have known that the check drawn was not the personal check of Easterling, but a check of the county treasurer drawn on county funds, is liable, because the appellant bank, in receiving and collecting the check, was the agent of Goodwin, and its knowledge and acts, being in the line of its duty and within the scope of its authority, became the knowledge and acts of Goodwin himself. The question as to whether the appellant bank knew or should have known that the funds of the county were being unlawfully converted was submitted to the court sitting as a jury, which had before it testimony tending to establish the facts hereinbefore stated. While it was stated by one of the officers of the appellant bank that the abbreviation "Co. Treas.," taken together

with the knowledge of what the check was for, made him think that the abbreviation meant company treasurer, this statement the court had the right to weigh with the surrounding circumstances, and, being the sole judge of the credibility of the witnesses and the weight to be given their testimony, concluded, and had the right to conclude, that the bank, when it received the check in question, knew that it was the check of the county treasurer, and drawn on county funds.

Did this knowledge render the appellant bank liable? The appellant bank insists that, notwithstanding the finding of fact by the court, it is not liable, because, as it says, it "never has claimed or held any right, title or interest in or to any part or portion of said funds," and, although the court might have found from the circumstances known to the bank that it should have known that the check was for county funds unlawfully converted, this would not be sufficient to bind it, because it must have had "actual knowledge that Easterling was using county funds to pay his individual obligations, or the obligations of the Calhoun Supply Company." The appellant bank contends that it merely was the agent for the collection of the check, and that, when collected, it held the proceeds in trust for Goodwin. Appellant relies upon the cases of *Second National Bank* v. *Bank of Alma,* 99 Ark. 386, 138 S. W. 472, and *State National Bank* v. *First National Bank,* 124 Ark. 531, 187 S. W. 673, to support this contention.

In the first mentioned case the court said: "The uncontroverted evidence shows that the plaintiff received the draft with the accompanying bill-of-lading from the Judge Machine Company (owner of the draft) for collection only, and did not discount said draft or purchase same. The Judge Machine Company was a depositor with the plaintiff, but the testimony clearly shows that no part of this draft was placed to its credit by the plaintiff, and no part thereof was paid to the Judge Machine Company by it. The plaintiff was not a purchaser of this draft,

and it therefore was not a holder thereof for value. It therefore did not become the purchaser or owner of the machine covered by the bill-of-lading accompanying the draft."

In the latter case the court found that the bank sought to be bound had never at any time had any interest in the check or title in its proceeds, but received same in the ordinary course of business for collection merely, and held the proceeds in trust solely for the purpose of remitting.

In the instant case, the check in question was drawn payable to the order of the appellant bank itself, and, while it was acting as the agent of Goodwin for the collection, yet, when the proceeds were collected, it appropriated the money and became the owner of same, crediting an equal amount to the time deposit of Mrs. M. H. Goodwin, according to the instructions received by it from Goodwin. Therefore the appellant bank became the owner of the money and indebted to Mrs. Goodwin for a like amount. It will be seen from an examination of the cases cited by the appellant bank, 99 Ark. and 124 Ark., that they are unlike the case at bar, in that the proceeds of the draft and check in those cases were never deposited to the credit of the owners, and in this case they were so deposited, and the check itself was made payable to the order of the appellant bank. As we have seen, the bank was the agent for Goodwin in the collection of the check, yet that relation ceased when the money on the check was received, and the account of Mrs. Goodwin credited with an equal amount. Therefore the relation of creditor and debtor, as between the appellant bank and Mrs. Goodwin, obtained, the bank being the owner of the money, but at the same time owing Mrs. Goodwin therefor. This is the general rule, (3 R. C. L. 634), which has been adopted and approved by this court in a number of decisions, among which are *Southern Sand & Material Co.* v. *Peoples' Savings Bank,* 101 Ark. 266, 142 S. W. 178; *Brown* v. *Yukon National Bank,* 38 Ark. 210; *Guaranty Bank &*

Trust Co. v. *Davis,* 170 Ark. 86, 279 S. W. 357; *City of Helena* v. *First National Bank of Helena,* 173 Ark. 197, 292 S. W. 140.

In support of its contention that it did not have actual knowledge of the conversion of county funds by the county treasurer, appellant bank argues that it might reasonably have concluded that the check, although drawn by the county treasurer on funds of the county, was not an unlawful conversion, because the testimony shows that Easterling, in paying himself commissions as treasurer of the county, would do so by checks drawn by himself as such on the county funds, and, for that reason, appellant bank was led to believe that Easterling was legally authorized to execute and deliver the check. This could not have been the belief of appellant bank, because, in the first place, it was shown that the county treasurer had no commission due him during the year 1928, having previously largely overdrawn his account as such; and, second, it knew that the check drawn was not for commissions, but to take the place of two checks of the Calhoun Supply Company, which had previously been dishonored, and that these checks so dishonored were for a debt due Goodwin. While it might be true that the bank would not be required to inquire into the legality of checks drawn by public officers on public funds under circumstances where there could be no reasonable grounds for suspicion that they were being diverted, yet the circumstances of the instant case show that the transaction was not of such character as to make it apparently legitimate on its face. Nothing is better settled than that the existence of a fact may be proved by circumstances as well as by direct testimony, and in this case the circumstances were sufficient to lead to the inference that the appellant bank must have known that the funds of the county were being used for an unauthorized purpose. It knew that the Calhoun Supply Company did its banking business with the Hampton State Bank, and that no checks had ever passed through its hands drawn by the supply company upon the Calhoun County Bank; it also knew that the supply com-

pany was indebted to Goodwin, and in payment of which debt certain post-dated checks had been issued drawn on the Hampton State Bank by the supply company, which had been dishonored, and that the identical check in question was drawn in its favor upon the Calhoun County Bank in payment of the dishonored checks, and that the signature of the check was not such as had been usually signed to the checks of that company, but by the name of a man whom it knew to be the treasurer of the county with the usual *indicia* of his official character. All this leads to the irresistible conclusion that the appellant bank knew, or should have known, all the facts of which it now has knowledge. This being true, liability attaches to the appellant bank by virtue of § 2833 of Crawford & Moses' Digest, act approved April 9, 1891. Section 2 of that act provides that "It shall be unlawful for any person or persons whomsoever to borrow or receive any public funds of any such officer, deputy clerk or employee, knowing the same to be public funds, and for the purpose of converting or applying the same to his or their own use or benefit, or to the use or benefit of any other person or persons, or of any corporation." Such "officer" referred to is any State, county, township or city officer mentioned in act 627, Acts of 1923, page 526, amending § 2832, C. & M. Digest.

A number of cases are cited by appellant bank and appellee, Calhoun County, in support of their various contentions, which we do not deem it necessary to review because of the conclusion reached. It is clear that, under the facts and the law, the appellant bank is liable to the county, and that the judgment of the trial court as to it is correct.

Since the lower court found that the appellant bank was in possession of facts sufficient to put it on inquiry, and, as we have seen, the evidence justifies such finding, it follows that the court erred in dismissing the complaint as to M. H. Goodwin, on the ground that he "had no notice or knowledge of the fact that the public fund was being unlawfully converted by said county treasurer,

and had no information sufficient to put him on inquiry thereof." The appellant bank, in accepting the check drawn in its favor by the county treasurer on county funds, and in making the collection from the drawee bank, was acting within the line of its duty and the scope of its powers as agent for M. H. Goodwin (3 R. C. L. 634) and he therefore was affected with notice of all that the agent knew or should have known. *Bank of Hoxie* v. *Meriwether,* 166 Ark. 39, 265 S. W. 42. The circumstances surrounding this transaction were sufficient to warrant the inference that the appellant bank had actual knowledge of the unlawful conversion of public funds, and it is unquestionably true that Goodwin was benefited by such conversion, for he was able thereby to collect the value of two worthless checks. It is immaterial whether the proceeds were deposited to his individual account or to that of his wife, for he owed his wife, according to his own testimony, $3,800, and this was a payment of his indebtedness to his wife *pro tanto.* Therefore he is clearly liable under § 2833, C. & M. Digest, hereinbefore quoted.

It follows that the judgment of the trial court will be affirmed as to the appellant, Farmers' & Merchants' Bank of Bearden, and as to the appellee, M. H. Goodwin, is reversed, and it appearing that the case was fully developed in the court below, a judgment will be entered here against the said M. H. Goodwin for the amount converted, together with six per cent. interest thereon from November 21, 1928. It is so ordered.

ARKANSAS POWER & LIGHT COMPANY *v.* CATES.

Opinion on Rehearing Delivered January 27, 1930.

Raymond Roddy, W. H. Holmes, Harry E. Meek and *Robinson, House & Moses,* for appellant.

Tom W. Campbell and *W. R. Donham,* for appellee.

MEHAFFY, J., (on rehearing). On the 30th day of April, 1915, the town council of Waldo, Arkansas, passed an ordinance granting to the Arkansas Power & Light Company for fifty years "a free right-of-way for the erection and maintenance of poles and wires with the nec-

essary appurtenances thereto for the purposes of operating and transacting a general electric light and power plant business over, through and upon all the streets, alleys, roads and highways within the boundaries of the present and future limits of the town of Waldo, Arkansas. The said poles shall be placed at points on a line where streets and sidewalks come together." Section one of the ordinance.

Section four of the ordinance reads as follows: "That the latest method of construction and good material shall always be used, and the wires shall be insulated so as not to endanger life or property in the maintenance and operation of the aforesaid light and power plant."

Section five of the ordinance reads as follows: "This ordinance, upon its acceptance in writing by the Arkansas Light & Power Company, filed with the clerk or recorder of the incorporated town of Waldo, Arkansas, shall constitute a contract between the Arkansas Light & Power Company, its successors and assigns, on the one hand, and the incorporated town of Waldo, Arkansas, on the other."

Thereafter, the Arkansas Power & Light Company, as provided in section five of the ordinance, accepted in the following language: "To the Mayor and City Council of Waldo, Arkansas: The Arkansas Power & Light Company, by H. C. Couch, its president, being duly authorized, hereby accepts the franchise granted, passed and approved on the 30th day of April, 1915. Arkansas Power & Light Company, by H. C. Couch, President."

The Arkansas Power & Light Company sold its property in Waldo, but re-acquired it in 1925. In 1915 and for ten years thereafter the distribution system in Waldo was 6,600 volts. After the appellant re-acquired the property, and until 1926, the wires carried 6,600 volts. But in 1926, so far as the record shows, without any authority from the town of Waldo, the voltage was increased from 6,600 volts to 13,000 volts. The wires carrying the high voltage were not insulated. Two of them

were wrapped, and, according to the evidence of appellant, the wrapping was for protection against the weather. But the third wire, the one nearest the building, was not wrapped or insulated in any way.

In 1928 a two-story brick building was erected on Main Street, the second story being 4½ feet from the inside wire, the one that was not wrapped or insulated, and this wire was on a level with the top of the windows in the second story.

Appellee's intestate, Virgil L. Cates, was in the employ of the Gay Oil Company of Little Rock, which company operated a filling station in the building above mentioned. His duties for his employer took him to Waldo, and, on November 15, 1928, while there, he discovered an electric sign which had not been attached to the building. He employed a contractor, Frank Spradling, to put up the sign, and attach it to the building which was done according to directions. This was accomplished by twisting together two No. 9 wires, attaching them to the end of the sign, running them through a vent hole in the wall of the building and fastening them to a joist in the attic above the second story, which left the sign hanging about 16 feet above ground. After the wire was fastened to the joist in the attic, Spradling's helper, Johnson, broke off the surplus wire, and pushed it back through the vent hole. Spradling, who was on a ladder near the sign, was pulling the surplus wire through the vent, and, by reason of a crook on the end of the wire it caught in the mortar joint between the brick. The lower end of the wire extended down to the ground and appellee's intestate took hold of it to assist Spradling in pulling it through the vent. Spradling jerked the wire loose, and it fell over against the heavily charged electric wire, causing a short circuit, the entire force of the electric current passing through Cates' body, which caused his death.

This suit was instituted by his widow as administratrix to recover damages for herself and two minor

children, and for his estate. The trial resulted in a verdict and judgment against appellant for $10,000.

As stated by appellant: "Nothing is involved in this appeal except the sufficiency of the testimony to sustain the verdict." And appellant insists the case should not have been submitted to the jury. Therefore, there is no question for us to consider, but the sufficiency of the evidence to sustain the verdict.

The ordinance provided, among other things, that the wires shall be insulated so as not to endanger life or property in the maintenance and operation of the aforesaid light and power plant.

Section five of the ordinance provides, among other things, that upon the acceptance in writing by the Arkansas Power & Light Company, filed with the clerk or recorder of the incorporated town of Waldo, Arkansas, shall constitute a contract between the Arkansas Light & Power Company, its successors and assigns, on the one hand, and the incorporated town of Waldo, Arkansas, on the other.

Thereafter, the Arkansas Power & Light Company accepted in the language above set forth, and it thereby became a contract, binding upon both parties.

The evidence introduced on the part of the appellant tends to show that the provisions of the ordinance were complied with except the insulation of the wires, and appellant insists that there is no negligence on the part of the appellant for failure to insulate its wires. They earnestly contend that because witnesses testify that, if the wires had been wrapped, it would have been no protection, but that does not in any way show that if the wire had been properly insulated it would not have been a complete protection. It may be that no type of wrapping could have been a protection, but this ordinance was passed and accepted by the Arkansas Power & Light Company, and became a contract which the Arkansas Light & Power Company and its successors were bound to comply with. And appellant insists that insulation

can only mean the proper and standard size and type of poles and cross-arms and insulators.

The ordinance provides that the company shall always use the latest method of construction and good material. If appellant's contention were true, that would cover all that it was required to do under the ordinance, because its contention is that proper construction meant the standard construction, and that they complied with the ordinance in that way. But the ordinance says they must do that, meaning, certainly, in addition to that, the wires shall be insulated so as not to endanger life or property.

Appellant does not contend that it insulated the wire so as to be of any protection whatever, but insists that, "but from the standard point of the public, it is now recognized as safer to have 6,600- and 13,000-volt wire bare, and this distinguishes the high voltage from the low voltage wire, and acts as a signal to put the public on notice that, since these wires are bare, they carry a high voltage and should be avoided." But that is not the ordinance; not the contract. The contract is to insulate the wires, and by this promise to insulate the wires it secured the passage of the ordinance. It was not required to accept the ordinance, but it did do so and the ordinance itself expressly provided that, when it did, it became a contract.

Some of appellant's witnesses testify that it would be expensive and impracticable, and that it would not be feasible. Whether it was not feasible or practicable and was very expensive is immaterial. The company contracted to do this. It evidently knew at the time that it could insulate the wires of 6,600 volts, and knew whether it was feasible, knew how expensive it would be, and knew whether it was practicable. It certainly knew more about these things than the other contracting party, and it agreed to do this.

"Inconvenience, or the cost of compliance, though they might make compliance a hardship, cannot excuse a

party from the performance of an absolute and unqualified undertaking to do a thing that is possible and lawful. Parties *sui juris* bind themselves by their lawful contracts, and courts cannot alter them, because they work a hardship. The rights of the parties must be measured by the contract which they themselves made. A contract is not invalid, nor is the obligor therein in any manner discharged from its binding effect, because it turns out to be difficult or burdensome to perform. Nor will unforseen difficulties, however great, excuse him. The law regards the sanctity of contracts.'' 6 R. C. L. 929.

Most of appellant's witnesses did not testify that it would be impossible to insulate wires with 13,000 volts, but they testified that it would be expensive. They, however, did not testify to facts showing how expensive it would be or how much it would cost to insulate the wire. They simply testify that it would be expensive, and one witness says it would be ridiculous.

The fact that it is expensive or ridiculous would not excuse the appellant from performing its contract. But, if it did, the testimony in this case is not with reference to any facts; no witness testifies to how much it would cost, nor do they testify to any facts that would prevent it from being feasible. What the witnesses of appellant might think was expensive or not feasible might not agree with what others would think was feasible or inexpensive, and, for that reason, if this question was involved, the witnesses would not be required to give their opinion of these things, but give the facts, and let the jury determine from the facts whether it was feasible or not.

One cannot contract to do a thing and then, because witnesses testify that it was unreasonable or expensive, be discharged from its obligation. In the first place, this is not material. The ordinance required the wires to be insulated, and the appellant accepted the ordinance, and it was bound to insulate the wires, no matter whether it was expensive or feasible or not. But, even if it could

not insulate the wires, it would be required to provide other means of safety that would be equally as effective as the insulation of the wires.

This court has recently held: "There is involved here no question about the duty of the electric company to insulate all its wires. The authorities appear to be unanimous in holding that there is no such duty, but the cases do hold, as we understand them, that this duty must be performed, or other sufficient safety methods employed to prevent contact with wires conveying the current at such places as danger of contact may reasonably be anticipated." *Hines* v. *Consumers' Ice & Light Co.*, 168 Ark. 914, 272 S. W. 59; *Morgan* v. *Cockrill,* 173 Ark. 910, 294 S. W. 44; 9 R. C. L., 1213, § 21.

The above authorities, as said in *Morgan* v. *Cockrill, supra,* have recognized the true rule, but it is the rule under the common law, and where there is no ordinance or statute. In the instant case the above rule would be correct if there had been no contract and no ordinance. And it would require, without any regard to the ordinance as held in these cases, that the duty of insulating the wires must be performed, or other sufficient safety methods employed, to prevent contact with wires conveying the current at such places as danger of contact may reasonably be anticipated. But, without regard to the ordinance, it might be reasonably anticipated that a wire carrying 13,000 volts within 4½ feet of a building was a situation from which it might reasonably be anticipated that persons would come in contact with the wire.

The above is the rule, as we have said, without regard to statute or ordinance, and would be a question for the jury, and not the witnesses to determine. The court cannot say wires should not be insulated because some witnesses swear it would be expensive or would not be feasible. This court has always held that the wires must be insulated or other sufficient safety methods employed to prevent contact with wires conveying the current at such

places as danger of contact may reasonably be anticipated.

"Not infrequently the duty of insulating electric wires is imposed by municipal ordinance, and in such a case persons whose business or duty takes them in proximity to such wires have the right to assume that the law has been complied with, and if an electric company fails to perform the obligation thus placed upon it, such failure is *prima facie* evidence of negligence, entitling a person injured by reason of such omission to recover damages unless guilty of contributory negligence." 9 R. C. L. 1224; 20 C. J. 361.

This is the well-established rule and has been repeatedly approved by this court.

"It is manifest that, in passing the ordinance prescribing the height of the wires of the telephone company, and of the street railway company, and their relative distance from each other when it was necessary for their wires to cross each other, the council recognized the danger to the public when these wires came in contact, and had in view the protection of persons who had a right to travel upon the streets. The passage of the ordinance was a municipal regulation, authorized by the laws of the State, and has the force of a statute within the limits of the city. It was the duty of the defendant companies to comply with the ordinance, and failure to do so is *prima facie* evidence of negligence on their part. These principles are established by the following cases." *S. W. Tel. & Tel. Co.* v. *Myane,* 86 Ark. 548, 111 S. W. 987; *Hayes* v. *Michigan Central Rd. Co.,* 111 U. S. 228, 4 S. Ct. 369; *Mitchell* v. *Raleigh Electric Co.,* 129 N. C. 166, 39 S. E. 801, 55 L. R. A. 398, 85 Am. St. Rep. 735; *Bush Electric Light & Power Co.* v. *Lefever,* 55 S. W. 396; *Knowlton* v. *Des Moines Edison Light Co.,* 117 Iowa 151, 90 N. W. 818; *Clements* v. *La. Electric Light Co.,* 44 La. Annual, 692, 11 So. 51, 16 L. R. A. 43, 32 Am. St. Rep. 348.

Within the city limits of Waldo the ordinance, as held by this court, had the force of a statute. It had the

same force as if the Legislature had passed a law requiring wires to be insulated; that is, the same force within the limits of Waldo.

Cates was an employee of the Gay Oil Company, and his duties took him to Waldo and other places, presumably to look after the interest of the company, and he saw the sign that had not been put up, and arranged to have this sign put up. He employed Spradling to do this, but Cates himself was assisting in the matter, and was therefore where he had a right to assume that the company had complied with the law, and that therefore there was no danger. He was killed, while in the discharge of his duties in a place where he had a right to be, because the company had not complied with the law.

"A company maintaining electrical wires, over which a high voltage of electricity is conveyed, rendering them highly dangerous to others, is under the duty of using the necessary care and prudence at places where others may have a right to go, either for work, business, or pleasure, to prevent injury. It is the duty of the company, under such condition, to keep the wires perfectly insulated, and it must exercise the utmost care to maintain them in this condition at such places. And the fact that it is very expensive or inconvenient to so insulate them will not excuse the company for failure to keep their wires perfectly insulated." 1 Joyce on Electricity, 735; *Duncan Electric & Ice Co.* v. *Chrisman,* 59 Okla. 57, 157 Pac. 1031.

The above rule is also stated by another writer in substantially the same language, and, continuing, he says: "This statement of the rule implies that, in the absence of statute or municipal ordinance, it is not necessary to insulate wires which are so placed that no one could reasonably be expected to come in proximity to them." Curtis on Electricity, 765; 20 C. J. 355.

But the wire which was not insulated and which caused Cates' death was so placed that it would be reasonably expected in putting the sign on the building that

persons engaged in this work might come in proximity to the wire. At any rate, it certainly could not be held, as matter of law, that it would not be reasonably expected that persons would come in proximity to the wire.

The authorities are practically unanimous in holding that a failure to comply with a statute or ordinance is *prima facie* evidence of negligence. The facts in this case are that the ordinance was passed imposing the duty to insulate the wires. This duty was not performed, and, by reason of the failure to comply with the ordinance, Cates was killed when he was at a place where he had a right to be, and he had the right to assume that the appellant had complied with the ordinance. But, if there had been no ordinance requiring the wires to be insulated, and had been no contract, it was the duty of the appellant to insulate its wires where it might reasonably be anticipated that persons pursuing business or pleasure may come in contact with them. In this case a wire carrying 13,000 volts was within 4½ feet of the building. Cates was on the ground helping to pull a wire from the building. When the wire came loose, it fell and came in contact with the wire of the appellant and Cates was killed. He had a right to help hang the sign, and had a right to be where he was.

The appellant, however, insists that, if its wire had been ten feet from the building, this wire that was pulled out by Cates would have reached it. This is a mere matter of opinion and is given by the witnesses as opinion. It was a question of fact for the jury. This was not an iron rod, but a wire, and persons might very well have different opinions as to where and how it would have fallen if the appellant's wire had been further away. It is not for the court or the witnesses to say what their opinion is, but it is a question for the jury. Appellant, however, says it was not required to insulate the wire, because it would not have been feasible or practicable and would have been very expensive. This, if true, would not relieve the appellant.

"Considering the dangerous character of the force produced by the gas company, there was a duty imposed on each to see that the wires into which it was sent were properly insulated. The danger was exactly the same, whether the wires were owned by one or both of the corporations. When one, through the instrumentality of machinery, can accumulate or produce such deadly force as electricity, he should be compelled to know that the means of its distribution are in such condition that those whose business or pleasure may bring them in contact with it may do so with safety. * * * If the wires were not properly insulated, and the death resulted therefrom, then both companies are liable, as it was the duty of the street railway company to have its wires properly insulated, and there was a duty resting on the gas company to see it was done before charging them with electricity." *Maysville Gas Co.* v. *Thomas,* (Ky.) 75 S. W. 1129; *Thomas* v. *Maysville Gas Co.,* 108 Ky. 224, 56 S. W. 53, 53 L. R. A. 147.

"Either the wire must be insulated, or it must be so located as to be, comparatively speaking, harmless. If the company does not choose to properly insulate a deadly wire of its maintenance, it must place the same underground, at a high altitude, or at some inaccessible place." Curtis on Electricity, 772.

It is true that the two-story house was built after appellant's wire was put up, but when the building was erected it was the duty of the appellant to use ordinary care with reference to the building and proximity to the wire after the erection of the two-story building.

"The duty of an electric company in reference to keeping its appliances in safe condition is a continuing one. Not only must it exercise a high degree of care in the original selection and installation of its electric apparatus, but thereafter it must use commensurate care to keep the same in a proper state of repair. The obligation of repairing defects does not mean merely that the company is required to remedy such defective conditions

as are brought to its actual knowledge. The company is required to use active diligence to discover defects in its system. In other words, an electric company is bound to exercise due care in the inspection of its poles, wires, transformers and other appliances." Curtis on Electricity, 699.

The evidence in this case shows that appellant knew all about the erection of the building, and knew the proximity of the wire to it, and it was its duty to exercise care, either to insulate it, put it under ground, or elevate it so that there would be no reasonable apprehension of persons rightfully there coming in contact with its wires.

It has been uniformly held that the question as to the negligence of the company, where one comes in contact with a dangerous wire, is for the jury, and it is always the duty of a company in conveying a current of high potential to exercise commensurate care under the circumstances; and it is required to insulate its wires and to use reasonable care to keep the same insulated whenever it may reasonably be anticipated that persons pursuing business or pleasure may come in contact therewith. See Curtis on Electricity, 765.

It is argued by appellant that the injury would have occurred if the wires had been 8 or 10 feet from the building, and they state that the evidence of Dice that they should have been at least 6 feet from the building, cannot indict the appellant company with negligence. It is true that Dice said that he had not had experience in plants of that kind, but no one needs experience to know that a wire without insulation that close to a building would be very much more dangerous than if removed at some distance away. And no experience is needed to know that, if the wires were elevated sufficiently, it would be safe. And Dice had had experience in constructing a plant and setting poles and wires, and testified that wires should have been at least 30 or 35 feet high. A competent electrician or an expert in anything would know no more about this fact, that it would be less

dangerous to put them up 30 or 35 feet than where they were, 4½ feet from the building. But, at any rate, we think under all the authorities that the negligence of the company was a question for the jury.

Appellants state that the case of *Kentucky Utilities Co.* v. *Searcy,* 167 Ky. 840, 181 S. W. 662, is a perfect illustration of the matter they are discussing. That is, with reference to the testimony of Dice and the expert witnesses. About the questions there being discussed, an expert would probably know more than a nonexpert, because the testimony referred to in the Kentucky case was testimony with reference to whether or not wires carrying 11,000 volts could be insulated. Certainly, a nonexpert witness would not know whether it could or could not, but in that case the wires were approximately 30 feet high, and the telephone company's wires were attached to the electric company's poles about 4½ feet below the two insulated wires of the Kentucky Utilities Company, which put them at a distance of about 8½ feet below appellant's uninsulated wires. Here was a distance of 8½ feet from the telephone wire to the uninsulated wire, but the question of negligence in maintaining that wire and in knowing that to put it 30 or 35 feet would be safer than where it was put, and to put it at a greater distance from the building would make it more safe, is within the knowledge of everybody who observes the situation. Of course a nonexpert witness would not be able to testify about how and when wires could be insulated.

They held in the Kentucky case that the undisputed proof showed that it was impossible to insulate wires carrying 11,000 volts. That is not the undisputed proof here because one of the appellant's witnesses testified that wire of 100,000 volts could be insulated. But, whether it could or could not, makes no difference, because, if it could not be insulated, then they had no right to place it and maintain it at a place where people would be reasonably certain to come in contact with it; or where it might reasonably be anticipated that they would come

in contact with it. If they can not do one, they must do the other. They must, as said by numbers of authorities, either put them underground, insulate them, or elevate them so that they will not maintain them at a place where it may be anticipated that persons will come in contact with them.

It is next contended that the evidence conclusively shows that Cates' death was due to an accident over which the company had no control. It is well established by the decisions of this court that no one is responsible for a mere accident. But there is no evidence of accident in the instant case at all. But, whether the injury resulted from accident or otherwise, of course was a question of fact and was determined by the jury against the appellant. Besides, the word "accident" means an effect that takes place without one's forethought or expectation. An effect which proceeds from an unknown cause or an unusual effect of a common cause and therefore not expected; a casualty or contingency.

The appellant asked no instruction in the court below on the question of an accident, and the case was tried by both parties on the questions of negligence of appellant and contributory negligence of Cates, and no other theory was advanced. No mention was made of accident until the appellant's brief was filed in this court.

If injury could be reasonably anticipated from persons coming in contact with the wire, then it was no accident. In fact, there is nothing in the evidence in this case that tends to show that the injury was accidental in the sense of excusing the persons who maintained the wire from liability.

All these questions that are argued now by the appellant were questions of fact properly submitted to the jury.

"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 testi-

mony, furnishes no ground for reversal." *Hyatt* v. *Wiggins,* 178 Ark. 1085, 13 S. W. (2d) 301; *S. W. Bell Tel. Co.* v. *McAdoo,* 178 Ark. 411, 10 S. W. (2d) 503; *Ark. Power & Light Co.* v. *Orr,* 178 Ark. 329, 11 S. W. (2d) 761; *Mo. Pac. Rd. Co.* v. *Juneau,* 178 Ark. 417, 10 S. W. (2d) 867; *Mo. Pac. Rd. Co.* v. *Edwards,* 178 Ark. 732, 14 S. W. (2d) 230; *Western Union Tel. Co.* v. *Downs,* 178 Ark. 933, 12 S. W. (2d) 887; *Wright* v. *State,* 177 Ark. 1089, 9 S. W. (2d) 233; *Turner* v. *State,* 109 Ark. 138, 158 S. W. 1072; *Peoples Bank* v. *Brown,* 136 Ark. 517, 203 S. W. 579; *Harris* v. *Wray,* 107 Ark. 281, 154 S. W. 499; *Gazola* v. *Savage,* 80 Ark. 249, 96 S. W. 981.

It is next contended by appellant that the death of Cates was caused by his own voluntary act. The only voluntary act, so far as the proof shows, is that he employed Spradling to hang a sign, and he was assisting him with it. We have already said that he had a right to assume that the company had not been guilty of negligence and to act accordingly, and, if he did that, it was not his voluntary act, but the negligence of the company that caused the injury. These questions, that is, the questions of contributory negligence, accident, and voluntary act of Cates were all questions of fact properly submitted to the jury, and the jury found against the appellant, and their finding is conclusive here.

There is ample evidence to sustain the verdict, and the judgment of the circuit court is affirmed.

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

OIL FIELDS CORPORATION *v.* CUBAGE.

Opinion delivered February 3, 1930.

[redacted]

[redacted]

Albert L. Wilson and *Mark T. Wilson,* for appellant.

Gaughan, Sifford, Godwin & Gaughan, for appellees.

HART, C. J., (after stating the facts). In the first place, it may be stated that where a case is tried on oral evidence, and such evidence is not brought into the record by bill of exceptions or otherwise, and no motion for a new trial is filed, this court can only consider on appeal errors apparent from the face of the record. *Buchanan* v. *Halpin,* 176 Ark. 822, 4 S. W. (2d) 510; *Tuggle* v. *Tribble,* 177 Ark. 296, 6 S. W. (2d) 312. In the application of the rule to the present appeal, we must indulge the presumption that the evidence introduced warranted the jury in returning a verdict for appellees in the sum of $500.

Counsel for appellant recognizes this rule, but rely for a reversal of the judgment on the ground that the court erred in not sustaining appellant's motion for judgment notwithstanding the verdict. They rely upon § 6273 of Crawford & Moses' Digest, which provides that where, upon the statements in the pleadings, one party is entitled by law to judgment in his favor, judgment shall be so entered by the court, although a verdict has been found against such party.

In the first place, it may be said that judgment notwithstanding the verdict can be entered only when motion is made after the verdict, and before the entry of judgment thereon. Freeman on Judgments (5th ed.), vol. 1, § 10; 15 R. C. L. 608; and 33 C. J. 1187, at paragraph 117.

While the common law has been relaxed to the extent that a defendant may have a judgment notwithstanding the verdict in a proper case, still such a judgment can be

rendered only when the pleadings entitled the party against whom the verdict is rendered to a judgment. *Fulbright* v. *Phipps,* 176 Ark. 356, 3 S. W. (2d) 49; and 33 C. J. 1180, at § 112. See also *Collier* v. *Newport Water, Light & Power Co.,* 100 Ark. 47, 139 S. W. 635, Ann. Cas. 1913D, 458, and *Scharff Distilling Co.* v. *Dennis,* 113 Ark. 221, 168 S. W. 141.

Even if appellant had filed its motion before the entry of judgment, it cannot be said that there was no statement in the complaint to justify the court in entering a judgment in favor of the appellees, who were the plaintiffs below. They allege in their complaint that the appellant committed a breach of the contract by failing to supply them with living and traveling expenses while securing the additional acreage as it had agreed to do. They also allege that it had failed and refused to pay appellees two dollars per lease as it had agreed to do. Both these matters constituted, under the allegations of the complaint, a violation of the contract between the appellant and appellees, and we must indulge the presumption that the proof showed that the amount of damage was $500. In any event, it was some substantial amount, and the court could not have entered a judgment in favor of the defendant notwithstanding the jury had found a verdict in favor of the plaintiff. As above stated, there being no motion for a new trial, we must indulge the presumption that the evidence was legally sufficient to support the verdict.

Again, it is insisted that the motion should have been granted, because appellees could have secured the 1,000 additional acreage from the Fordyce Lumber Company, and that this, together with the 2,800 acres of leases in escrow, would have made up the 4,000 acres which they required. The complaint, however, alleges that appellant failed and refused to enter into a contract with the Fordyce Lumber Company for leases on its 1,000 acres of land, and that, on this account, appellees failed to secure the leases from the Fordyce Lumber Company. Again, they stated that appellees were not damaged, be-

cause they were in control of oil and gas leases largely in excess of the amount which appellant agreed to secure from them. This would not make any difference. Under the allegations of their complaint, appellees were entitled to recover damages against appellant for breach of contract. One of the grounds for the breach of the contract was that appellant had failed and refused to pay them their living expenses and traveling expenses in securing the additional leases, and had also refused to pay them for certain additional leases. No matter how much appellees might have made from the contract, they were entitled to recover whatever damages they may have suffered by reason of the breach of it on the part of appellant.

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

SKELLY OIL COMPANY *v.* MURPHY.

Opinion delivered February 3, 1930.

Marsh, McKay & Marlin, W. P. Z. German, Robert M. Turpin, Geo. W. Cunningham, Alvin F. Molony and *Gaughan, Sifford, Godwin & Gaughan,* for appellants.

J. P. Machen, Jr., for appellee.

HART, C. J., (after stating the facts). The parties to this lawsuit have agreed that Oscar T. Murphy has no interest in the land in controversy, and that his interest therein was legally conveyed by the deed executed by his father on March 3, 1888, and by his recognition of the validity of that deed after he became of age. Oscar T. Murphy owned the lands at the date of his marriage, and his wife never relinquished her dower in the lands. She was married to Oscar T. Murphy on January 19, 1888, and continued to live with him until his death. Oscar T. Murphy moved off the land on March 3, 1888, and never lived on it any more. He died on the 28th day of May, 1927, and appellants claim that appellee is barred of her dower right under an act passed by the Legislature of 1923, entitled, "An Act to Bar, Under Certain Conditions, the Inchoate Right of Dower of Married Women in Real Estate." General Acts of 1923, p. 250. The act was approved March 5, 1923, and § 1 reads as follows:

"The inchoate right of dower of any married woman in any real estate in the State of Arkansas is hereby barred in all cases when the husband has been barred of his title, or of any interest in said property for fifteen years or more, and also in real estate or interest therein conveyed by the husband, but not signed by his wife when such conveyance is made fifteen years ago or more. This act shall affect her inchoate right of dower in real estate only where the husband has now been barred fifteen years or more, or, when a conveyance by him without her signature has been made fifteen years or more prior to the passage of this act."

It will be seen from the terms of the act, that the interest of the husband in the land was barred for more than fifteen years before the passage of the act, and that the inchoate right of dower in the wife is barred, provided the act is valid.

A majority of the courts hold that, before the death of a husband, and while the right of dower is inchoate, it is subject to legislative control, and may be enlarged, diminished, or abolished, by the Legislature. Case note to 12 Ann. Cas., p. 191; and case note to 20 A. L. R. at 1330. Among the cases cited in support of the rule is that of *Hatcher* v. *Buford,* 60 Ark. 169, 29 S. W. 641, 27 L. R. A. 507.

The reason for the rule is that, since the wife's right of dower is not a vested right in property, it is not protected from legislative impairment or destruction by the constitutional guaranties for the protection of property. *Randall* v. *Kreiger,* 23 Wall. (U. S.) 137.

The cases cited hold that dower is not a right based on contract, but one resulting from wedlock as an incident to it, and as a matter of social and domestic policy. Therefore the right to dower results from operation of law, and is not an impairment of the obligation of a contract to change or abolish it before the right becomes vested.

In the case of *Boney* v. *State,* 156 Ark. 169, 245 S. W. 315, the court held that, the right of the widow to take dower being a privilege which the Legislature may give or withhold, it might impose a tax upon the exercise of the right against the person to whom it is given; such a tax, not being a property tax within the constitutional requirements of equality and uniformity. In that case the court expressly said, that the estate of dower was as old as the common law, and that the lawmaking power possesses full and complete control over it.

Again, in *Tatum* v. *Tatum,* 174 Ark. 110, 295 S. W. 720, 53 A. L. R. 306, the court recognized that the wife's inchoate right of dower is not a vested right in the sense that it is not subject to change, or even abolishment, by the Legislature so long as it is contingent, but held that it

could not be divested by any act of the husband, and on that account it was a valuable right, which the law would recognize and protect. It necessarily results that, since the right of dower does not exist by virtue of contract, but by operation of law, the obligation of a contract is not impaired by the modification of the law which governs it.

Neither does a modification of a dower statute fall within the ban of the Constitution of the United States, or of the State of Arkansas, as to equality of privileges, immunities, and protection of property. In *Ferry* v. *Spokane, Portland & Seattle Ry. Co.*, 258 U. S. 314, 42 S. Ct. 358, it was held that dower is not a privilege or immunity of citizenship, State or Federal, within the meaning of § 2 of article 4 of the Constitution, or the Fourteenth Amendment, but at most a right attached to the marital relation, and subject to regulation by each State respecting property within its limits.

In that case, the court upheld the constitutionality of a statute relating to dower in the State of Oregon, which gave a dower right to resident wives in the lands in which the husband was seized of an estate of inheritance at any time during the marriage; but restricted the dower right of nonresident wives to the land of which the husband died seized. The court, after stating that dower given by the law is believed to be the only kind ever obtained in this country, quoted with approval from *Randall* v. *Kreiger*, 23 Wall. (U. S.) 137, the following:

"During the life of the husband the right is a mere expectancy or possibility. In that condition of things, the lawmaking power may deal with it as may be deemed proper. It is not a natural right. It is wholly given by law, and the power that gave it may increase, diminish, or otherwise alter it, or wholly take it away. It is upon the same footing with the expectancy of heirs, apparent or presumptive, before the death of the ancestor. Until that event occurs the law of descent and distribution may be moulded according to the will of the Legislature."

The court also quoted with approval from the opinion of the Circuit Court of Appeals, in the same case, the following:

"The Legislature having the power to give or withhold dower, it follows that it has the power to declare the manner in which the dower right may be barred, or the grounds upon which it may be forfeited, and, if so, it has the right to provide that it may be barred by the wife's nonresidence in the State."

If the Legislature has the power to provide, as it has done in § 3514 of Crawford & Moses' Digest, that a widow shall be endowed of one-third of all the lands whereof her husband was seized of an estate of inheritance at any time during the marriage, unless the same shall have been relinquished in legal form, it might amend that statute by providing that a widow shall be endowed of a one-third part of all the lands of which her husband died seized, or it might provide that a widow shall be entitled to dower in the lands of which her husband was seized within a certain number of years before his death.

The general doctrine established by the cases above cited, including our own cases, is that the widow's right of dower is to be determined by the law in force at the time of her husband's death, and that during his lifetime her inchoate right of dower may be modified or entirely cut off by statute.

But it is contended that this holding is contrary to the principles decided in *Little Rock* v. *Parish,* 36 Ark. 166. We do not think, however, that the principles decided in that case have any application to the present case. Under the provisions of the Constitution construed in that case, cities and towns were required to be organized under general laws, and no change in the boundary lines of a city could therefore be made by special act. It was further held in that case that, whether a municipal corporation has definite boundaries, and what they are, is for the courts and not the Legislature to determine. Hence the court held that it was a judicial act,

and not a legislative one, to determine what were the boundaries of the city of Little Rock under the existing law. So it would be a question for the courts to determine what dower a widow would take under laws existing at the time of her husband's death, but it would be a legislative question to prescribe what portion of her husband's estate should be given a widow as her dower. To illustrate: Dower is one thing, and the assignment, or allotment, of dower is a different thing. Dower results from marriage, and is an incident to it, and is that part of the husband's estate which the common law or the Legislature in the change of the common law gives to the widow upon her husband's death; and the act of giving it is legislative, whether as the result of the adoption of the common law or by act of the Legislature.

On the other hand, the assignment of dower is the ascertainment the widow's interest by laying out or marking off that part of her husband's estate at his death, which the law has given her, and is a judicial act.

The act under consideration was passed by the Legislature of 1923, and that was before the adoption of the amendment construed in *Webb* v. *Adams, ante* p. 713, prohibiting the Legislature from passing local or special acts. Therefore, at the time the act in question was enacted by the Legislature, it could change or modify the existing statute relating to dower in any manner it saw fit, since its act in doing so did not impair the obligation of a contract within the meaning of the Constitution of the United States or of this State, and did not fall within the ban of these Constitutions against abridging the privileges or immunities of citizens, or depriving any person of property without due process of law, or denying to any person within its jurisdiction the equal protection of the law. By the enactment of the statute in question, the Legislature evidently had in mind to protect innocent purchasers of land when the husband had been barred of his land, or any interest in the property for fifteen years or more prior to the passage of

the act. It will be noted that the act expressly states that it shall affect the inchoate right of dower in real estate only where the husband has been barred for fifteen years or more, or when a conveyance by him without the signature of his wife has been made fifteen years or more prior to the passage of the act.

It makes but little difference whether this act be called a general or a special one, since it was within the power of the Legislature at that time to pass special laws. We are of the opinion, however, that the act was a general one, and that the Legislature merely made an amendment to existing dower laws prescribing the conditions under which dower should be given, and that there was a reasonable basis for the classification.

The result of our views is that the decree of the chancery court was erroneous, and it will be reversed, and the cause will be remanded with directions to dismiss the complaint of the appellee, who was plaintiff below, for want of equity.

NORTH RIVER INSURANCE COMPANY OF NEW YORK *v.* LOYD.

Opinion delivered February 3, 1930.

W. P. Strait and *McMillen & Scott,* for appellant.
Edward Gordon, for appellee.

SMITH, J. Appellee sued the appellant insurance company, and recovered judgment for a thousand dollars, the amount of a policy of fire insurance on a stock of goods owned by him, which was totally destroyed by fire. The insurance company denied liability upon the grounds that the insured had negligently failed to extinguish the fire when he might have done so, and had taken out a thousand dollars additional insurance, contrary to the provisions of the policy sued on, to the effect that no other insurance would be permitted.

There was evidence on the part of the insurance company to the effect that appellant had failed to extinguish the fire when, by ordinary care, he might have done so, but, on the contrary, had caused a fire, which had originated in an adjoining building, to spread to the one in which his stock of goods was housed by scattering hay. This testimony was denied, and, on the contrary, it was asserted that the hay was removed to prevent the spread of the fire. This issue of fact was submitted to the jury under the following instruction: "If you find or believe from the testimony in this case, taking into consideration all the facts and circumstances, that the property covered by the policy sued on was destroyed as a result of a fire originated or started by the plaintiff, then he cannot recover in this suit, and your verdict should be for the defendant."

The verdict of the jury, which was in appellee's favor, is conclusive of this issue of fact.

It appears that two policies were issued on the same day, each being for a thousand dollars, and that both policies provided that there should be no other concurrent insurance. The insured testified, in effect, that he did not intend to keep both policies, and that he took out the policy sued on because of his apprehension that the other would be canceled on account of the location of the building which housed his stock of goods, and the undisputed testimony shows that it was agreed, before the fire occurred, that the other policy should be can-

celed, although the premium thereon was not actually returned until after the fire.

Instructions of the court were given upon the theory that the policy sued on was void if there was, in fact, an outstanding policy for additional insurance at the time of the fire, but that there was liability if the other policy had been canceled before the fire, although the premium had not been returned, and the instructions made the liability of the insurance company dependent upon the good faith of the cancellation of the other policy.

It was and is the theory of the insurance company, as expressed in the instructions asked by it and refused by the court, that the existence of concurrent insurance invalidated the policy sued on, and that the cancellation of the other policy before the fire did not operate to make the policy sued on a binding and effective contract of insurance. The correctness of this contention is the decisive question in the case.

The case of *Nabors* v. *Dixie Mutual Fire Ins. Co.*, 84 Ark. 184, 105 S. W. 92, recognized the rule which appears to be followed by all the courts that "where a policy of fire insurance contains a clause avoiding the policy if insured procures additional insurance, the procurement of such additional insurance without the insurer's consent avoids the policy."

The policy there sued on contained such a clause, and liability was denied upon the ground that another policy was outstanding. It was contended, however, that the other policy was void on two grounds, "first, because the insured executed a mortgage on the property in violation of the terms of the policy; second, because the insured had taken out additional insurance not permitted by the policy." The judgment in favor of the insurance company which had been sued, and which judgment had been rendered in its favor upon a verdict directed by the court, was reversed, for the reason there stated that there was competent testimony

tending to show that the other policy had become void before the loss had occurred, and that there was, therefore, no policy of insurance in force at the time of the fire except the one sued upon.

At § 321 of the chapter on Insurance in 14 R. C. L. page 1139, it is said: "There is a conflict of opinion on the question, whether the fact that a policy obtained in violation of a warranty expires or is canceled before a loss restores the liability of the insurer. Some courts hold that in such a case the insurer is liable; others hold that it is not."

Among the cases cited in the note to this text is that of *Born* v. *Home Ins. Co.,* 110 Iowa 379, 81 N. W. 676, which is annotated in 80 A. S. R. 300. In the annotator's note it is said: "The general rule to be deduced from the weight of authority is, that the violation of a condition in a policy of insurance, which works a forfeiture thereof, merely suspends the insurance during the violation, and that, if such violation is discontinued during the life of the policy, and is nonexistent at the time of loss, the policy revives, the insurance is restored, and the insurer is liable, although he has never consented to a violation of the conditions in the policy, and such violation has been such that the insurer could, had he known of it at the time, have declared a forfeiture therefor. The decisions upon this subject, however, are by no means uniform, and, while the majority of them maintain the doctrine above stated, a considerable number assert that, upon a breach of condition for which a forfeiture of the insurance might be declared, the policy, from that fact itself, becomes void, and can never be restored to validity except with the consent of the insurer, and that the fact that the breach of condition is past and did not contribute to the loss does not necessarily put an end to the right of the insurer to avoid the policy. Both classes of cases will be noticed in the following note."

Another case cited in the note to the text from R. C. L. quoted above, is that of *Sumter Tobacco Warehouse Co.* v. *Phoenix Ins. Co.*, 76 S. C. 76, 56 S. E. 654, 10 L. R. A. 736, 12 Am. St. Rep. 941, 11 Ann. Cas. 780. This case is extensively annotated in 10 L. R. A. (N. S) 736, and the annotator's note accords with that of the annotator in the Born case, *supra.*

In the Sumter Tobacco Warehouse Company case, *supra,* the facts were that the policy provided that "This entire policy, unless provided by agreement indorsed hereon or added hereto, shall be void * * * if the hazard be increased by any means within the control or knowledge of the insured." The owner of the building in whose favor the insurance had been written leased the property insured to a tenant, who made a different and more hazardous use of the building, but before the loss by fire occurred the owner took possession of the building from his tenant, and devoted it to its former use. When liability was asserted against the insurance company on account of damage by fire, liability was denied for the reason stated. In holding the insurance company liable under the facts stated the Supreme Court of South Carolina said: "On this point the authorities are in hopeless conflict. Some courts of high authority hold the policy to be finally avoided by such temporary increase of hazard," and cases to that effect were cited. But the court also said: "It may be reasonable to suppose an insurance company would desire to reserve the valuable right of canceling a policy, even on a temporary increase of hazard, if known to it at the time, because such change might result in loss; but it is not reasonable to impute to it a purpose or desire to curtail its own revenue by canceling a policy on account of a temporary increase of hazard, which has come to an end without loss, and from which it could not possibly suffer detriment. Hence there may be ground for holding a temporary increase of hazard forbidden by the policy to avoid the insurance without action, or even knowl-

edge, on the part of the company, when the loss resulted from that cause; but there is no ground for such an inference when the increase of hazard comes to an end without loss. The greater weight of authority supports this conclusion." (Citing authorities).

In 2 Wood on Insurance (2d ed.) § 397, p. 809, it is said: "When a policy provides that if other insurance or insurance beyond a certain amount shall be obtained, such policy shall be *of no effect,* the policy is not rendered void by other insurance, or over insurance, but only inoperative during the period that such 'other' or 'over insurance' exists, and if, prior to a loss, such other insurance has ceased to exist, or no over insurance exists, the policy is operative and enforcible."

We do not review the numerous cases cited in the annotator's notes above referred to, and we accept as true their statements that the weight of authority is to the effect that a policy is not made void by the fact that there was other insurance contrary to the terms of the policy sued upon, where such other insurance had ceased to be in force before a loss occurred. We are convinced that the sounder reason supports this view, and that this rule is more in consonance with principles of justice than the other, as it is not all probable that, if a policy, such as the one here sued upon, expired without a loss, any portion of the premium would be tendered in return, if it were thereafter discovered that there had been in fact concurrent insurance in violation of the provisions of the expired policy on account of which the policy might have been declared void.

In so far as the views here expressed are in conflict with the opinion in the case of *German-American Insurance Co.* v. *Humphrey,* 62 Ark. 348, 35 S. W. 428, 54 Am. St. Rep. 297, that case is overruled.

No error appearing, the judgment must be affirmed, and it is so ordered.

MAGNA PIPE LINE COMPANY *v.* OBER.

Opinion delivered February 3, 1930.

[redacted]

John Bruce Cox and *C. E. Wright,* for appellant.

Mahony, Yocum & Saye, for appellee.

SMITH, J. In support of the judgment which appellee recovered in the court below, he testified that Joe and Louis Olsan, who were brothers, operated through two corporations which they owned, one being known as the Magna Pipe Line Company and the other as the Magna Producing Company, and that Olsan Brothers owned a half interest in an oil lease, and he owned the other half. One of these corporations, as its name indicates, was a pipe line company, and the other corporation was engaged in buying and selling oil. Joe Olsan represented to him that he had negotiated a contract to purchase 150,000 barrels of oil at a net profit of ten cents per barrel, but that approximately $50,000 would be required to handle the deal, as the oil would be delivered over a period of several months, the proceeds of such sales to be applied to the payment of the oil, as it was

moved under the contract which the Olsan brothers had negotiated.

Appellee was a stockholder and director in the Exchange National Bank, of Shreveport, and through his connection with this bank he was able to borrow the money required to carry out the Olsan contract.

Appellee further testified, that he and Joe Olsan called on the cashier of the bank and made application for the loan, which was made upon notes signed by all parties, and secured by a mortgage upon the oil lease owned by appellee and the Olsan brothers. Appellee further testified that the terms of his contract with the Olsan brothers were restated in the presence of the cashier of the bank, and that officer testified that he made the loan for the accommodation of appellee, who was a large depositor and officer of the bank. The cashier fully corroborated appellee as to the terms of the agreement, which were that appellee should finance the deal in the manner stated, and that appellee should have one-half of the net profits, which were represented to be ten cents per barrel, less the interest on the loan and the commission charged for making it.

The oil began to move pursuant to the contract, and $25,000 was required to make a payment, but, as the title to the oil lease had not then been examined and approved, appellee obtained from the bank $25,000 on his personal note, and advanced that sum of money to the credit of an account which had been opened in the name of Magna-Ober Producing Company for the purpose of financing the deal.

A few days later appellee stated to the Olsans that he had no writing to show his interest, whereupon the following writing was delivered to him:

"September 22, 1927.

"Mr. J. Ober,
"Shreveport, La.

"Dear sir: This is to confirm our agreement that you are to receive one-half of the net profits derived from the sale of one hundred and fifty thousand barrels to be

shipped by us to Penn Oil Company. This confirms our agreement whereby we acknowledged receiving $25,000, this being your half of the money to apply in financing this deal.

"Magna Pipe Line Company,
"Louis Olsan,
"Secretary & Treasurer."

The law question in the case is the admissibility of the testimony recited above.

It is the insistence of the Olsans that the contract was not one required to be in writing, but was reduced to writing, and, while signed by only one party, was nevertheless accepted and acquiesced in by the other, and has therefore the attributes of a written contract. They are correct in this contention. *Parker* v. *Carter*, 91 Ark. 162, 126 S. W. 836, 134 Am. St. Rep. 60; *Vieth* v. *Mushrush Lbr. Co.*, 167 Ark. 669, 269 S. W. 44.

Upon this predicate it is insisted that it was erroneous and prejudicial to permit appellee to offer testimony to the effect, that he was to share a profit of ten cents per barrel (less interest and commission) whereas the writing provided that he was "to receive one-half the net profits derived from the sale of one hundred and fifty thousand barrels to be shipped by us to Penn Oil Company," and the testimony in appellant's behalf showed that no profits had been realized, but, on the contrary, an actual loss had been sustained.

We think it quite apparent that the writing referred to and copied above, was not the complete contract between the parties, and did not purport to be. It was merely a written confirmation of the fact, that there was an existing contract between the parties, the details of which the writing did not purport to recite.

In the chapter on Evidence in 22 C. J., page 1283, § 1715, it is said: "Where a written instrument, executed pursuant to a prior verbal agreement or negotiation, does not express the entire agreement or understanding of the parties, the parol evidence rule does not

apply to prevent the introduction of extrinsic evidence with reference to the matters not provided for in the writing, and under such circumstances it is not necessary that there should be any allegations of fraud, accident, or mistake in order to render parol evidence as to the real contract between the parties admissible."

Many cases from all the States are cited in support of the text quoted, and among them the following cases by this court: *American Sales Book Co.* v. *Whitaker,* 100 Ark. 360, 140 S. W. 132, 37 L. R. A. (N. S.) 91; *Cox* v. *Smith,* 99 Ark. 218, 138 S. W. 978; *St. Louis, etc. R. Co.* v. *Wynne Hoop Co.,* 81 Ark. 373, 99 S. W. 375; *Bloch Queensware Co.* v. *Metzger,* 70 Ark. 232, 65 S. W. 929. Other cases by this court might be cited, but this rule of evidence does not appear to require further discussion.

This question of law being settled adversely to appellant's contention, there remains only the question of fact as to what the *net profits* were within the meaning of the contract.

Appellant submitted a statement showing the cost of the oil to have been $130,696.95, and its sale price $146,280.40, but from the difference, $15,583.45, they subtract various items in arriving at what they say were the net profits, included in which was a purported fee of one cent per barrel to the Penn Oil Company itself, and some dishonored checks given by that company in payment of the oil.

The verdict returned in appellee's favor was in the sum of $6,642.54, which is one-half of $15,000, less one-half of the interest and commission, which amounted to $1,712.93.

The testimony is legally sufficient to support this verdict, and the judgment rendered thereon. According to the testimony offered on appellee's behalf the parties had, in their oral contract, defined the term *net profits* to appellee as meaning five cents per barrel, less one-half of the interest and commission, and the verdict was for this sum.

It does not appear that the Olsans made any explanation to appellee of the details of their contract with the Penn Oil Company. Appellee was not advised where, from whom, or at what price, the oil had been purchased, nor at what price it had been sold, and, so far as he knew when he agreed to finance the deal, there might have been a profit of more than ten cents per barrel. He was promised, according to the testimony in his behalf, the right to share in a profit of ten cents per barrel, less interest and commission; and while the testimony is conflicting on this issue, the issue is concluded by the verdict of the jury.

The judgment must therefore be affirmed, and it is so ordered.

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

Opinion delivered February 3, 1930.

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

J. F. Gautney and *A. U. Tadlock,* for appellee.

HUMPHREYS, J. This is an appeal from a judgment in the circuit court of Craighead County, Jonesboro District, condemning lands for street purposes across the right-of-way of appellant, upon which its main and side tracks are constructed, which are in the corporate limits of the town of Bay, and assessing damages in its favor for one hundred dollars.

Appellee followed the procedure for condemning and opening the street across said right-of-way authorized by §§ 4006-07, 4009 *et seq.*, and 8483-87 of Crawford & Moses' Digest, which procedure was and is challenged by appellant.

It is contended by appellant, that the judgment should be reversed, and the complaint of appellee dismissed upon the alleged ground that the Railroad Commission has the exclusive original jurisdiction to determine the necessity for, and order street crossings over railroad tracks or rights-of-way within towns and cities.

It is argued that the sections of Crawford & Moses' Digest above referred to, under which this suit was brought and prosecuted, were all repealed by § 1645 of Crawford & Moses' Digest. Section 1645 of Crawford & Moses' Digest is as follows:

"It shall further be the duty of said Corporation Commission, or any member thereof, to make a personal inspection of any designated place, where it is desired that a road or street, either public or private, cross any railroad in this State, and upon ten days' notice, as now required by law, and, after a public hearing, may make such order as in their judgment shall be just and proper. Said order may provide for a crossing at grade over or under the railroad, and shall be enforced as others now made by the Corporation Commission."

Neither this section, nor the act of which it is a part, conferred exclusive jurisdiction upon the Railroad Commission to determine the necessity for and order street crossings over railroad rights-of-way and tracks. The section referred to is a part of act of March 29, 1913, which also contains the following section:

"Section 3. Nothing in this act shall be so construed as to amend or repeal any other act now in force, nor to curtail or remit the powers of the Railroad Commission of the State of Arkansas."

From this declaration it is apparent that the Legislature did not intend to amend or repeal any law then on the statute books by the passage of the act of March 29, 1913, conferring the authority upon the Railroad Commission to designate and order crossings at grade over or under any railroad being operated in the State of Arkansas. It is a remedial act in nature, and provides for an alternative proceeding for the protection of existing crossings, and the establishment of public or private crossings over railroad rights-of-way and tracks in the State. It was intended as a supplemental act to all other existing acts on the subject.

It is argued that § 1645 of Crawford & Moses' Digest was borrowed from the statutes of Missouri, and that the highest courts of that State have construed the statute as conferring exclusive jurisdiction upon the Public Service Commission in said State to regulate and establish crossings over the rights-of-way and tracks of railroad companies. Both acts were passed in 1913, and the acts are not alike in all essential particulars. At the time § 1645 of Crawford & Moses' Digest was passed the Missouri act (Laws 1913, p. 556) had not been construed by its courts, so, if the acts were alike in all essential particulars, the construction placed upon the act by the Missouri courts would only be persuasive and not binding upon our courts.

Again, the Missouri act did not contain a provision that it should not repeal any law upon the subject then in force, nor did § 1645 of Crawford & Moses' Digest confer the exclusive power upon the Railroad Commission to protect existing crossings, and establish other crossings over railroad rights-of-way and tracks which was conferred by § 2 upon the Public Service Commission by the Public Service Act of Missouri passed by the Legislature of 1913.

Again, after the passage of § 1645 of Crawford & Moses' Digest, the procedure adopted by the town of Bay was the same as that adopted and followed by Mena

in the case of *K. C. Sou. Ry. Co.* v. *Mena,* 123 Ark. 323, 185 S. W. 290, which procedure was approved by this court in that case. It is true the question of jurisdiction was not raised in that case, as it has been in the instant case, yet the opinion of the court in that case was a tentative or implied declaration of this court that §§ 4006-07, 4009 *et seq.*, and 8483-87 of C. & M. Digest had not been repealed.

No error appearing, the judgment is affirmed.

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

Opinion delivered February 3, 1930.

[redacted]

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Thos. S. Buzbee, H. T. Harrison and *Geo. B. Pugh,* for appellant.

Hays, Priddy, Rorex & Madole, for appellee.

KIRBY, J., (after stating the facts). The undisputed testimony discloses that the decedent was a trespasser upon the railroad company's track at the time and place where he was killed by the passing train, but the refusal of the court to tell the jury that he was a trespasser in requested instruction No. 3 was not prejudicial, if erroneous, since the case was tried throughout, and the instructions all given on the theory that the deceased was a trespasser and entitled only to consideration as such.

If the engineer's testimony had been believed by the jury or could be regarded as undisputed, appellant would have been entitled to a directed verdict. The engineer stated that he saw the decedent sitting on the

tie or rail of the track in the range of his headlight distant, that he immediately blew the warning blasts with the whistle, and that decedent turned and saw the train coming, and got up as if to get away from the track, which he expected him to do, and that his feet suddenly seemed to slip out from under him letting him fall back on the track. Nothing possible could have been done to prevent the injury thereafter. It was impossible to stop the train before it was stopped, two coach lengths beyond where he was struck. This testimony however, was not undisputed since six witnesses who lived or were in the vicinity of the station all of whom testified that they could have heard the signals, if any were given, saw the train coming in, watched its approach, and none of them heard any signals given until after the train stopped suddenly when the blasts of the whistle were made calling out the brakeman. No error was committed in refusing to direct a verdict.

The court discussing the liability of railroad companies for damages for injuries to persons trespassing upon the tracks and failing to keep a lookout under Act 284 of 1911, said in *Railroad* v. *Gibson,* 107 Ark. 431: "We think the construction there placed upon the act applies to persons alike, and that the railroad company now owes the same duty to keep a lookout to avoid injuring the trespasser upon its tracks, and that upon proof of injury to such person by the operation of its trains under such circumstances as to raise a reasonable inference that the danger might have been discovered, and the injury avoided if a lookout had been kept, that a *prima facie* case is made, and the burden of proof then devolves upon the railroad company to show that a proper lookout was kept as required by the statute, and that it used ordinary care to prevent the injury to the person after his discovery in a perilous position in order to escape liabilty for such injury." The engineer testified that a lookout was kept, and the perilous position of the decedent upon the track or ties was discovered as soon

as could have been done in the night with the headlight of the train, that he gave the warning and the trespasser looked toward the oncoming train, got up as if to get away from the track, and that suddenly his feet seemed to slip from under him, and he fell back upon the track, and it was thereafter impossible to stop the train or prevent the injury. A *prima facie* case of liability was made by the proof herein to go to the jury, and the case is different from the cases relied upon (*St. L. I. M. & S. R. Co.* v. *Coleman*, 97 Ark. 438, 135 S. W. 338; *Kelley* v. *DeQueen & E. R. Co.*, 174 Ark. 1000, 298 S. W. 347), and appellant was not entitled to a directed verdict as already said.

On the question of the excessiveness of the verdict the testimony is rather meager as to the disposition and ability of the deceased to continue to contribute to the support of his father, but it was shown that he had been contributing about one-half of his earnings to his father since his coming of age, and that he stated frequently that his father should not worry about the future, as he would take care of him when he could no longer work. The expectancy of the father and the decedent, his son, was shown, and the majority has concluded that the amount of damages, $2,000, awarded the father as the next of kin for pecuniary loss on account of the negligent killing of his son, is not excessive.

The judgment is accordingly affirmed.

UNIONAID LIFE INSURANCE COMPANY *v.* MUNFORD.

Opinion delivered February 3, 1930.

J. V. Walker, Robert Bailey and *Duty & Duty,* for appellant.

C. C. Wait, for appellee.

MEHAFFY, J. This action was begun by appellee to recover on an insurance policy issued by the appellant to W. W. Munford, on the 20th day of March, 1928.

The deceased, W. W. Munford, on the 26th day of April, 1916, made application for a certificate of membership in the Mutualaid Union, an assessment company, and the certificate issued by this company to Munford, among other things, provided that, upon the death of the applicant within the first six months after the date of the certificate, the company would pay $75; if within the calendar month next succeeding, the sum of $87.50, and the amount thereafter to increase each calendar month in the sum of $12.50 for and during the term of eighty months. And that after the expiration of eighty months, upon condition only that prompt and due payments be made

to the home office of the Mutualaid Union of all assessments that may be made under the rules and by-laws, that it would pay $1,000.

W. W. Munford paid all dues and assessments from that time until the reinsurance agreement between the appellant and the Mutualaid Union.

On December 14, 1926, the appellant entered into an agreement with the Mutualaid Union by which it was agreed, in substance, that the members of the membership of the reinsured association is taken over by the reinsuring company, its successors or assigns, under the terms and conditions set forth in the contract. It provides that all living contributing members and policyholders of the reinsured association in good standing in said association on the first day of April, 1927, are hereby taken over, and the liability of the reinsured association to such members under their certificates of membership is assumed by the reinsuring company under the terms and conditions herein set forth, in consideration of such members complying all and singular with the terms and conditions of this contract and with the rules, regulations, laws and requirements of the reinsuring company.

It also provided that the reinsuring company should be subrogated to all the powers, privileges, authority, rights and good will enjoyed by the reinsured association, including the authority delegated under the constitution and by-laws of the reinsured association for the government and control of its members, and provided that it should be subrogated to each and every defense that would have been available to the reinsured association in the conduct of its business.

Section three of the contract provided that all living members of the reinsured association, that is, the Mutualaid Union, in good standing, should pay to the reinsuring company, the appellant, contributions and assessments that they were then paying to the Mutualaid Union.

And a statement of the Unionaid Life Insurance Company was delivered to W. W. Munford, advising him

of the reinsurance contract, and that it assumed all liabilities under his certificate.

Sometime in March he received a letter from the appellant with reference to exchanging his certificate for a policy in the appellant company. In response to this letter, he made an application for the change, and sent in his insurance certificate issued by the Mutualaid Union, as directed by appellant, to be canceled.

On the 20th day of March the appellant canceled his old certificate, issued a new policy, and sent it to their agent to be delivered to Munford. The evidence, however, shows that they directed him not to deliver it until Munford had signed an application which was presented to him, in which it was said he did not have stomach trouble or pellagra. This was presented to him three days after his old certificate had been canceled, and after the new policy had been issued.

He answered all the questions, and, among other things, stated that he did not have any disease of the stomach, or cancer, or pellagra.

It appears that on the 23rd day of March, the same day that his policy was taken to him, and he signed this application in which he stated that he was in good health, that he went to see Doctor Smith, of Russellville, and complained of his stomach. Dr. Smith, at that time, examined him, but told him that he would have to have an X-ray picture made in order to determine what his ailment was. Thereafter, the X-ray picture was made, and it showed some ailment that the doctor thought required an operation, and he performed the operation, and a short while after the operation Munford died of pellagra.

It is contended that Mr. Munford, on the day he signed the application, warranted that he was in good health, and had no physical defects at that time; and appellant states he was then in a serious condition, and was fully aware of the fact. There is no evidence at all that he had any kind of physical ailment at the time he secured the certificate in the Mutualaid Union in 1916. And when

the company wrote him to send in his policy, together with an application to be made on a blank which was sent by the company, he had a right to assume that that was all he had to do. And, so far as the evidence shows, at that time he at least thought that he was in good health.

It is contended by the appellant that his statements in this application were warranties, and numerous authorities are cited, among others, § 14 of act 139 of the Acts of 1925. That section reads as follows:

"Statements, representations and answers on the part of applicants for membership as to questions of age, condition of health and eligibility shall be construed as warranties on the part of the applicant, and such applicant bound thereby, and shall constitute a part consideration for issuance of the policy or certificate of membership."

The above section has no application. The appellant is not an assessment company, not organized under the act referred to, and that act is an act to define assessment, liability, health and accident associations or companies, industrial insurance companies, to provide how same may be organized, and transact business in this State, for proper regulation of the same, and for other purposes.

The appellant, as we have said, is not an assessment company, and the act referred to has reference to assessment companies only, or such companies as are mentioned in the act, and the appellant is not in that class.

The court was justified in finding that, when Munford applied to the doctor, he did not think he had any ailment mentioned in the application, or that he did not have any serious ailment at all. And if he, in good faith, answered the questions, or if he believed the answers he gave were true, the fact that they turned out to be untrue would not affect the policy. *United States Annuity & Life Ins. Co.* v. *Park,* 129 Ark. 43, 195 S. W. 392, 1 A. L. R. 1254.

There is no law making statements, representions and answers as to condition of health or eligibility war-

ranties in an application to a company of this kind. And there was no law at the time Munford made his application to the Mutualaid Union making statements of this kind of warranties. The difference between a representation and a warranty is that a warranty must be true, and a representation is not required to be true, but it is only required that the applicant state what he honestly believes to be the truth. This question was discussed at length in the case of *Modern Woodmen of America* v. *Whittaker,* 173 Ark. 921, 293 S. W. 1145, and numerous authorities cited.

It is not necessary here to repeat the discussion or review the authorities reviewed in that case. In that case, however, we said, among other things:

"A warranty is in the nature of a condition precedent; it must appear on the face of the policy; or, if on another part of it, or on a paper physically attached, it must appear that the statements were intended to form a part of the policy; or, if on another paper, they must be so referred to in the policy as clearly to indicate that the parties intended them to form a part of it. A warranty cannot be created nor extended by construction."

The appellant company entered into a contract of reinsurance with the Mutualaid Union, and in that contract section seven is as follows: "The members of the reinsured association hereby admitted shall be accepted by the reinsuring company upon the original application heretofore made to such association, and the reinsuring company shall be subrogated to each and every defense that would have been available to the reinsured association, and it is hereby expressly understood and agreed that such members taken over are subject to the conditions and limitations set forth in this contract, and the reinsuring company shall not be liable to such members or their beneficiaries in any other manner, except as herein provided."

The law under which the reinsurance contract was made provided, among other things, that the membership

or policyholders of consolidating associations or companies shall be bound in all respects by the contract of consolidation as filed with the insurance commissioner of the State. Acts 1925, No. 137, § 8. It is also provided that the general insurance laws of this State or [and] any laws governing the organization and control of mutual assessment companies shall not apply to or govern companies organized under this act. *Id.*, § 16.

At the time of the reinsurance contract and at the time that Munford made application to change his certificate for a policy in the Unionaid Life Insurance Company, he had a certificate issued by the Mutualaid Union entitling him to $75 if he died within six months after it was issued, and to an additional sum of $12.50 each month thereafter until he had paid for eighty months, and then he was entitled to $1,000. It is true the by-laws of that association provided that this should be raised by assessment on the members, but the reinsurance contract certainly did not contemplate that one should pay for ten or fifteen years, and continue to pay to the reinsuring company, and be limited in recovery to the amount paid by those persons who belonged to his circle. There might be none of them left or there might be a very few. But, in either event, whether there were many or none at all, the member would have to continue to pay his assessments.

Appellant could not secure the certificate from Munford, cancel it, and then require him thereafter to make any statements with reference to his health as a condition precedent to delivering him his policy. He had a right to the policy under the reinsurance contract by complying with the terms of the letter written to him by the appellant. He had signed that application, sent the money required, and it canceled his policy and issued another, and it was its duty to deliver it to him.

In the view we take of the case, however, it is immaterial whether the policy issued by appellant was void or not. If it was valid, as we hold that it was, then he can recover on the policy. If it was not valid, then he

would be entitled to recover on his certificate, and, under the evidence in this case, we think the recovery would be the same.

The statements made in the application signed on the 23d day of March were made after the policy was issued, and after Munford had done all that he had been requested to do in order to secure the change, but the statements in this application were not warranties.

We have held in the case of *Modern Woodmen of America* v. *Whittaker, supra,* that such statements are not warranties, but are representations. And, if the applicant believed them to be true, it would not avoid the policy if they afterwards turned out to be untrue. Munford had been going about his business as usual. It is true the evidence shows that he complained of his stomach and went to see Dr. Smith, but he evidently did not think he had any serious ailment. He certainly did not know he had pellagra.

One of appellant's witnesses, Dr. Ross, testified that it was his stomach, constipation and indigestion, and he gave him a treatment for that. Certainly Munford did not think this constipation or indigestion was any serious trouble, but must have thought it was temporary. He consulted this witness just a short time before he went to Dr. Smith. Nothing was said by Dr. Ross about pellagra.

Appellant then put on the stand Dr. Scarlett. He testified that pellagra, the disease that caused the death of Munford, is not always readily recognizable. A great many of the affected discover it themselves, and this doctor testified from the history of the disease he would say that he had pellagra.

Dr. Smith testified that when Munford came to him he complained of pain in his stomach. He made an examination, and that he came back to see him on the 4th day of April. He performed the operation on the 14th day of April; but Dr. Smith testified at his first examination that he did not determine what was the matter with him.

One of the physicians testified that pellagra was not hard to detect, but that you might not notice it very much for two or three years. At any rate, neither of the doctors at first discovered that it was pellagra, and they did not know it was. It would be unreasonable to assume that Munford knew that he had pellagra when the doctors did not know it. He had been at work continuously, and, while he may have had pellagra all that time, he had never been told so by a doctor, and he evidently did not know it. And he must have thought that whatever ailment he had was not a serious trouble. Besides that, the agent who delivered him the policy had known him for years and lived just across the street from him, and he testified that he collected his dues every month. He also testified that he could not say what Munford's health was, but that he was tending to his business, and, with his knowledge of him and long association with him, he did not detect any difference in his condition of health on that day—the day that the policy was delivered—to what he had known for years.

The company did not require medical examination, but simply gave directions to its agent, who had known him for years and who, when he went to deliver the policy, believed him to be in good health, saw no difference between him then and for years.

The statements made being representations and not warranties, the evidence was sufficient to justify the court in holding that the answers were made in good faith.

Finding no error, the judgment is affirmed.

INTERNATIONAL HARVESTER COMPANY OF AMERICA *v.* HAWKINS.

Opinion delivered February 3, 1930.

J. A. Comer and *Watkins & Pate,* for appellant.

George W. Emerson and *W. R. Donham,* for appellee.

MEHAFFY, J. This action was begun in the Pulaski Circuit Court by appellee, who alleged in his complaint that the appellant was a corporation engaged in the business of selling harvesting machines, parts for machinery and other merchandise, and has a place of business, stock of parts of machines and machines and machinery, and other property in the city of Little Rock.

Appellee was employed by defendant in its place of business, and he alleges that, pursuant to directions of appellant's foreman, he was engaged in taking inventory of parts which were located across the walls of the building, said parts being in various bins. The appellant provided a chair upon which appellee was to sit while engaged in such duties, the chair being attached to the bins several feet from the floor; that appellant and its servants negligently and carelessly furnished a chair and parts of said bin upon which said chair was attached, and appliances which were insecure, insufficient and unsafe for appellee to sit upon while discharging his said duties, and that, on account of this condition, while appellee was in the exercise of care for his own safety, said part upon which said chair was attached broke and plaintiff fell several feet, and that as a result of the fall he was severely injured.

Defendant answered, denying the material allegations of the complaint, pleaded assumed risk, and alleged that the accident complained of by appellee was one of risks and hazards which he assumed in his contract of employment.

It appears from the testimony that the appellee was at the time of the injury engaged in making an inventory. The parts and merchandise were in small bins against the wall. A strip of timber was nailed to the bins at the bottom part, and this strip served as a place to fasten the chair, and also to prevent the parts from coming out. While the appellee was in the discharge of his duties, making an inventory and using this chair, the strip of board to which the chair was attached at the bottom of the bin broke, and caused the appellee to fall and receive the injuries of which he complains. There is some conflict in the evidence as to whether the board simply broke or whether it broke and also the nails pulled out; one witness testifying that the nails were pulled loose. At any rate, the board broke, and appellee fell and received the injuries complained of.

Appellant first argues that the burden is upon the appellee to show not only that the appliances furnished him were unsafe and defective, but that the master had notice of such unsafe condition or defect, or could by the exercise of reasonable care have discovered same.

This court has many times held that, in order to recover because of the failure of the master to furnish an employee with safe appliances or a safe place to work, the burden is upon the complaining party to establish the fact that the appliances or place was unsafe, and also that the master either had notice of the unsafe condition or defect or could, by the exercise of ordinary care, have known of the defect. A master is not required to furnish an absolutely safe place to work, but he is required to exercise ordinary care to provide safe appliances and a safe place to work.

Appellant cites many authorities supporting the rule contended for, but it is unnecessary to review them here because there is no dispute or controversy about this being the well established rule. One of the cases cited and relied on by appellant in this connection is the case of *St. L. S. F. Ry. Co.* v. *Smith,* 179 Ark. 1015, 19 S. W. (2d) 1102, in which the court stated:

"Juries are not permitted to base verdicts on mere conjecture or speculation. There must be substantial testimony of essential facts, or facts which would justify a reasonable inference of such essential facts, on which to base a verdict, before it will be permitted to stand."

This proposition of law is not only correct, but has been repeatedly announced by this court. Juries must base their verdict on facts, and not on mere conjecture or speculation. But in the instant case the undisputed facts are that the strip of board which broke was constantly used for the very purpose for which the appellee was using it at the time of the injury; that it broke, causing appellee to fall and receive his injuries. There is no conjecture about this, and no speculation about it. It is an undisputed fact. If there was a defect that caused the break, then, under the evidence in this case, the appellant was liable because there is no contention and no claim that it was such a defect as was obvious or might be discovered without inspection. In other words, there is no contention that appellee might have discovered the defect. Moreover, it was not the duty of the appellee, the servant, to make inspection, but it was the master's duty. It is not only the duty of the master to use ordinary care to provide safe appliances, but it is also its duty to exercise ordinary care to maintain them in a safe condition; to make inspection, if necessary, to ascertain the condition, and it is not the duty of the servant to make inspection.

It is next contended by the appellant that negligence cannot be inferred merely from the injury. This is also a rule of law so well established that we need not cite authorities in support of it. While negligence cannot be inferred merely from the injury, negligence may be inferred from facts shown in evidence. And the facts here are sufficient to justify the jury under proper instructions to find that the appellant was guilty of negligence, and that this negligence caused the injury.

It is next contended that appellee assumed the ordinary risk of his employment. This is correct. The serv-

ant, when he enters into the employment, assumes all of the ordinary risks and hazards of the employment, but he does not assume the risk of negligence of the company for which he was working or any of its servants. And where a servant engaged in the performance of his duty for the master, in the exercise of ordinary care for his own safety, is injured, whether by the negligence of the company for which he works or by the negligence of any other servant of the company, he is entitled to recover. *Aluminum Co. of North America* v. *Ramsey,* 89 Ark. 522, 117 S. W. 568.

If the strip of timber which broke causing appellee's fall and injury was the strip provided by the master to be used in the manner in which it was being used by the appellee at the time, this was sufficient to justify the jury in finding that the master was negligent. While negligence cannot be presumed, but must be established by the evidence, it is not established by witnesses saying it is negligence, but it is established by showing facts from which the jury may say it is negligence. It is established by evidence of facts which show the negligence.

There is no question in this case about the failure of the court to give any instructions requested by appellant. In fact, the appellant does not set out any of its instructions, whether given or refused by the court, and in appellant's motion for a new trial no suggestion is made that the verdict is excessive.

Appellant argues in his brief that, if there is any liability at all, the appellee's measure of damages would be extremely small. He does not, however, make the amount of damages, or the fact that he claims it was excessive, a ground for its motion for a new trial.

Witness August Kahler, a general contractor, testified that the board was perfectly sound and safe, and he also said: "The nails would have to give away before the board can break, that is certain, but the sound of the nails giving can be heard, the nails would squeak as it come out; that took quite a little jerk to pull that loose;

this nail, I presume, was put in afterwards, when it was nailed back up because the original nails were six penny; there were two originally nailed into the board."

This witness also said, in speaking about it breaking by reason of the man's weight, that he did not know. He was asked if the thing broke or was pulled off by a man's weight, how he would account for it, and he simply said he did not know.

The circumstances and evidence show that either the board was insufficient, or that it was insufficiently nailed. In either event, the master was guilty of negligence if he knew the condition or, by the exercise of ordinary care, could have known it. If witness Kahler is correct about the nails having to pull out before the board would break, then the jury were justified in reaching the conclusion that an ordinary inspection would have discovered the defect.

Appellant urges that the court erred in giving instruction No. 2 because, he says, it was given without testimony to justify it, and, for that reason, it was confusing. This is the only error urged to the instruction by appellant. Instruction No. 2 was as follows:

"The defendant has interposed, as a defense to plaintiff's cause of action, the doctrine of assumed risk, that is that plaintiff by proceeding with the work assigned to him by defendant, assumed the risk of being injured under the circumstances, and that the defendant would not be liable to him for injuries, in the event he should be injured, and you are instructed that while plaintiff, as a matter of law, assumed the risks ordinarily incident to the work he was doing, yet he did not assume the risk of the negligence of defendant, or any of its employees in failing, if there was such failure, to exercise ordinary care to provide plaintiff a reasonably safe place to work, unless plaintiff was aware that such place was unsafe, or unless such danger was so apparent as to be observed by an ordinary prudent person, and if, therefore, you find that defendant failed to exercise ordinary care to pro-

vide plaintiff with a reasonably safe place to work, and find that plaintiff was not aware of such place being unsafe, if it were unsafe, and that the danger was not so apparent as to be obvious to a person of ordinary prudence, then the plaintiff would not assume the risk, and you cannot find for defendant on the ground of the assumed risk."

This was a correct instruction, and there seems to be nothing in it or about it, that would confuse the jury.

Appellant also urges that the court erred in giving instruction No. 4. Its special objection to this instruction is that appellant was not responsible for latent defects that were not open to observation in the exercise of ordinary care. We do not agree with appellant in this contention. The correct rule is that the master is not responsible for latent defects that were not open to observation in the exercise of ordinary care, or that would not be discovered by a proper inspection. Whether the defect was open to observation or not, and whether it was known to the employer, if it was such a defect as was discoverable by a careful inspection, then the master was guilty of negligence if he failed to make the proper inspection. The servant is required to take notice of obvious risks, and all the usual and ordinary risks, but he is not required to inspect, and he does not assume any risk resulting from the negligence of the master or other servants unless he knows of such risk. He assumes the ordinary and usual risks of his employment, whether he knows them or not, but he has a right to assume that the master and all the other servants will exercise care, and he has the right to act on this presumption unless he knows of the negligence. No. 4 was a correct instruction, and was not open to the objection urged by the appellant.

It would serve no useful purpose to set out the evidence in full. We have carefully considered all of the evidence, and reached the conclusion that there was sufficient evidence of negligence to justify the submission of the case to the jury.

There is substantial evidence upon which to base the verdict, and the judgment of the circuit court is affirmed.

[redacted]

BEENE MOTOR COMPANY *v.* DISON.

Opinion delivered February 3, 1930.

[redacted]

Silas W. Rogers, for appellant.

Joiner & Stevens, for appellee.

McHANEY, J. Appellant brought this action to recover the balance due, $116, on a promissory note in the sum of $286 dated September 11, 1926, and due ninety days thereafter with interest at 8 per cent. on which a payment had been made on the due date of $170, said note having been executed and delivered by appellees to appellant under the following conditions: On September 11, 1926, appellee, Dison, purchased from appellant a truck for the total sum of $572, none of which was paid in cash, but a note representing one-half the purchase price, dated the same date and due December 11 thereafter at 8 per cent. was executed by appellee, Dison, with appellee Shepherd, as surety. On the same date appellee Dison and appellant entered into a conditional sales agreement for the purchase of said truck which recited that "The buyer has this day paid to the seller two hundred and eighty-six ($286) dollars, and the buyer agrees to pay the seller, or order, two hundred and eighty-six

($286) dollars, one at $286 due December 11, 1926, balance payable in 5 monthly installments of forty-eight ($48) dollars each, and one monthly installment of forty-six ($46) dollars each, which installments shall become due on the 11th day of each month, and shall bear interest, etc." The sales agreement further provided: "Title to the car * * * shall not pass by delivery to the buyer, but shall remain vested in and be the property of the seller or assigns until the purchase price has been fully paid." On December 11, 1926, appellees paid $170 on the note in controversy, but prior and subsequent thereto said Dison had paid on the conditional sales agreement $193. He failed to pay the balance due on the note in controversy, and defaulted in payment of the installments due under his contract. After being in default for some time, appellant repossessed the truck under the terms of said conditional sales agreement, and brought this action for the balance due on the note due December 11, 1926, in the sum of $116 as aforesaid, with interest. Appellees admitted the execution of said note, but defended on the grounds, 1st, that said note had been paid, and 2nd, if not paid, that appellant had elected to repossess said truck under its title retaining contract, which released them from all further liability on the note. The case was tried to a jury, which resulted in a verdict and judgment for appellees.

We find it necessary to discuss only one defense offered by appellees, and that is, that the repossession of the car by appellant before the full purchase price had been paid released the appellees from further liability on said note. We think the appellees were entitled to an instructed verdict in their favor on this account. The note for $286, as also the installment payments due under the contract, represented a part of the purchase price of said truck, for which title was retained until paid. By the express provisions of the contract, the buyer, Dison, agreed to pay the seller, appellant, one note of $286, due December 11, 1926, and the balance in five equal monthly

installments of $48 each, and one installment of $46, which installments became due, the 1st on October 11, 1926, and one on the 11th of each and every month thereafter, until paid, and since title was retained for the full amount of the purchase price, when appellant retook possession of the car, it elected to take the property to which title had been retained, and thereby cancel the indebtedness. It had only one of two remedies; either it could have treated the sale as canceled and repossessed the property, as it did, or treat the sale as absolute, and sue for the purchase price. We held in *Loden* v. *Paris Auto Co.*, 174 Ark. 720, 296 S. W. 78, that "where a vendor of chattels has reserved the title until the purchase price has been paid, on breach of condition, he has two remedies; one is to retake the chattel and thereby cancel the debt, and the other is to sue for the debt, and thereby waive his title to the property. So, in such a case, the vendor has the right to elect which remedy he will pursue, and, having elected to pursue the one, he is precluded from pursuing the other." In that case we cited one of the leading cases on the subject in this court, *Nashville Lumber Co.* v. *Robinson,* 91 Ark. 119, 121 S. W. 350, and quoted therefrom the following: "For, if the appellant elected to retake the property, and thus in effect to cancel the debt before this suit was brought, then it could not thereafter sue to recover the purchase money also. When this debt became due, and was unpaid, the vendor, having reserved the title until the purchase price was paid, had its election to take either of two courses. It could elect to retake the property, and thus in effect cancel the debt, or it could bring its action to recover the debt, and thus affirm the sale and waive reservation to title." (Citing cases). And see also cases cited in *Logan* v. *Paris Auto Co., supra.* From one of the cases there cited, *Olsen* v. *Moody, Knight & Lewis, Inc.,* 156 Ark. 319, 246 S. W. 3, we quoted with approval as follows: "This court is committed to the doctrine that a vendor who has retained title in personal property until the payment of the purchase money has only two

remedies for the breach of contract. He may either treat the sale as canceled, and bring suit in replevin for the property, or may treat the sale as absolute, and sue for the unpaid purchase money, and, in aid thereof, attach the property, under §§ 8729 and 8730, C. & M. Digest. (Citing cases). There is no suggestion in any of the Arkansas cases that a third remedy is open to a vendor who has conditionally sold personal property."

Since the $286 note, as we have already seen, was included in the conditional sales agreement for the sale of the truck, was a part of the purchase price recited therein, and title to the property was retained until the whole purchase price was paid, it necessarily follows, from the authorities heretofore cited, that when appellant elected to retake the truck, it also elected to cancel the balance of the indebtedness due against the car, which had the effect of relieving the appellee Shepherd either as surety or joint maker on the note.

Appellant also complains of certain leading questions asked by counsel for appellee. We have examined these questions and do not find them to be leading. Complaint is also made of certain instructions, but since appellees were entitled to an instructed verdict in their favor, as we have already seen, it is in no position to complain about instructions submitting the matter to a jury. Judgment affirmed.

MISSOURI PACIFIC RAILROAD COMPANY *v.* MYERS.

Opinion delivered February 3, 1930.

Thos. B. Pryor, Vincent M. Miles and *Thos. B. Pryor, Jr.,* for appellant.

C. M. Wofford, for appellee.

BUTLER, J. This is a suit brought by the appellee against the appellant to recover for damages to an automobile which resulted from a collision with appellant's passenger train at Alma, on the 8th of December, 1928. There was a trial in the circuit court of Crawford County, resulting in a verdict and judgment for the appellee, from which this appeal is prosecuted.

The facts may be briefly stated as follows: Lee Lollis, while in the employ of the appellee, and in the discharge of his duties, left the home of the appellee in a Chevrolet car to journey to Little Rock. His route lay through the town of Alma, where he arrived about 3:30

o'clock in the morning. Passing through the town on the main street, he reached the railway crossing, and found it blocked by a freight train. He turned and went one block east to find the crossing there blocked by a locomotive attached to the train which blocked the Main street crossing. The engineer in charge of the locomotive, in compliance with a signal given by Lollis, backed his locomotive so that about one-half of the crossing was left clear, giving sufficient room for Lollis to pass, which he did, and proceeded two blocks to the north, where he found the highway blocked at that point. He then returned to the crossing over which he had just passed, where he found the locomotive in the same position as when he crossed.

There is a dispute as to whether the headlight of the locomotive was shining, or whether it had been turned out, Lollis stating that it was lighted, and the operators of the train that it was not. Before attempting to cross the track again, Lollis stopped his car about fifteen feet from the track, putting his car in low gear, and starting over the crossing directly in front of the locomotive. Passing on from thence his car reached the main track just as a passenger train was passing, which train struck his automobile, demolishing it. As Lollis passed from in front of the locomotive and entered on the space between the side track and the main track, he discovered the approach of the passenger train, and, being unable to stop his car, he turned it so that it went at an angle on to the main track and not directly in front of the passenger locomotive. The testimony is conflicting regarding the giving of signals by the blowing of the whistle and the ringing of the bell for the crossing. Witnesses for the appellant all testified that such signals were given, and Lollis testified that he did not know the passenger train was approaching, and did not hear any whistle sounded or bell rung. The testimony to the effect that the engineer and fireman on the passenger locomotive were keeping a lookout, and that they did not see, and could not have

seen, Lollis until he had passed from in front of the freight locomotive on the side track, was uncontradicted. When Lollis stopped his car just before entering upon the crossing, he saw two or three men in the cab of the freight engine, and the headlight of the freight engine was turned on. The men he saw were the engineer and the firemen of the freight train. They were expecting the passenger train, and had entered on the side track for the purpose of clearing the main line for its passage, and, at the time Lollis entered the second time upon the crossing in front of the freight locomotive, the engineer was looking back in the direction from which the passenger train was approaching. The fireman at that time was shoveling coal into the furnace of the locomotive, one of the brakemen was on the left side, two or three cars back from the engine, looking over the train, and another was standing south of the depot, some distance away from the crossing. None of the train crew were watching the crossing in front of the locomotive, and none saw Lollis when he approached the second time, or when he went upon the crossing, passing in front of the locomotive, just before the collision. The car Lollis was driving was a closed car, and it is uncertain whether or not the windows of the car were up, the testimony on this point not being very clear. The locomotive and freight cars on the side track prevented Lollis from seeing the approaching passenger train, and prevented the engineer and fireman on that train from seeing him.

At the request of the appellee, the court gave the following instruction: "Under the laws of this State, it is the duty of all persons running trains upon any railroad in the State to keep a constant lookout for persons and property upon the tracks of such railroad. If any person or property is injured by the neglect of any employee of any railroad to keep such a lookout, the company owning or operating such railroad shall be liable and responsible to the person injured for all damages resulting from the neglect to keep such lookout, notwith-

standing any contributory negligence, if any be shown, on the part of the person injured, where, if such lookout had been kept, the employee or employees in charge of such train could have discovered the peril of the person injured in time to have prevented the injury by the exercise of reasonable care; and the burden of proof is upon the railroad to establish the fact that this duty to keep such lookout has been performed."

It is the contention of the appellant that this instruction should not have been given for the reason that the undisputed proof shows that, if the engineer and firemen had been keeping the lookout, they could not have discovered the approaching automobile in time to avoid striking it, and for the further reason that there was no allegation in the complaint which warranted the submission of that issue to the jury. We agree with the appellant in this contention, but are of the opinion that, in view of the other instructions given and the testimony, the attention of the court should have been called to the vice of this instruction by specific objection, and that a general objection was not sufficient.

The case of *Missouri Pac. Rd. Co.* v. *Wright,* 168 Ark. 259, 270 S. W. 601, relied on by the appellant as authority for the position taken by it, is quite similar to the instant case. In that case the court held that it was error to submit to the jury the issue of failure to keep a lookout, both because there was no allegation of negligence in this regard, and because it was undisputed that the view was obstructed so that the train crew could not see any one approaching in time to avoid a collision. The appellant requested the court to give an instruction excluding that question from the consideration of the jury, which instruction the court refused. The request for the instruction was tantamount to a specific objection. In the case at bar there was only a general objection, and, since the instruction was a correct declaration of law, if the defendant conceived that it was abstract as submitting an issue not raised by the pleadings or testimony, it should have

called the attention of the court to this error by specific objection, or by asking the court, as in the Wright case, *supra,* to give the jury the instruction excluding that question. *Moline Lumber Co.* v. *Taylor,* 144 Ark. 318, 222 S. W. 371; *Cohn* v. *Chapman,* 150 Ark. 258, 234 S. W. 42; *Roach* v. *Scott,* 157 Ark. 165, 247 S. W. 1037.

By instruction No. 3, at the instance of the appellee, the court presented the issue in this case. That instruction is as follows: "You are instructed that, if you find from the evidence in this case that, at the time plaintiff's car was approaching the crossing where it is alleged the injury occurred, a freight train occupied a side track, and was partly upon said crossing, or near thereat, waiting for an east-bound passenger train to pass, it was the duty of the employees of defendant on both trains to keep a constant lookout for persons or cars upon said tracks and crossing; and if the destruction of plaintiff's car was the result of the negligence of the employees of defendant to keep such lookout, the defendant is liable to plaintiff for the injury to his car." This instruction is not complained of by the appellee in his brief, and we think the instruction, when taken together with instructions given at the request of the appellant, which submitted the question of contributory negligence, correctly stated the law in this case. It is our view that the testimony fails to disclose any negligence on the part of the operators of the passenger train, and the jury might well have been so instructed, but the negligence, if any, consisted in the failure of the operators of the freight train, after having cleared the crossing and knowing of the imminent arrival of the passenger train, to maintain a watch on the crossing for any one who might approach, as the view of any such person would be obstructed by the freight train. Under ordinary circumstances, the exercise of ordinary care would not require a lookout to be kept by the operators of a freight train on a side track to watch for persons entering upon the crossing, but this cannot be said to be the case where a freight train clears

the crossing, and thus impliedly invites persons to enter thereon when the view is obstructed, and where the approach of another train is expected at any moment. This would be a proper question for submission to a jury.

The next proposition relied upon for reversal is that the uncontradicted evidence established the negligence of the driver of the car, and that this was the proximate cause of his injury. It is true that the evidence is undisputed, but we cannot say as a matter of law that these facts sustained the appellant in its contention. The situation was such that there might easily be a difference of opinion as to what might constitute ordinary caution under the circumstances. Viewing the facts and making the deductions therefrom in a light most favorable to the appellee, as we are bound to do, it might be said that, while as a usual thing it would have been the duty of the driver of the car to exercise extra caution in the use of the crossing where the track is obstructed so as to interfere with sight or hearing, still, where, in response to a signal given by the driver of a vehicle, the crossing is cleared for its passage, over which it passes safely, and on his return in a short time to recross the driver sees the crossing still clear and the locomotive of the freight train standing where he had last seen it, with headlight burning, it cannot be said that it was unreasonable for him to assume that there was an invitation to again cross the track with the implied assurance that the way was safe. The conduct of the train crew in charge of the freight train in the instant case was such that an ordinarily prudent person might have assumed that the crossing was clear, and have acted upon this assumption. What is ordinary care, or what is negligence, depends upon the peculiar character of the circumstances incident to each case, and we are of the opinion that the facts in this case warranted the submission to the jury of the question of the driver's negligence.

"The suggestions of ordinary caution and prudence may require the traveler, under peculiar circumstances,

to get out of his vehicle and approach the track and look up and down it in both directions before attempting to cross it, but plainly there can be no rule of law establishing such a duty for all cases; but whether the circumstances are of that peculiar character which requires the traveler so to act will be a question of fact for the jury." *Elkins* v. *Western Maryland Ry. Co.,* 76 W. Va. 733, 86 S. E. 762, 1 A. L. R. 198.

"It is well settled that, where there is uncertainty as to the existence of either negligence or contributory negligence, the question is not one of law, but of fact, and to be settled by a jury, and this whether the uncertainty arises from a conflict in the testimony, or because, the facts being disputed, fair-minded men will honestly draw different conclusions from them." *St. L. I. M. & S. R. Co.* v. *Hitt,* 76 Ark. 227, 88 S. W. 908.

The allegations in the complaint relating to negligence for failure to keep a lookout might not have been sufficient to include a charge of negligence on the part of the engineer and fireman on the passenger train to keep a constant lookout, as provided by § 8568, Crawford & Moses' Digest, but it was sufficient to allege negligence on the part of the crew of the freight train for failure to watch for and warn travelers on the highway of the approach of passenger trains, since it was through their acts that a view of the tracks and the approaching train was prevented.

The record presents no reversible error, and we think that the circumstances warranted the submission of the question of the negligence of the appellant and the contributory negligence of the appellee to the jury. The judgment is therefore affirmed.

CANNON *v.* FELSENTHAL.

Opinion delivered February 10, 1930.

Powell, Smead & Knox, for appellant.

C. B. Crumpler, for appellees.

HART, C. J., (after stating the facts). The decree of the chancery court was correct. The principal ground relied upon for reversing the decree is that the commissioners were about to take a part of the property of appellant, and other real property within the proposed improvement district, without first condemning said property and paying them therefor.

Under § 4006 of Crawford & Moses' Digest, municipal corporations are given the power to lay off, open, widen, straighten, and establish streets, etc. Section 4007 of the Digest provides that no street shall be opened, straightened or widened without the concurrence in the ordinance directing the same of two-thirds of the whole number of members elected to the council.

The complaint shows that the provisions of the statute in this respect were duly complied with in the passage of the ordinance providing for the widening of the street in question. The complaint also shows that a street improvement district was duly organized in the manner provided by statute for the purpose of taking and improving said street, as widened under the provisions of said ordinance, and that commissioners were duly appointed who were proceeding to construct the improvement provided for.

Appellant, as a property owner of said proposed improvement district, seeks to enjoin the commissioners from proceeding further in the matter, because they have not first paid him the compensation for taking his property, as required by article 12, § 9, of our Constitution, which prescribes, in effect, that no property or right-of-way shall be appropriated to the use of any corporation until full compensation therefor shall be first made to the owner in money, etc. This court has held that the sec-

tion of the Constitution just referred to does not apply to the taking of property for public use by a municipal corporation. *Paragould* v. *Milner,* 114 Ark. 334, 170 S. W. 78. In that case, the court had under consideration the taking of a strip of land for the purpose of widening a street in the city. Again, in *Dickerson* v. *Tri-County Drainage District,* 138 Ark. 471, 212 S. W. 334, it was held that the section does not apply to a taking by a drainage district.

The power of eminent domain is an attribute of sovereignty, and, for the purpose of a case like this, is governed by the provisions of article 2, §§ 22 and 23, of our Constitution, which is a part of what is commonly called our Bill of Rights. Section 22 provides that the right of property is before and higher than any constitutional sanction, and that private property shall not be taken or damaged for public use without just compensation. Section 23 provides that the State's right of eminent domain and taxation is herein fully and expressly conceded.

Under constitutional provisions like these, it is generally held that the procedure for ascertaining the value of the property sought to be condemned, and the making of reasonable provision for the payment of the same, is a matter of legislative regulation. As stated in *Backus* v. *Fort Street Union Depot Co.,* 169 U. S. 557, 18 S. Ct. 445, "All that is essential is that, in some appropriate way, before some properly constituted tribunal, inquiry shall be made as to the amount of compensation, and, when this has been provided, there is that due process of law which is required by the Federal Constitution."

In *Albert Hanson Lumber Co., Ltd.,* v. *United States,* 261 U. S. 581, 43 S. Ct. 442, it was said, that the owner is protected by the rule that title does not pass until compensation has been ascertained and paid, nor a right to the possession until reasonable, certain, and adequate provision is made to obtain just compensation.

In *Joslin Manufacturing Co.* v. *Providence,* 262 U. S. 668, 43 S. Ct. 684, in discussing the subject, the court said:

"Third. We next consider the contention that the act permits the taking of property, and grants the power to lease, sell or dispose of it without an offer to pay compensation therefor, or a determination of it in advance. It has long been settled that the taking of property for public use by a State, or one of its municipalities, need not be accompanied or preceded by payment, but that the requirement of just compensation is satisfied when the public faith and credit are pledged to a reasonably prompt ascertainment and payment, and there is adequate provision for enforcing the pledge."

Our own statute complies with the requirements laid down in the cases cited above, both from this court and from the Supreme Court of the United States. Sections 4022 to 4026, inclusive, of Crawford & Moses' Digest relate to condemnation proceedings by boards of improvement in cities and towns. Section 4022 provides that the board of improvement shall have power to enter upon any private property for the construction of any designed improvement, and that any damages that may be sustained thereby shall be paid out of the improvement fund.

Section 4023 provides that, if the person damaged and the board of improvement cannot agree upon a sum to be paid for such damages, the person aggrieved may file his petition in the circuit court of the county, setting forth his grievance and asking compensation therefor, making the board a party defendant.

Section 4024 provides for a trial of the issue by a jury, and that the case shall be advanced on the docket so as to have precedence over all other causes.

Section 4025 provides that the judge of the circuit court may hold a special term for the trial of any such cause.

Section 4026 provides that the judge of the circuit court may, in vacation, in case an agreement cannot be arrived at between the board of improvement and the owner of the property in relation to the damages claimed, fix an amount to be deposited with some person to be des-

ignated by the court before entering upon and taking possession of the property to be used and taken, as aforesaid.

Thus it will be seen that the statute provides that compensation must be made, and the amount of damages for the taking settled in the circuit court, before the board of commissioners can take possession of the property and proceed with the construction of the improvement. Under the provisions of the statute, the title to the property would not pass until the money had been deposited in court for the payment of the damages to the owner. The reasoning of our own court, as well as that of the Supreme Court of the United States, on the question is, that no one has a vested right in any given mode of procedure, and all that the landowner may require is that a form of procedure may be given him with a right of review in the courts, and that a reasonable and adequate means of payment for the property taken shall be provided. *Dickinson* v. *Tri-County Drainage Dist., supra.* So it will be seen that the landowner may proceed in accordance with the provision of §§ 4022-4026, inclusive, of the Digest; or he may wait until the street is widened and sue for damages under § 3930 of the Digest.

It is next insisted that the ordinance creating the district is void because it fails to limit the cost of the improvement to 50 per cent. of the assessed value of the property. In making this contention, counsel rely upon act 64 of the Acts of 1929, which is entitled, "An act to simplify the system of organizing and administering local improvement districts in cities and towns." Acts of 1929, vol. 1, p. 241.

The part of the section relating to this question reads as follows: "If it is found that a majority has signed the petition, the district shall be authorized, unless limited by the terms of the petition to a smaller per cent., to make improvements costing not more than fifty per cent. of the assessed value of the real property in the district; and, if it is found that the petition has been signed

by seventy-five per cent. or more in value of the owners of real property within the district, said district may expend, in making the improvement for which it is organized, as much as one hundred per cent. of the assessed value of the real property therein, unless limited by the petition as aforesaid. Interest upon money borrowed shall not be computed in determining the cost of improvement."

Under the statute a majority in value of the owners of real property shall be authorized, unless limited by the terms of the petition to a smaller per cent., to make improvements costing not more than fifty per cent. of the assessed value of the real property in the district. The council expressly found upon the report of the commissioners that the estimated cost of the improvement was less than fifty per cent. of the assessed value of the property in the district. Hence, there is nothing in this contention.

No other grounds for a reversal of the decree have been urged upon us, and it will therefore be affirmed.

CATHEY *v.* STATE.

Opinion delivered February 10, 1930.

Harney McGehee, for appellant.

Hal L. Norwood, Attorney General, and *Robert F. Smith,* Assistant, for appellee.

HART, C. J. Buford Neely and Jack Cathey were jointly indicted and tried by a jury for the crime of robbery. The jury returned a verdict of not guilty as to Neely, and guilty as to Cathey, and fixed his punishment at three years in the penitentiary. Cathey has appealed.

The only ground relied upon for a reversal of the judgment is that the testimony was not legally sufficient to sustain the verdict.

According to the testimony of E. E. Moore and his wife, they operated a grocery store in the city of Fort Smith, Sebastian County, Arkansas. When they were getting ready to close their store, at about seven o'clock in the evening on the 20th day of February, 1929, their telephone bell rang, and some one telephoned them to wait a few minutes, so he could come and get some groceries. They sat down by the stove to wait while their customer was coming. In a few minutes a man came in and asked Mr. Moore about some pork chops. He walked behind Moore, and Moore asked him if he was the party who called over the telephone. The man, whom Moore recognized as Neely, replied, "No." Neely drew a pistol on Moore, and the defendant, Cathey, drew a Winchester gun on Mrs. Moore, and the Moores were told to put up their hands, that they were being held-up. They demanded cash from Moore, and he told them that he had put it up. Neely then knocked Moore down, and he was rendered unconscious. Mrs. Moore then became frightened and told them where the money was. They continued to hold their guns on Mr. and Mrs. Moore, and took from the store $195 in money of the United States and three checks amounting to $97. Both Mr. and Mrs. Moore recognized Neely and Cathey as the men who robbed them.

According to the testimony of Neely, he was sick at home at the time of the robbery, and his testimony was corroborated by that of the physician who attended him, and by that of other persons.

According to the testimony of Cathey, he lived about two doors from the store that was robbed, and was engaged in playing a social game of cards there at the hour

when the robbery occurred. His testimony was corroborated by that of the people with whom he lived, and with whom he was playing cards at the time.

While we cannot say that there is no sufficient evidence upon which the verdict might be sustained, it is not very satisfactory, and the verdict of the jury is somewhat inconsistent. Mr. and Mrs. Moore identified both Neely and Cathey as the men who robbed them. They identified each of the parties with equal positiveness, and it is manifest from their testimony that they were both guilty. The jury returned a verdict of not guilty as to Neely, and guilty as to Cathey. Both defendants made proof of an alibi. According to the testimony of Neely, and of the witnesses in his behalf, he was sick at home at the date of the robbery. According to the testimony of Cathey and of other persons, he was playing a social game of cards at the house where he roomed, which was about two doors away from the store that was robbed, at the time of the robbery. The jury, however, were the judges of the credibility of the witnesses, and there is no principle of law upon which the court could reverse a judgment of conviction against Cathey, because it seems inconsistent with returning a verdict of not guilty as to Neely.

According to the testimony of the witnesses for the State, all the elements of the offense of robbery existed; and while their testimony was somewhat weakened by cross-examination, and by the contradictory evidence of the witnesses for the defendant, yet it was within the province of the jury to believe them, or so much of their testimony as it believed to be true; and this testimony, being of a substantive character, we are not at liberty to disturb the verdict of the jury or to reverse a judgment based upon it. *Martin and Woodard* v. *State,* 178 Ark. 117, and *Weldon* v. *State,* 179 Ark. 10, 14 S. W. (2d) 245.

Therefore, the judgment will be affirmed.

FIRST NATIONAL BANK OF WALDRON *v.* ARY.

Opinion delivered February 10, 1930.

[redacted]

O. R. Smith, A. F. Smith and *Evans & Evans,* for appellant.

Sam T. Poe, Tom Poe, McDonald Poe, Duke Frederick, W. A. Schofield, Lee J. Lewis, W. A. Bates, Holmes, Canale, Loch & Glanker and *Hamilton E. Little,* for appellee.

SMITH, J. This case involves a contest of the will of W. B. Turman, who died at the age of eighty-seven without having married. He had for a number of years been the president of the First National Bank of Waldron, and was serving in that capacity at the time of his death, and, while he owned only a small amount of the stock, he carried a large deposit in the bank. Upon his death his will was probated in common form, without notice to his heirs. By the terms of his will, Turman gave $1 to all persons related to him within the fourth degree, and the remain-

der of his estate was devised to the bank of which he had been president.

Five separate appeals were prosecuted from the order of the probate court admitting the will to probate, all of which were perfected in the manner provided by the statute. Section 2258, C. & M. Digest. One of the appellants was Dona Ary, who alleged that she was the illegitimate—but adopted—daughter of the decedent. The others were second cousins, or the descendants of second cousins, who were shown to be the next of kin. These claimants are divided into two groups, one tracing their kinship through the decedent's paternal line, the other through the maternal line, and these latter claim that they are the sole heirs at law, for the reason that the estate in question is an ancestral one which came to the decedent through his mother. Dona Ary claims the entire estate, to the exclusion of both sets of heirs, upon the theory that, having been adopted as a daughter, she is the sole heir at law. She claims that she was adopted pursuant to the act of January 12, 1853, which appears as §§ 3493 and 3494, C. & M. Digest, and that the declaration of that fact, for which the statute referred to provides, was duly recorded, but that all the records of the county were destroyed by a fire. A *prima facie* showing to this effect was made before the court.

Numerous motions were filed in the case, which we find it unnecessary to discuss in detail, as the purpose of all of them was to require the contestants to settle their conflicting claims before being allowed to contest the will. These motions were overruled, and the will was contested in the circuit court, upon the appeal from the probate court, upon the grounds that the testator lacked testamentary capacity to make a will, and had been unduly influenced in its execution.

There was a preliminary hearing before the court, upon which much testimony was taken, touching the rights of the contestants to oppose the probate of the will, and the court, without passing upon the respective merits of

the conflicting claims, held that all of them had made a *prima facie* showing of an interest in the estate, which gave them the right to resist the probate of the will. The court consolidated all the appeals into a single case, and a jury was impaneled to determine the validity of the will. The jury found against the will, and, as the testimony upon which this finding was made has not been abstracted on this appeal from that judgment, it will be conclusively presumed that the testimony supported the verdict of the jury, and the judgment thereon to the effect that Mr. Turman had died intestate.

For the reversal of this judgment, it is very earnestly insisted that it was prejudicial error for the court to have permitted these conflicting interests to make common cause in an attack upon the will, and that the court should have required these claimants to contest separately or to have first litigated among themselves the merits of their respective claims.

We do not agree with learned counsel in this contention. Certainly it is not the policy of the law to permit five separate contests of a will. There was either a will or there was none, and this was the only question involved on the appeal from the probate court, and as each contestant raised this question and no other, it was entirely proper to consolidate these separate appeals, and to try them as a single case. Section 1081, C. & M. Digest. There was an order and judgment of the probate court admitting the will to probate, which bound all persons until that judgment was set aside. It would, therefore, have been an anomalous practice to have required these claimants, whose interests under the will were merely nominal, to first litigate the merits of their respective claims, while a valid order probating the will was outstanding, which will practically exclude all of them from any participation in the distribution of the estate. Dona Ary took nothing under the will, and the other claimants only $1 each, and until it had first been determined that there was no will, there was no occasion for them to litigate with

each other. The time within which any of them could appeal might have expired before the question of their relative rights could be adjudicated.

The trial in the court below was had under § 10,525, C. & M. Digest, which provides that "When the proceeding is taken to the circuit court, all necessary parties shall be brought before the court; and, upon the demand of any one 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."

The question for trial, therefore, was, how much, if any, of the testamentary paper produced was or was not the last will of the testator? and the question was not how the estate should be distributed if the will was not valid. That question did not then arise, and has not yet arisen. All of the appellants from the probate court were necessary parties, and should have been brought before the court if they had not voluntarily come through their appeals from the probate court, as a proceeding was about to be had which would be conclusive of their rights to an interest in the estate.

"An heir at law may contest without any other showing of interest than heirship, so may the widow, legatees, devisees, beneficiaries under a trust, assignees of legatees, claimants under prior or subsequent wills. Borland on Wills and Administration (enlarged ed.), pp. 210-211.

All the contestants made a *prima facie* showing of heirship, and of an interest adverse to the will, and upon this showing they were entitled to contest the will. None of them has asked that the estate be distributed, nor could they do so in this proceeding, as the sole question to be tried on the appeals from the probate court was, How much of the testamentary paper produced is or is not the last will of the testator?

By § 216, C. & M. Digest, it is provided that "No executor or administrator shall be compelled to pay legacies or distributive shares, unless the same are of a perishable nature or subject to injury, until two years

after the date of his letters, unless ordered by the court so to do; and not then until bond, with good and sufficient security, be given by the legatee, or distributee, to refund his proportion of any debt which may afterward be established against the estate, and the costs attending the record thereof."

When the time thus provided by law for the distribution of the estate arrives, these conflicting claims will then be heard upon that question; but, before that question could be properly determined, it was necessary, first, to determine whether there was a will, and this is the only question which § 10525, C. & M. Digest, provides shall be determined upon the appeal from the probate court.

The cases of *Flowers* v. *Flowers*, 74 Ark. 212, 85 S. W. 242, and *Brackville* v. *Holt,* 153 Ark. 248, 239 S. W. 1059; are decisive of the question here presented.

The Flowers case arose under facts which are very similar to those of the instant case. There Josephine Flowers claimed to be a child and sole heir at law of the testatrix, while Baldwin and two others who joined in the contest denied the legitimacy of the alleged daughter, and claimed that, there being no legitimate child, they were the sole heirs at law. In that case testimony was offered on the question of the legitimacy of Josephine Flowers, and the court said:

"It is next argued by counsel for appellants, that the court erred in submitting to the jury the question of the legitimacy of appellant, and they contend that the statute limits the submission to the sole question, 'which or how much of any testamentary paper produced is or is not the last will of the testator.' Kirby's Digest, § 8041. It is only persons who are interested in the estate of a decedent who can be heard to contest a proposed will; and if an issue be made as to the right of contestant to appear for that purpose, it becomes necessary for the court to determine that question. In this kind of a proceeding the jurisdiction of the probate court, and of the circuit court on appeal, is limited to the sole question as

to whether or not the proposed instrument shall or shall not be admitted to probate as a will; but, for the purpose of ascertaining the rights of the parties to contest, the court may inquire into the interest of the contestant as a preliminary question. *Brogan* v. *Brogan,* 63 Ark. 405, 39 S. W. 58; Works on Courts and Jurisdiction, p. 441; Brown on Jurisdiction, § 146.

"The better practice is, we think, for the court to settle such incidental or preliminary question before the trial of the main issue, rather than to submit them all together; but this is a matter left to the sound discretion of the trial judge, and we cannot say there has been any abuse of that discretion, or any prejudice resulting therefrom to the appellants. They, having raised the issue as to the legitimacy of appellee, thereby challenging her right to contest the will, and having taken the initiative in producing proof tending to show her illegitimacy, cannot now be heard to complain of the court's action in submitting the question to the jury to be determined from the proof."

Here the trial court did what was there said to be the better practice. It was determined by the court as a preliminary matter that all the contestants had made a *prima facie* showing adverse to the will, and upon this showing they were all permitted to join in its contest, and to try the question, "which or how much of any testamentary paper produced is or is not the last will of the testator?"

Numerous cases are cited in the briefs of appellees, which are in harmony with the views of this court expressed in the cases above cited, but the value of those cases depends upon the similarity of the statutes construed to the statutes of this State, for the reason that the contest of a will is a statutory proceeding.

We call attention, however, to the case of *Lillard* v. *Tolliver,* 154 Tenn. 304, 285 S. W. 576, in which the authorities are reviewed at length. The procedure in contests over wills is similar under the statutes of Ten-

nessee to the procedure in this State. The court there held that the filing of a will contest transferred the proceeding to the circuit court to be there heard as an original—and not an appellate—proceeding, and that all persons interested, either for or against the will, had the right to be made parties to the suit, and that strict common law rules relating to adversary proceedings between parties would not be enforced, but that most liberal rules admitting parties would prevail. It was there further held that public policy required the courts to shorten, as far as possible, litigation involving estates of decedents, and that claimants or persons having any possible interest in the estate of the decedent are proper parties in a will contest.

It having been determined that there was no will, the contestants may now litigate in an appropriate manner the validity of their respective claims.

Certain other questions have been raised as to the trial of the cause at an adjourned term, and the refusal of the court to change the venue; but there does not appear to have been any abuse of discretion in the ruling of the court in either of these matters.

As no error appears in the proceeding from which this appeal comes, the judgment must be affirmed, and it is so ordered.

WILSON *v.* MONTICELLO COTTON MILLS COMPANY.

Opinion delivered February 10, 1930.

D. A. Bradham, W. F. Norrell and *R. W. Wilson,* for appellants.

J. G. Williamson, Lamar Williamson and *Adrian Williamson,* for appellees.

HUMPHREYS, J. This suit was brought in the chancery court of Drew County by appellees to enjoin appellant, Walter Wilson as ex-officio collector of taxes, from distributing to the State of Arkansas and her subdivisions $6,051.52 in taxes collected from it over its protest on April 10, 1928, which had been assessed, and extended on the tax books of Drew County against the property used in the manufacture of cotton and fiber goods, and for judgment against him to refund said sum to it; and to enjoin appellant A. B. Clower and his successor, as assessor, from assessing its property invested in its textile plant in Monticello, Drew County, Arkansas, for a period of seven years from the date of its organization and location of its said textile mill on January 1, 1926.

The gist of the complaint, gleaned from the express allegations therein, and the reasonable inferences deducible therefrom, is that the capital or property involved herein was invested in a textile mill in this State on January 1, 1926, and was, and is exempt from assessment and taxes for a period of seven years from said date under amendment No. 12 of the Constitution of the State of Arkansas adopted on the 5th day of October, 1926, which is as follows:

"Section 1. That all capital invested in a textile mill in this State for the manufacture of cotton, and other fiber goods in any manner, shall be, and is, hereby declared to be exempt from taxation for a period of seven years from the date of the location of said textile mill."

"Section 2. This amendment shall take effect and be in force and operation after its approval and adoption by the people of the State of Arkansas."

A demurrer was filed to the complaint which was overruled by the court, and, appellants electing to stand upon their demurrer and refusing to plead further, the court rendered a decree cancelling the assessment of 1926, and the extension of taxes upon the taxbooks of Drew County pursuant to the assessment, and enjoining further assessment and collection of taxes upon said property by appellee for a period of seven years from January 1, 1926, and adjudging that said collector return all the taxes collected to appellee, from which is this appeal.

Appellants contend for a reversal of the decree, and a rendition of a decree sustaining the demurrer to the complaint, and a dismissal of same, alleging as reasons therefor; first, that amendment No. 12 is not retroactive, and does not and can not exempt capital invested in textile mills prior to its adoption; second, that amendment No. 12, as construed by the General Assembly in act No. 74 of 1929, applies to capital invested after its adoption; and third, that amendment No. 12 exempting capital invested in textile mills from taxation grants immunity to certain citizens of the United States, and denies an equal protection of the laws to other citizens of the United States contrary to § 1, article 14, of the Constitution of the United States, and is void.

■ It was not necessary, as contended by appellants, for amendment No. 12 to expressly state that it was retroactive, or that such intention be clearly implied, in order to exempt appellee's property or capital from assessment and taxation. The language of the amendment itself exempts the property or capital without interpreting the language as retroactive in effect. The amendment plainly and unmistakably states that capital invested in a textile mill "shall be and is hereby declared to be exempt from taxation for a period of seven years from

the date of the location of said textile mill." The amendment does not say that all capital invested in a textile mill after the adoption thereof, nor thereafter invested shall be exempt from taxation for a period of seven years from the date of the location of the textile mill, but, on the contrary, grants exemption to all capital invested in a textile mill in this State "for a period of seven years from the date of the location of said textile mill." It will be observed that the emphasis is placed upon the date of the location of the mill, whether located before or after the adoption of the amendment. A part of the seven year exemption might exist before, and a part after the adoption of the amendment, or all after the adoption thereof. According to the allegation of the complaint in the instant case, conceded by the demurrer, all of appellee's capital involved was invested in a textile mill at Monticello, Arkansas, in the year 1926, prior to the adoption of the amendment in October of that year, so this period of seven years exemption from assessment and taxation began when it located its textile mill at Monticello on January 1, 1926. It is true that appellee purchased the physical assets of the Monticello cotton mills, which was a textile mill that had been operated for many years, and then engaged in the manufacture of cotton cloth at the present site; but the complaint contained the following allegation relative to the investment of its capital in the textile mill in question.

"(b). The plaintiff (appellee) immediately took possession of the textile mill so purchased, and invested a large amount of additional capital therein by practically rebuilding said mill, changing it from an old styled steam driven to an electrically driven mill, installing large amounts of new machinery, and doubling the capacity of said mill, which textile plant, as so rebuilt and enlarged and modernized, the plaintiff has continuously operated at its location in Monticello, in Drew County, in the State of Arkansas until the present time."

This allegation was tantamount to alleging that appellee's capital was invested on January 1, 1926, in a textile mill within the meaning of amendment No. 12.

■ We cannot agree with appellants that the Legislature of 1929 construed amendment No. 12 to apply to capital only invested in a textile mill after its adoption ment. The act referred to followed the language of the amendment in exempting the capital invested in textile mills for a period of seven years after the adoption of the amendment or for a period of seven years after the location of such textile mills in the State. Certainly, the Legislature did not intend to exempt property by the passage of said act which was not exempt under the language of amendment No. 12. If such was its purpose, the act would necessarily be void because in conflict with the amendment itself. The purpose and intent of act No. 74 was to effectuate amendment No. 12 and not to efface or destroy it.

■ Amendment No. 12 does not, as contended by appellants, contravene or offend against § 1, article 14, of the Constitution of the United States prohibiting the abridgment of immunities or requiring equal protection of the laws to every citizen of the United States. The effect of the amendment was not to grant immunity to some and deny equal protection to other citizens of the United States, but to exempt capital of all citizens invested in textile mills from taxation for a period of seven years from the date of the location of the mills. It was a reasonable classification under the State's right of taxation exempting certain capital from taxation applicable to all individuals, partnerships or corporations within the class to encourage the location of textile mills in this State for the manufacture of cotton and other fiber goods. The classification was not discriminatory and arbitrary, but applied alike to all citizens coming within the class. Such classifications and exemptions have been upheld as valid, when extended by States to

railroads and telephone lines, by the Supreme Court of the United States in the cases of *Florida Cent. Rd. Co.* v. *Reynolds,* 183 U. S. 480, 22 S. Ct. 176, and *Citizens' Telephone Co.* v. *Fuller,* 229 U. S. 322, 33 S. Ct. 833. The right of a State to classify and exempt railroad companies and telephone lines necessarily implies the right of a State to exempt textile mills from taxation, if the classification applies impartially to the property of all citizens in the class. In amendment No. 12 and act 74 of the Acts of 1929 it does.

No error appearing, the decree is affirmed.

MR. JUSTICE KIRBY dissents.

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

Opinion delivered February 10, 1930.

H. T. Harrison and *Thos. S. Buzbee,* for appellant.

Golden Blount and *Tom W. Campbell,* for appellee.

HUMPHREYS, J. This is an appeal from a judgment rendered in the circuit court of White County against

appellant for injuries received by appellee at the public crossing where the highway crosses appellant's railroad track near Protho's gin in Pulaski County, in a collision between appellant's freight train and appellee's motor truck between 10:00 and 11:00 o'clock on the night of May 8, 1928.

Appellee joined the engineer, E. G. Medlock, operating the locomotive at the time of the collision, with the appellant as co-defendant, alleging their concurrent negligence as grounds for a recovery against both. The allegations of concurrent negligence are contained in paragraph (c) of the complaint, which is as follows:

"The said defendants, and each of them, then and there neglected and wholly failed to ring the bell or sound the whistle of the engine of said train at all, as the said train approached said crossing, or to give any signal whatever to warn persons of the approach of said train, although said crossing was upon one of the most constantly used highways in the State, and many people were then and there almost constantly coming and going along said highway and over said crossing, which fact was known by said defendants; the said defendants therefore failed to exercise ordinary care for the safety of persons then and there about to cross over said crossing, in violation of the duties imposed upon said defendants by law, but carelessly and negligently ran said train over said crossing, and struck the plaintiff and truck in which he was then and there riding, causing the plaintiff's injuries as aforesaid, and said defendants then and there knew that plaintiff was approaching said crossing in his said truck, and said defendants then and there knew, because of the darkness of the night, and because of the fact that no bell had been rung or was being rung and no whistle had been sounded or was being sounded upon the engine of said train, and the headlight on said engine was so defective, that it could not be seen at a safe distance by travelers upon said highway,

that the plaintiff did not know said train was approaching said crossing, yet, with full knowledge of the plaintiff's said peril, said defendants then and there negligently, wilfully and maliciously ran said train over said crossing, and struck the plaintiff and his said truck, and injured him as aforesaid."

Appellant filed a petition in apt time to remove the cause to the United States District Court, in due form and accompanied by proper bond, which contained, in addition to an allegation of diversity of citizenship, the following averment:

"That it is alleged in paragraph (c) of the complaint that E. G. Medlock, an engineer on a train of the defendant, which it is alleged struck a truck driven by the plaintiff; knew that the plaintiff was approaching the crossing at which said alleged collision took place. Petitioner alleges as a fact that at the time of said alleged collision the defendant E. G. Medlock, as engineer of said train, had passed said crossing, was several hundred yards therefrom, and could not have known that plaintiff was approaching said crossing, and that these facts were known to the plaintiff at the time the complaint herein was prepared and filed, and said allegations were made by plaintiff fraudulently, and for the sole purpose of preventing a removal of this cause to the United States District Court."

The trial court refused to transfer the cause to the United States District Court, over appellant's objection and exception, although the request to transfer was renewed after all the evidence had been introduced.

The record reflects, in substance, the following facts:

Appellee, with two guests, A. R. Brewer and Opal Padgett, was driving his truck from Beebe to Little Rock, and, after crossing the Iron Mountain Railroad, all of them began and continued to listen in both directions for a whistle or bell as they approached the crossing near Protho's gin, and, hearing none, continued to

travel, still listening, at the rate of twenty-five or thirty miles an hour until within about one hundred feet (estimated) of said crossing, when they observed appellant's through freight near to or on said crossing running east towards Memphis. The train was running about thirty-five miles an hour. Although looking, they had been unable to see any headlight on the train. Immediately upon the discovery of the train on or near the crossing appellee applied the foot and emergency brakes, which were in good repair, turned off the switch, and put the engine in gear, but, failing to stop the truck in time to prevent a collision, turned it to the right in an effort to do so, and ran into either the corner of the first box car or the twentieth box car in the rear of the locomotive. The three occupants of the truck testified that the corner of the first box car behind the engine struck the automobile, and Opal Padgett, who recovered consciousness immediately, testified that other box cars bumped against the truck as they passed along. One of appellant's employees found the radiator of the truck hung onto the corner of the twentieth box car following the locomotive, when he inspected the train after same reached Carlisle. Appellee met two automobiles just before he discovered the train, which had passed over the crossing in front of said train. Ben Hodges, in company with Lon Etson, was driving the second car which appellee met just before he discovered the train near or on the crossing. They both testified that, as they approached the crossing near Protho's gin, they were listening and watching in both directions for a train, and did not hear any bell or whistle, and did not see the headlight of the train, although there was nothing between them and the train to prevent them hearing, or to obstruct their view. They also testified that, after meeting and passing appellee, they heard a noise, and looked back, and saw a train moving over the crossing, but heard no bell or whistle. Appellee further testified that he thought, at the rate of speed he

was traveling, that he could stop his truck within a space of about thirty-two feet by applying his brakes, but that he might not be able to do so on a concrete road. The highway at this point had a concrete surface.

The employees operating the train testified that the headlight was in good repair, shining brightly, and that they were sounding the whistle and ringing the bell continuously, for a distance of eighty rods before reaching the crossing near Protho's gin.

Appellant first contends for a reversal of the judgment because the trial court refused to grant its petition for the removal of the cause to the United States District Court. It is argued that paragraph (c) of the complaint failed to state a joint cause of action against appellant and E. G. Medlock, and that its petition for a removal to the United States District Court contained a statement of facts showing that the joinder of E. G. Medlock with appellant was a fraudulent device to prevent a removal of the cause. Our attention is called to the allegation in the petition to the effect that E. G. Medlock, the engineer, had passed the crossing, was several hundred yards therefrom, and could not have known that appellee was approaching the crossing, and that these facts were known to appellee at the time the complaint was prepared and filed. The allegation of a fraudulent joinder in the petition for removal is directed at the latter part of paragraph (c) in the complaint. A complete joint cause of action is sufficiently alleged in that portion of paragraph (c) down to and including the word "aforesaid" just before the first semi-colon in the paragraph. It was so ruled in the case of *Burke* v. *Missouri Pacific Rd. Co.,* 294 Fed. 1913, and the rule announced in that case is supported by the decisions of the Supreme Court of the United States cited therein. The facts alleged in the first part of paragraph (c) of the complaint referred to were not traversed by the allegations in the petition for removal and, as they

state complete joint cause of action against appellant and E. G. Medlock, the engineer, it is apparent that the petition for removal was insufficient on its face to deprive the trial court of its jurisdiction to try the cause. No facts were set forth therein tending to show that the joinder of appellant and E. G. Medlock in that part of paragraph (c) was a fraudulent device to prevent a removal of the cause. We also think the court properly retained jurisdiction to try the cause after all the evidence had been introduced upon the renewal of appellant's petition to remove said cause to the United States District Court. The record reflects ample evidence of a substantial nature to sustain the allegations of fact contained in the first part of paragraph (c) in the complaint heretofore referred to.

Appellant's next contention for a reversal of the judgment is the refusal of the trial court to peremptorily instruct a verdict for it.

The facts in the instant case bring it within § 8575 of Crawford & Moses' Digest, commonly known as the comparative negligence statute, as there is substantial evidence in the record tending to show negligence on the part of appellant and its employees, as well as to show contributory negligence on the part of appellee.

The testimony introduced by appellee tended to show either that the headlight on the locomotive was not functioning or was in bad repair, and that the bell was not ringing and whistle not blowing as the train approached the public crossing near Protho's gin.

The testimony introduced by appellant tended to show that appellee approached said crossing without exercising ordinary care for his own safety by listening for warning signals that were given, and watching for the train, the headlight of which could have been seen within time to have stopped his truck and prevent the injury.

The rule of the comparative negligence statute is that an injured party, guilty himself of contributory

negligence, cannot recover damages for an injury unless his negligence is of less degree than the negligence of the railroad company or its employees.

The facts detailed above presented the issue of whether appellant was to blame in greater degree than appellee for the collision resulting in the injury, and, on account of the conflict in the evidence, the issue was properly determinable by the jury, not by the court.

Appellant argues that, because appellee did not stop his truck after discovering the train, and thereby prevent the injury, it must be said, as a matter of law, that he was to blame in equal or greater degree than the appellant for the collision and consequent injury. The distance he was from the train when he discovered it was only an estimate, and the evidence tends to show that he did all in his power to stop the truck, and avoid the collision after he discovered the train. He did not testify positively the distance he was from the train when he discovered it, nor that he could stop his truck within thirty-two feet on a hard surface road. The undisputed evidence does not show that he was driving at a reckless rate of speed, or that he could have discovered before he did that a train was coming by listening for signals and watching for same. The evidence tended to show that he did both. The court therefore submitted the issue to the jury for determination under correct instructions. Appellant's criticism of instruction No. 6 to the effect that it was abstract is not supported by the record.

No error appearing, the judgment is affirmed.

SMITH, J., (dissenting). The testimony on the part of the railroad company was to the effect that the train had been made up at Biddle, which is a division point in the suburbs of Little Rock where engines are inspected, and where this engine had been inspected and the headlight found to be in perfect condition, and no trouble of any kind developed during the trip, which began at Biddle; that it was only four or five miles from Biddle to the

Protho crossing, where the collision occurred, and that the run of this train and of similar trains between these points was usually made in about twenty-five or thirty minutes; that the automatic bell ringer was turned on when the train left the yards at Biddle and was not turned off until the train had gone some miles beyond that point; that it was customary to ring the bell with the automatic bell ringer between Biddle and the Protho crossing because of the numerous road crossings between those points, and the engineer and fireman testified that they would not have dared run this train without the protection which a headlight afforded. Dr. Protho, near whose place the collision occurred, testified that he visited the scene shortly after the train had passed, and that the tracks of the truck showed that it was run "head-on" into the train.

If it be assumed that the jury disregarded all of this testimony, and that it was not arbitrary so to do because it was in conflict with other testimony on the subject, there are certain undisputed facts which it was arbitrary to disregard, and among others are these: The country was open and level, and there was nothing to obstruct the view of the approaching train. There had been no rain, and the night was clear, although the testimony does not show whether the moon was shining. Certainly the driver of the truck could have seen an object as large and as long as a train if he had looked, even though the headlight was not burning. More certainly could appellee have heard this train, had he listened. The train consisted of sixty-three cars in addition to the engine, and it had attained a speed of about forty miles per hour at the time of the collision. It could not have done this without making a noise which could have been plainly heard by appellee a sufficient distance away from the track to have enabled him to stop his truck if he had been paying the slightest attention to his surroundings. Appellee admitted that he could have stopped his truck in a distance equal to two or three times its length. The train could not have been stopped in many times that distance.

Appellee was thoroughly familiar with his surroundings, and for some time had been crossing the railroad tracks at the place of the collision twice daily. He knew that he was approaching the crossing, for he and the other occupants of the truck testified that they were listening for trains. Appellee did not claim that the engine struck his truck, but he did testify that he thought it was the first car next to the engine which had struck the truck. He testified. "I don't know what box car, but somewhere between the second or tenth or twelfth box car, somewhere along there."

The train crew testified that they knew nothing about the collision until the train stopped at Carlisle, which is twenty-seven miles east of the Protho crossing, when the conductor found part of an automobile radiator hanging on the oil box of the twentieth car from the rear of the engine, and this radiator was identified as the one which had been knocked off of appellee's truck.

The testimony appears to me to establish the fact beyond question that appellee ran his truck into the train; that the train did not hit him, but that he hit it, and if this is true it should be said here, as was said in the case of *St. Louis-San Francisco Ry. Co.* v. *McClinton,* 178 Ark. 73, 9 S. W. (2d) 1060: "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," which is the comparative negligence statute under which the majority have upheld the verdict and judgment of the court herein.

I therefore dissent, and am authorized to say that Mr. Justice BUTLER concurs in the views here expressed.

SCHULTZ CONSTRUCTION COMPANY *v.* LOVETT.

Opinion delivered February 10, 1930.

[redacted]

Pryor, Miles & Pryor, for appellant.

Partain & Agee, for appellee.

HUMPHREYS, J. The sole question presented by this appeal is whether the record contains any substantial evidence tending to show negligence on the part of appellant which contributed to appellee's injury. An automobile operated by Henry Shull ran into a cable in use by appellant causing it to hit appellee, who was engaged in his duties near the cable, with such violence and force that he was thrown twelve feet into the air and thirty feet from where he was standing, and severely injured him. He sued appellant for damages in the sum of $3,000, and recovered a judgment for $500 on account of the injury for alleged negligence in placing him at work with the cable stretched across a traveled street without putting out any warning sign of approaching traffic,

and maintaining an outlook to protect appellee while engaged in the performance of his duties.

The record reflects that a three-quarter inch steel cable was attached at one end to a railroad car, containing sand, which was standing on one side of the main street in Alma, Arkansas, with the other end attached to a clam shell on the other side of the street, for the purpose of pulling the car across said street; that, in doing this, appellee was directed by Ole Oleson, appellant's foreman, under whom he was working, to stand in front of the car, and pull the slack out of the cable when the clam shell stopped working, to keep the cable from being run over by the wheels of the railroad car, and that, while engaged in his work, a traveler by the name of Shull ran his automobile into the cable, causing it to strike the cable in the manner, and with the result alleged in the complaint.

Ole Oleson testified that he was the clam shell operator for appellant and engaged, at the time of the injury to appellee, in pulling a railroad car containing sand across the street with the cable and clam shell; that it was appellee's duty to pull the slack out of the cable, and to watch for traffic coming from the south, while it was the duty of another employee by the name of Rob Bounds to watch for traffic from the north, and to perform other duties around the car of sand; that, while Rob Bounds had gone to the car to perform duties there, the automobile driven by Shull came from the north, and struck the cable just as appellee was going to pick it up to keep the slack away from the wheels of the railroad car; that just as appellee started down the automobile came along and struck the cable; that he put no one up the street to stop the traffic.

The record also reflects that no signs warning the traffic were put out.

On cross-examination the following questions were propounded to and answered by appellee:

"Q. Was the place provided for you to work a safe place? A. Why, the street was a safe place if that man had stayed back where he belonged and not knocked me out in the street. It is just as safe a place as you ever saw if that man had stayed where he belonged. Mr. Hardin: We object to the statement about where he belongs. The court: Yes, that is right. Q. When this cable was stretched across the street, was it easy to see? A. Yes sir. Any one could have seen it. Q. Do you think it was necessary, to prevent a man in a car from running into the cable, to place a watchman there? A. No sir. It was not necessary to have a watchman there. He could see the cable. Mr. Hardin: We object on the ground that these are conclusions. The court: That is well taken."

Appellant contends for a reversal of the judgment, because appellee is bound by his answers tending to show that the street was a safe place to work without a watchman being stationed there, and without signs being put out to warn the public. The questions and answers are set out above. They were objected to by the attorney for appellant's co-defendant, and ruled out by the court. They cannot be treated as a part of the record against appellee on this appeal as they were ruled out by the trial court generally, and for all purposes. The record stands as if the questions had never been asked and answered. In this view it is unnecessary to decide whether these questions and answers within themselves would have precluded appellee from recovering a judgment.

Appellant also contends for a reversal of the judgment, because there is no substantial evidence tending to show any negligence on the part of appellant. We cannot agree with appellant in this contention. The law imposed the duty upon it to use ordinary care to make the place reasonably safe for its employees, and it could have done this by putting out warnings and watchmen to keep the traffic back while appellee was

at work. He was called from other work to this place for the purpose of taking up the slack out of the cable, and was unable to watch and protect himself against traffic approaching him from the rear or the north at the time his attention was required in the performance of his other duties.

Appellant also contends for a reversal of the judgment, because the injury it claims resulted to appellee through the negligence of his co-employee, Rob Bounds in leaving the place as watchman. This would have been true, had his co-employee abandoned his post as watchman without the knowledge of appellant. The record reflects that he left, not only with the knowledge of appellant's foreman, but with his implied consent, to attend to appellant's business around the car of sand. This made his leaving or his absence the negligence of appellant.

No error appearing, the judgment is affirmed.

SULLIVANT *v.* CLEMENTS.

Opinion delivered February 10, 1930.

Isaac McClellan and *Clary & Ball,* for appellant.

Nathan Nall and *George H. Holmes,* for appellees.

KIRBY, J. Appellant prosecutes this appeal from a judgment for damages obtained against him by appellees for the obstruction of an alleged public road interfering with their hauling logs to and lumber from their mill to the State highway.

Appellant denied the allegations of the complaint, and filed a demurrer and cross-complaint.

The testimony shows that the road had been used by the public, the people living in that neighborhood and beyond, for 40 or 50 years, although some of the witnesses testified that it had fallen into disuse and had been used very little, if at all, for the last 10 or 15 years. Appellant admitted, too, that he had given appellees permission to haul over the road that ran across his land. The testimony showed that appellant had obstructed the road by tearing up some of the bridges, cutting trees down across the road, and rolling logs into the road, as well as removing some of the causeway put down by appellees. Appellees had bought some timber on some land there, and put the mill on one of the tracts of land on which they had bought the timber, expecting to use this old road in hauling the logs to the mill, and lumber from the mill to the State highway. It was the most convenient, if not the only way, to and from the mill. It was shown that, because of appellant's activity in obstructing the road, it got so bad that some of the teamsters that had hauled lumber at so much per thousand feet quit their contracts, and appellees were compelled to hire them at a specified amount per day. That finally the interference got so bad that appellees were compelled to move their mill; and the testimony showed that appellant continued to obstruct the road and harass the teamsters when they were hauling the logs from the old to the new mill-site. Appellant admitted, that he had consented for appellees to use the road in hauling the logs and timber, and gave no explanation of having withdrawn this permission. He

also testified about the damages done to his unfenced lands, through which the road ran, by reason of the use of it for the transportation of logs to and lumber from the mill. The jury returned a verdict for $150 damages for appellees, and from the judgment thereon this appeal comes.

Appellant insists that the court erred in not directing a verdict in his favor, and also in overruling his general demurrer to the complaint.

It is insisted that no special damages were suffered by appellees because of appellant's obstruction of, and interference with, their use of the road more than resulted to all others using the road and the public generally. Such is not the case, however. The undisputed testimony shows that this was the most convenient, if not the only practical, way to and from the mill in supplying it timber and transporting the lumber to the market; and this court has held that the deprivation of an entrance to, or exit from, one's property is a special or peculiar damage to him, different from that suffered by the general public, and for which an action will lie. *Langford* v. *Griffin,* 179 Ark. 574, 17 S. W. (2d) 296; *Peeples* v. *Aydelott,* 125 Ark. 50, 187 S. W. 671.

Moreover, appellant, having expressly consented for appellees to use the old road across his land, was bound to show that something had occurred to bring to an end or terminate the right of occupancy and use of the road under that permission, which the jury evidently found he had not done.

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

BAKER *v.* GOWERS.

Opinion delivered February 10, 1930.

[redacted]

James B. McDonough, for appellants.

Cochran & Arnett, Hays, Priddy & Smallwood and *W. B. Rhyne,* for appellees.

KIRBY, J., (after stating the facts). Appellants insist that the chancellor's finding, that the conveyances were made with a fraudulent intent to cheat, hinder and delay the creditors of appellants in the collection of their debts, is contrary to the preponderance of the testimony, and that these conveyances were valid, regardless of the fact that they may have effected a preference in payment of the claims of these creditors over others. The court has concluded, after a careful examination of the testimony, that the contention of appellants must be sustained.

The preponderance of the testimony shows, in our opinion, that the advances or loans of money claimed to have been made by Mrs. Van Hoozer to her son-in-law and daughter, and borrowed by them for payment of the wages of the miners and other expenses incident to the operation of the mine, as well as for interest due upon the mortgage and loans by other persons to Mrs. Baker, were actually made. The notes given by Nellie and F. B. Baker, evidenced different amounts borrowed from and furnished by Mrs. Van Hoozer, and attached to each of the notes was a short memorandum showing the different sums constituting the amount of the note given, and a great many canceled checks from Mrs. Van Hoozer were also introduced, showing the amount of money advanced as indicated by the memorandum attached to the notes executed theretofore. Both Mrs. Baker and F. B. Baker, her husband, who had the matter specially in charge, kept the memorandum of indebtedness for money borrowed from Mrs. Van Hoozer, produced a great number of paid checks, showing the amounts of money obtained, testified that they owed her for money borrowed the amount of the different notes given in the whole sum of the consideration recited in the conveyances of the 160 acres to her in payment thereof. That the debts were *bona fide* and the money had been actually supplied by Mrs. Van Hoozer. She testified that she had advanced the money in the amount shown to be due by the recited consideration in the deed, and even attempted to borrow some more money and lend to them to keep the mine in operation when they were unable to proceed. It was established also by other witnesses, that Mrs. Van Hoozer had a good deal of property, with an annual income of something over $5,000, and was able to loan the money claimed to have been advanced.

The brother, John L. Baker, Nellie Baker and F. B. Baker all testified that the debt due John L. Baker, secured by the mortgage, was a *bona fide* debt due for money obtained from him; and there was no evidence

contradicting their statement, further than the mortgage was not given at the time the note was made and the money borrowed.

It is true Mrs. Van Hoozer conveyed these lands, after they were conveyed to her by the appellants, to her grandson, the son of Nellie and F. B. Baker, for a recited consideration of love and affection; but she could do as she pleased with her own property, without regard to the source of its acquisition, if the conveyance to her was valid. The conveyances complained of are not voluntary conveyances, although made to near relatives, as disclosed by a close scrutiny of the entire transaction, and no presumption as to their being fraudulent therefore arises. "Fraud may be established by circumstantial as well as by direct evidence, but it is not to be presumed. If the form and design of the transaction may be traced to an honest source, under a preponderance of the evidence, the transaction must be allowed to stand." *Frauenthal & Schwartz* v. *Bank of El Paso,* 170 Ark. 326, 280 S. W. 1001, 44 A. L. R. 871. In Wait on Fraudulent Conveyances, § 5, it is said:

"Fraud, it is also argued, will not be lightly imputed and cannot be established by circumstances of mere suspicion. * * * The creditor must prove tangible and substantial facts from which a legitimate inference of a fraudulent intent can be drawn. The evidence must convince the understanding that the transaction was entered into for a purpose prohibited by law."

While it is true that the conveyance from Mrs. Van Hoozer to her grandson, Fenner Brown Baker, may be regarded a voluntary conveyance, it must be remembered that Mrs. Van Hoozer was not indebted to any of the creditors of the corporation, nor to F. B. Baker or his wife, Nellie Baker, and was not insolvent; and it can make no difference to any such creditors how she disposed of her property legally acquired. Having concluded, as already said, that the chancellor's finding and holding the conveyance of the 160 acres of land to Mrs.

Van Hoozer fraudulent as to creditors, and also the mortgage of the other tract to John Luther Brown, is erroneous and contrary to the preponderance of the testimony, it follows that the decree must be reversed, and the cause remanded with directions to dismiss the complaint for want of equity. It is so ordered.

[redacted]

LINOGRAPH COMPANY *v.* BOST.

Opinion delivered February 10, 1930.

[redacted]

Hugh Basham, for appellant.

Paul McKennon, for appellee.

MEHAFFY, J. This is the second appeal in this case. The suit was originally brought in the Johnson Chancery Court to recover $2,149.50, the balance of the purchase money due on a typesetting machine, and to foreclose a chattel mortgage given to secure the debt.

S. H. Logan bought the property from the appellant, and executed the notes and mortgage upon which suit was brought. Logan afterwards sold his business to Hunter and Bost, and Hunter and Bost purchased the typesetting machine from appellant, and assumed the payment of the unpaid notes given by Logan.

One of the defenses in that case was that appellant was a foreign corporation, and had not complied with the laws of this State permitting it to transact business in this State, and this contention was sustained by the chancery court; the complaint was dismissed for that reason, and appeal was prosecuted to this court. This court reversed the chancery court. The only question decided by this court, however, was the question of whether the chancery court erred in dismissing appellant's complaint on the ground that it was a foreign corporation, and had not complied with the laws of this State permitting it to transact business in this State. This court held that the transaction was an act of interstate commerce, and that the judgment of the court below in holding to the contrary should be reversed, and the cause remanded. The opinion in the case when it was here on appeal before is *Linograph Co.* v. *Logan,* 175 Ark. 194, 299 S. W. 609.

After the case was remanded it was again tried, the appellee defending on the ground that the machinery was defective, and would not work as guaranteed by appellant, and he denied that he owed appellant anything. The appellant undertook to prove that when Logan sold

out to Hunter and Bost, he sold the typesetting machine. Logan testified to this, but the other witnesses testified that Hunter and Bost bought the property from the appellant, and that Logan stated that he had nothing to sell. He had purchased it and only paid a small amount, and the appellant had retained title to the property and took notes and a mortgage.

The preponderance of the testimony shows that Hunter and Bost bought from the Linograph Company and agreed to execute notes for the purchase price, and that the representative came to Clarksville and sold the typesetting machine to them, and promised to put the machine in first-class condition, so that it would do the work. The representative went back to the home office, and they concluded that, instead of writing new notes, they would get Turner and Bost to assume the notes that Logan had given. Hunter and Bost signed a written obligation assuming to pay the notes that had been given by Logan. There was no written contract entered into between Hunter and Bost and the Linograph Company. They simply signed an obligation assuming the payment of the Logan notes.

The evidence shows that the agent of the Linograph Company came to see Bost and Turner a few days after they purchased the newspaper outfit from Logan; and after they took charge of the paper, and the agent of appellant with whom Hunter and Bost made the contract to purchase the machine promised to put the machine in good order, and guaranteed that it would do the work, and, because of these promises, they purchased the property and signed the obligation agreeing to pay the Logan notes. They had intended to buy a new machine.

The preponderance of the evidence shows that the machine was not only unsatisfactory, but so defective that it was impossible to use it; that they bought it on the guaranty made by the agent, and that they purchased from the agent because of the warranty, and this evidence was practically undisputed. There is some

conflict in the testimony as to the purchase of the machine by Hunter and Bost from Logan, Logan testifying that he sold it to them. But he could only have sold his interest in the contract, and the undisputed proof shows that they bought it of the Linograph Company and agreed to pay Logan's note, and the undisputed proof also shows that the agent of the Linograph Company warranted the machine. Bost paid the amount Logan was due the company at the time he, Bost, made the purchase, $400. When he found out he could not use the typesetting machine, he refused to pay any more, and suit was brought.

Appellant contends, first, that the case should not have been tried a second time in the lower court, because it says the pleadings have not been changed, although it is admitted that the appellee did not develop the proof fully as to the paragraph of its answer alleging the defects in the machine. And it is contended, because this court reversed and remanded the case, the lower court should have entered a decree for appellant. Appellant argues that in reversing the case this court simply said: "This cause is remanded to said chancery court for further proceedings to be had according to the principles of equity, and not inconsistent with this opinion." And he calls attention to a number of authorities sustaining his contention that when a case is reversed and remanded with directions no more proof can be taken.

Appellant is mistaken about this court reversing it and remanding it with directions for further proceedings to be had according to the principles of equity and not inconsistent with the opinon. The only question decided by this court was whether appellant was prevented from recovering, because it had not complied with the laws of Arkansas, and the court said:

"We conclude, therefore, that the transaction here under review was an act of interstate commerce, and

the judgment of the court below holding to the contrary will therefore be reversed and the cause remanded."

So it will be seen from the opinion in that case that, while the pleadings originally contained in the issue as to the defective condition of the machine, and there was some proof on that, that question was not decided by the chancery court nor this court. The chancery court holding that the contract was unenforceable because of the failure of appellant to comply with the laws of Arkansas of course made it unnecessary to decide any other questions in the case. When the case was sent back to the chancery court, it was then proper to try the question that had not been settled by this court. If a case has been fully developed, and it is reversed and remanded with directions, the lower court, of course, simply complies with the directions of this court. But when it has not been fully developed, and there are other issues made by the pleadings that have not been determined either by the chancery court or this court, then it is proper for the court below to determine these issues after the case is remanded.

Appellant calls attention to and relies on the case of *Stevens* v. *Shull,* 179 Ark. 766, 19 S. W. (2d) 1018, and quotes as follows from the opinion in that case: "In the last suit two additional grounds of attack upon the validity of the district were added. But these grounds might have been offered in the first two suits." That case involved the validity of an improvement district, and the court had passed on the validity of the district, and this was another attack on two additional grounds. And the court said: "But these grounds might have been offered in the first two suits, and for that reason the plea of *res judicata* should be sustained. As pointed out in the cases referred to, if this were not true, litigation would not end until the parties had no more money or the ingenuity of counsel in suggesting additional grounds in support of the issue had been exhausted. Different landowners could prosecute different suits and make

different attacks on the validity of the district, so that it would be practically impossible to make any proposed improvement in a city within a reasonable time. Therefore we hold that the chancery court properly sustained the plea of *res judicata* in case No. 1173."

The difference between that case and this is that there have been no additional grounds alleged in the answer in this case. The issues were made up by the original pleadings, and the ground now relied on by appellee was in the original answer. The court simply held that the contract was invalid, and did not consider or decide these other issues, and certainly it cannot be contended that an issue that has not been decided by any court is *res judicata,* where the failure to decide the issue was not the fault of the parties.

Where a case has been to the Supreme Court and been reversed, the law announced on the former appeal is the law of the case. Propositions of law once decided by an appellate court are not open to reconsideration in that court upon a subsequent appeal. Whatever was decided on the first appeal remains the law of the case for all further proceedings. *Morris & Co.* v. *Alexander & Co., ante* p. 735, 22 S. W. (2d) 558; *Fentris* v. *City National Bank,* 172 Ark. 711, 290 S. W. 58. However, the decision on former appeal is the law of the case as to so much of the case as was adjudicated. *Henry* v. *Irby,* 175 Ark. 614, 1 S. W. (2d) 49; *Chicago Mill & Lumber Co.* v. *Osceola Land Co.,* 94 Ark. 183, 126 S. W. 380.

The only question adjudicated in this case on former appeal was the right of appellant to maintain the suit. This question was settled on the former appeal, and cannot be reconsidered. The other issue raised by the pleadings was not adjudicated on former appeal, and is not *res judicata.*

It is next contended that there was no warranty because the instrument signed by Turner and Bost as-

suming the indebtedness of Logan contains no warranty. The witnesses in behalf of appellee show that the agent came here from the company, made the representations and warranties to them, and that, because of these promises and warranties, they purchased the machinery, and agreed to assume and pay the notes of Logan.

Appellant quotes and relies on the case of *Lower* v. *Hickman,* 80 Ark. 505, 97 S. W. 681, quoting from the syllabus as follows: "A warranty is so clearly part of a sale that where the sale is evidenced by a written instrument it is incompetent to engraft upon it a warranty proved by parol."

The instrument signed by Turner and Bost does not purport to be the contract of sale entered into, but simply a promise on their part to assume the notes which had been executed by Logan. The instrument does not undertake to do anything else, and does not even recite the sale.

Whether there was a warranty at the time of the sale to Hunter and Bost, and whether the machine was unfit for use, were both questions of fact, and we have repeatedly held that the finding of facts by a chancellor will not be set aside unless contrary to the preponderance of the evidence. The chancellor passed on these questions of fact, and he necessarily found that there was a warranty and a breach of the warranty.

We think that the finding of the chancellor is supported by a preponderance of the evidence, and the decree is therefore affirmed.

SPENCE *v.* STATE.

Opinion delivered January 13, 1930.

Peyton D. Moncrief, J. B. Brice, A. G. Meehan and *John W. Moncrief,* for appellant.

Hal L. Norwood, Attorney General, and *Robert F. Smith,* Assistant, for appellee.

KIRBY, J. This appeal is prosecuted from a judgment of conviction of murder in the second degree, with a penalty assessed of nine years' imprisonment in the penitentiary, against appellant for the killing of one Jed Wilsey, on an indictment for murder in the first degree.

Appellant pleaded self-defense, and it is conceded that, under the evidence, the jury would have been warranted in returning a verdict of murder or manslaughter, as well as not guilty.

Appellant contended that timber had been stolen from him, and that the deceased was interested in the stolen timber, and that on the day of the killing he went down to where a number of timber workers were living in house boats for the purpose of trying to employ one of them. He had previously spoken to Jed Wilsey about working for him; stated he went up to the house boat where Wilsey lived, and spoke to him and some other people nearby; that; while he was trying to adjust something in the motor boat, his wife, who was with him, suddenly cried, "Look out!" and he glanced up and saw Wilsey approaching with a pistol, and he dropped down in the bed of the boat and jerked up a shotgun and started firing; shot so fast that witness did not know the number of shots he fired; said he did not know where the shot took effect in Wilsey's body, and the State's testimony tended to show some of them struck him in the back and others in the side. Deceased was shot with small shot, bird or squirrel shot, and it was also shown that deceased had threatened the life of appellant.

The State's testimony showed that appellant came up to where the house boats were moored, in a motor boat, with his wife and another man. He asked if Jed Wilsey was there, and, being told he was, asked him if he was in charge of the timber. Wilsey replied that he was, and appellant said, "Come over here." Wilsey, coatless, dressed only in his shirt and trousers and unarmed, started over towards appellant's boat, and when he had gotten within about 15 feet of him, appellant presented a repeating shotgun, shot it empty, shooting deceased in the side and back as he turned to get away. Deceased fell on one of the boats, and his body was hanging off into the water. Appellant said to the others, "Let's get him out of the water," and, after first being assured by the others that they would not hurt him, he assisted, and the body was dragged back on the boat where the deceased died shortly.

The only errors assigned for reversal are the giving of instruction 7A, reading as follows: "The State is required to prove the material allegations in this indictment, and that beyond a reasonable doubt, and the material allegations are that this defendant, some time prior to the finding of the indictment in the Southern District of Arkansas County, Arkansas, killed the deceased, one Jed Wilsey;" and the misconduct of the jury in that one of the jurors, while the case was being considered became violently ill, and was allowed to be separated from the others after the court had ordered the jury to be kept together.

The instructions relative to the degree of homicide of which defendant might be convicted, were in narrative form, and there is no complaint that any of the others, or all of them, did not correctly declare the law. The jury was told that the burden was upon the State to prove all the material allegations of the indictment fully specified therein, beyond a reasonable doubt, and the law relative to reasonable doubt and the presumption of innocence was also fully declared.

The instruction complained of is not contradictory of any of the instructions given, correctly defining the different degrees of homicide, and instructing the jury that appellant could not be convicted of either of them, except upon proof convincing them beyond a reasonable doubt of his guilt. Neither does the instruction complained of attempt to set out all the elements of the different offenses, or contain any direction about how the jury should find. It could not have misled the jury to the prejudice of the defendant, since it only convicted him of murder in the second degree upon evidence showing him to have been guilty of, and conceded to be sufficient to have supported a verdict against him for, the higher degree of the offense charged—murder in the first degree—showing that the jury's consideration of the question was guided by the law, as correctly declared. The jury was directed to consider the instructions given,

as a whole, and if the instruction complained of was erroneous it was not prejudicial. *Zinn* v. *State,* 135 Ark. 374, 205 S. W. 704; *Greathouse* v. *State,* 166 Ark. 206, 265 S. W. 950; *Stotts* v. *State,* 170 Ark. 194, 279 S. W. 364; *Smith* v. *State,* 172 Ark. 164, 287 S. W. 1026.

It is next complained that the jury was allowed to separate after having been directed to be kept together by the court, in care of an officer; and, by amended motion for a new trial, that the sick juror was under the influence of narcotics to such an extent as to render him incapable of discharging the duties of a juror, which fact it was alleged was unknown to appellant before the rendition of the verdict. After the jury had been ordered kept together, and put in charge of a deputy sheriff, one of the jurors, Mr. L. F. Baker, became violently ill, and the judge, upon being notified, directed that a physician be called for the sick juror, and that he be also attended by a deputy sheriff, which was done, the remainder of the jury being kept together by the other officer in charge. The doctor visited the juror about 7 o'clock in the morning, and administered treatment for bowel trouble, giving him a hypodermic containing ¼ grain of morphine, and left him a preparation of bismuth and paregoric to be taken. He stated that the juror was suffering no pain, and his mental condition was normal when he went back to service on the jury in the afternoon. The juror said he was feeling all right, and he was down to his place of business the next day, and informed the doctor, who called at his filling station for gas, that he was feeling all right. The doctor did not think the medicine given the juror would have had a tendency to put him in a dull and sluggish condition, and, if he had not thought the man was normal, he would not have let him continue to sit on the jury.

The record recites the judge stated: "Let the records show that Mr. Hughes, deputy sheriff, was in charge of the jury, and he called me about seven o'clock that morning in my room at the hotel and told me that

one of the jurors was ill, and that it was necessary for him to have a doctor, and I advised the deputy sheriff immediately to get up and get in touch with the sheriff, and get another deputy, if it became necessary that the sick juror have a doctor. I believe it was deputy Benton Gibson who told me that it was necessary to have another deputy to look after the sick juror. Attorneys Bogle and Moncrief were sitting on the porch at the hotel, and I asked them if there was any objections to having another deputy to look after the sick juror, and Mr. Moncrief, attorney for the defense, said that it would be agreeable with him."

Joe Gordon, the deputy sheriff, stated he stayed with, and looked after, the sick juror, L. B. Baker, and that no one was permitted to talk with the juror during the time he was taking care of him. The evidence also shows that the other jurors were kept together by the officer, into whose charge they were given by the court. There was other testimony, also, showing that the sick juror, separated from the others, was not subjected to any outside influence that could have been hurtful to appellant.

It became necessary for the sick juror to have medical attention, and be separated from the others for that purpose, and he was required to be, and was kept in charge of a deputy sheriff during his separation from the jury.

Under these circumstances we think that the case does not come under the rule that such separation casts upon the State the burden of showing that no improper influence was brought to bear upon the juror during his absence from the jury, or that it was *prima facie* ground for a new trial, without any affirmative showing that the separated juror was not subjected to any noxious influence. In other words, the separation of the sick juror in charge of a deputy sheriff, for medical attention by direction of the court, from the other members of the jury pending the trial, and after the jury had

been ordered kept together by the court, was a proper exercise of the court's discretion, and could not be regarded a violation of the order requiring the jury kept together, and imposing on the State the burden of making an affirmative showing that the sick juror was not exposed to any improper influence. *Armstrong* v. *State,* 102 Ark. 356, 144 S. W. 195, Ann. Cas. 1914A, 734.

Moreover, an affirmative showing was made by the State that said juror was not exposed, or subjected to any improper influence during the separation. The sick juror, upon the resumption of the trial, returned into court with the others, and while it is true he sat in a rocking chair supported by pillows to make his position more comfortable during the remainder of the trial, there was no showing made that the juror was incompetent to proceed with the discharge of his duties. The doctor who was treating him testified that his condition was normal, and that the medicine administered as and according to directions would not have rendered him in any way incapable of discharging his duty properly. Neither does the verdict, rendered upon evidence that shows him to have been guilty, and which it is conceded would have supported a verdict of a higher degree of the offense charged, indicate any incompetence on the part of such juror. No objection was made by appellant (as should have been done if the juror's condition warranted it) to proceeding with the trial with the jury as constituted, because of the condition of the sick juror who had been treated by a physician, but this is attempted to be explained by his attorneys stating that they had no knowledge of the kind of medicine administered in the treatment until after the trial was completed. This court has held that no error was committed in denying motions for a new trial on the ground that a juror had the appearance of being asleep, or was asleep, during the progress of the trial. *Pelham* v. *Page,* 6 Ark. 535; *Dolan* v. *State,* 40 Ark. 454. See also *Braunie* v. *State,* 105 Neb. 355, 180 N. W. 567, 12 A. L. R. 658, and note.

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

Mr. Justice McHaney dissents.

National Benefit Life Insurance Co. *v.* Brown.

Opinion delivered November 11, 1929.

Lewis Rhoton and *John A. Hibbler,* for appellant.

Smith & Fitzsimmons, for appellee.

Butler, J. This action at law was instituted by appellee, Sarah V. T. Brown, against the appellant, National Benefit Life Insurance Company, to recover the proceeds of a policy of life insurance issued in her favor on the life of John E. Brown by the appellant. The complaint alleged by proper averments the issuance of the policy, the payments of the premiums, the death of the insured, and the proper steps taken subsequent thereto as to the notice of death. There was a prayer for judgment for the face value of the policy, less a loan that had been negotiated by the insured prior to his death.

The answer denied liability, alleging as an affirmative defense that said policy had been reinstated during the life of the insured upon the false and fraudulent statement that the insured was in good health, and that since the day of his examination for the policy he had no illness, ailment, or injury whatsoever, while at the time

the said Brown made the statement for reinstatement of his policy he was, and had been, suffering from a disease of the heart for more than one year, of which disease he died.

The issues of fact were presented by the pleadings as to the liability of the appellant company, and were submitted to a jury, which found in favor of the appellee, and judgment was accordingly rendered in her favor.

Counsel for the appellee contend, among other things, for affirmance of the judgment, that there was no motion for a new trial filed in apt time, and, there being no errors of law apparent on the face of the record, this court cannot review the proceedings in the trial court.

Final judgment was entered on the eighth day of April, 1929, and the court continued its session until April 17, 1929, when the term expired. After the expiration of the term, and on July 15 following, appellant filed its motion for a new trial, it having, during the term and immediately after the verdict of the jury, prayed an appeal to this court, and on motion was given one hundred and twenty days to file a bill of exceptions. The record does not show that appellant filed a motion for a new trial during the term, and a certificate of the judge appended to the transcript certified that no such motion was filed. The attorney for the appellant made and filed his affidavit in which the following statement is made: "After the verdict was rendered in favor of the plaintiff in this court, I asked the presiding judge for time to file a motion for a new trial and to get up the bill of exceptions. He stated that he would give me 120 days, and I understood that he meant 120 days to file the motion for a new trial, and made no effort to file my motion until I had received the bill of exceptions from the official reporter. I am within the 120 days which I understood that I had been given by the presiding judge, W. D. Davenport. I am attaching a statement from Judge Davenport which speaks for itself."

The certificate as referred to is as follows: "This is to certify that on the day that the case of Sarah V. T.

Brown against the National Benefit Life Insurance Company, No. 2721, Lee Circuit Court, was tried, and after the jury brought in its verdict for the plaintiff, the attorney for the defendant asked the court how many days would be allowed to file the bill of exceptions, and the court said 120, but made no record of it, as no motion for a new trial was filed during the term."

The trial court had no authority to extend the time of filing the motion beyond the term, and did not in this instance attempt to do so. *Allen* v. *Francis,* 171 Ark. 1187, 287 S. W. 182. The contention of the appellee is correct, and, for the failure to file the motion for a new trial in apt time, this court cannot consider alleged errors in regard to the lack of sufficient evidence to support the judgment, and granting and refusing instructions cannot be considered.

There appearing no errors of law in the record, the judgment must therefore be affirmed. It is so ordered.

RAGAR *v.* STATE.

Opinion delivered February 10, 1930.

Clary & Ball and *Duval L. Purkins,* for appellant.

Hal L. Norwood, Attorney General, and *Pat Mehaffy,* Assistant, for appellee.

McHaney, J. Appellant was convicted of assault with intent to kill and sentenced to five years in the penitentiary, on an indictment charging, in three counts, (1) an assault with intent to kill R. T. Hester by shooting him with a shotgun; (2) an assault with intent to kill Mrs. George Hester in the same manner, and (3) an assault with intent to kill George Hester in the same manner. To this indictment, a general demurrer was filed, and also a specific demurrer on the grounds that it charged three separate and distinct crimes, and was in effect three separate indictments for separate and distinct offenses; that appellant was entitled to know before the trial what crime he is charged to have committed; that it failed to apprise him of the manner and mode of the commission of the crime for which he would be tried; that appellant could not prepare himself for trial without knowing what crime was charged against him. There was also a motion to require the State to elect upon which one of the three counts in the indictment he would be tried, alleging for grounds substantially the same as set up in the specific demurrer. The court overruled the demurrers and motion to elect, the prosecuting attorney making the following declaration of record: "The indictment No. 972 charges only one crime, one act of assault with intent to kill, and same having been committed by firing through a closed door into the room in which George Hester, Mrs. George Hester and R. T. Hester were, after threats having been made that the defendant was going to kill the whole

family, the immediate threats before the shots having been addressed to Mrs. George Hester. The shotgun having been fired through a closed door, and having struck R. T. Hester, George Hester and Mrs. George Hester not having been within the range of the discharge of the gun, and the defendant is apprised of the fact that he is placed upon trial for one crime of assault with intent to kill, and only one crime being charged."

For a reversal of the judgment of conviction appellant first says the court erred in overruling the demurrers and the motion to elect. We deem it unnecessary to set out the facts, as only questions of law are presented for our determination. The undisputed proof shows that appellant fired a shotgun through a closed door into a room where each of the parties named into three counts of the indictment were. When the demurrer and motion to elect were presented to the court, the prosecuting attorney made the statement heretofore set out which specifically stated that the indictment charged only one crime. It showed that the State sought only one conviction. The indictment, while charging an assault on three people, refers to one transaction or to facts growing out of the same transaction, all taking place at the same time, and, when taken in connection with the statement of the prosecuting attorney, shows that no possible prejudice could have resulted to appellant in overruling the motion to require the State to elect. Nor was the indictment open to demurrer on the grounds stated. In *State* v. *Jourdan*, 32 Ark. 203, the court said: "If the prosecuting attorney, in drafting the indictment intended in fact to charge but one offense, and inserted the second count to obviate uncertainty in the evidence as to the ownership of the animals, he should have stated that fact to the court, on the interposing of the demurrer, and made it appear of record." That is exactly what the prosecuting attorney did in this case.

In 14 R. C. L., page 197, it is said: "It is universally held that an indictment or information may charge different offenses covered by the same transaction in all the various ways necessary to meet the possible phases of evidence that may appear at the trial. The rule just stated has been applied to counts charging distinct felonies relating to the same transaction, with the qualification in some of the cases, that the felonies so charged are of the same grade and belong to the same family of crimes, and are subject to the same mode of trial and nature of punishment. It will be assumed that the intention was to charge but one offense, where all the counts are manifestly based upon one and the same transaction." See also Clark's Criminal Procedure, 2d ed. p. 338; Kelly's Criminal Law of Procedure, 4th ed. p. 159; Joyce on Indictments, 2d ed. p. 668. In Kelly's Criminal Law of Procedure, *supra,* the general rule upon the question is stated as follows: "Where the several counts evidently refer * * * to one transaction and one offense, he will not be compelled to elect, and where it may be doubtful upon the face of the indictment whether the intention is to charge more than one felony, he will not be compelled to elect, if he will declare that the charges relate to one transaction, and that he means to convict on one felony only."

We are therefore of the opinion that the indictment was not defective as against demurrer or on motion to elect, since it charged only one offense, and, even though on its face it might be said to charge separate offenses, yet, when taken in connection with the statement of the prosecuting attorney, it charged only one offense, and the court did not err in overruling the demurrer and motion.

It is next said the court erred in giving instruction No. 15 as follows: "You are instructed that an assault is an unlawful attempt, coupled with the present ability to commit a violent injury upon the person of another,

and you are told in this case that the actual hitting of the person is not necessary to constitute the crime charged, and if you believe beyond a reasonable doubt that the defendant at the time he fired the shot had in his mind the specific intent to kill either George Hester or Mrs. George Hester or R. T. Hester or all of them, and that, had death ensued, the crime would have been murder, defendant would be guilty of assault with intent to kill, even though the shot did not hit the one the defendant intended to kill, but did hit one of the mentioned parties whom the defendant did not intend to kill."

The evidence shows that appellant walked some distance away from the duplex apartment in which he and the Hesters lived in separate apartments, procured a shotgun, returned and fired through a closed door into the room where the three parties named in the indictment were, after having made the statement that he intended to kill the whole family, severely wounding R. T. Hester, a young man who was at home sick. Mr. Michie says: "Where one shoots into a crowd, not caring whom he may kill, with the intent to kill some one of them, it is an assault with intent to kill each of them." Michie on Homicide, vol. 1, p. 285. In 30 C. J., p. 25, it is said: "Where a person fires into a crowd indiscriminately, with intent to kill some one, it is an assault with intent to kill each of them." In *Scott* v. *State*, 49 Ark. 156, 4 S. W. 750, the court said: "Doubtless shooting into a crowd is an assault upon each member of the crowd." (Citing cases).

The instruction complained of is undoubtedly correct in telling the jury that if appellant had the specific intent to kill either of the parties or all of them, and, had death resulted, the crime would have been murder, he would be guilty of assault with intent to kill, even though the shot hit one not intended to be killed. Mr. Wharton says: "Where a blow aimed at one person lighteth upon another and killeth him, this is murder. Thus A., having

malice against B, strikes at and misses him, but kills C, this is murder in A." 2 Wharton, Crim. Law, § 965, quoted in *Lacefield* v. *State,* 34 Ark. 275. The doctrine in that case is that where one, intending to kill A, shoots and wounds B, he cannot be convicted of assault with intent to kill B. But where he shoots into a room containing three persons with intent to kill one or all of them, under such circumstances that if death had resulted it would be murder, then he would be guilty of the crime charged, whether he hit any one of them or not, or if he hit one not intended, because he did intend to kill one of them, and was so charged in the indictment. If he had been charged with assault to kill R. T. Hester only and the proof had shown that shooting him was accidental, that he intended to kill George Hester, then the rule announced in the Lacefield case and followed by many others since, down to *Jones* v. *State,* 159 Ark. 215, 251 S. W. 690, would apply.

This disposes of the complaint made as to the modification of two instructions requested by appellant, and given as modified. The modification made by the court simply made them harmonize with No. 15, which we have already found to be a correct statement of the law under the circumstances. We find no error, and the judgment is accordingly affirmed.

MARTIN *v.* STATE.

Opinion delivered February 10, 1930.

Cravens & Cravens, for appellant.

Hal L. Norwood, Attorney General, and *Robert F. Smith,* Assistant, for appellee.

BUTLER, J. The appellant was indicted for grand larceny in the usual form, the specific charge being that he did unlawfully and feloniously take, steal and carry away $1,600 in gold, silver and paper money of the value of $1,600, the property of Fay Sloan. There was a trial which resulted in a verdict of guilty. Judgment was rendered in accordance with the verdict, from which judgment is this appeal.

The appellant assigns as error, first, that the evidence was insufficient to support the verdict, and that the trial court erred in giving instructions Nos. 1 and 2 at the instance of the appellee, and for refusal to give instruction No. 2 requested by the appellant. The testimony in this case is very confused, whether because the prosecuting witness, Sloan, was intoxicated at the time of the happening of the events, the circumstances of which he attempted to describe, or because of his unwillingness to fully and frankly narrate all the facts, we are unable to say. However, from his testimony and that of the other witnesses it is reasonably certain that

$1,600 was obtained from him either by stealth or by trick or device. It appears that one Russell Cooper approached Sloan with the proposition that they would engage in a game of poker with an alleged millionaire oil man from Tulsa, Oklahoma, and by some means cheat him out of his money. The plan was that Cooper and the appellant, Martin, and Ray Sloan, the prosecuting witness, were to win the money from the supposed millionaire, Woodward, in the poker game. It developed later that Woodward was a confederate of Martin and Cooper, while Sloan was the real victim. He was induced to obtain from his wife $1,700, and with this, while intoxicated, engaged in the game with the parties named in a hotel room. In order to induce Mrs. Sloan to let her husband have the money, Martin left a Chrysler sedan in her possession as security and gave her a key, which later turned out not to be a key to the ignition, but to the door of the car. Mrs. Sloan was to wait in front of the hotel in the car. At and during the game, Sloan deposited his money with Martin who was the stakeholder. The confederates would indicate to each other by signs the manner of their play, the effect of which was that Sloan consistently lost. There was evidence tending to prove that Sloan had given to Martin as stake-holder some six or seven hundred dollars, and kept about that much in his trouser pocket. After a time an altercation occurred and Sloan attempted to repossess himself of the money he had lost, and in the confusion which followed he either left, or was ejected from the room, and he then discovered that he had only $100 left. Mrs. Sloan had left the sedan, and had come into the room where the play was going on, and, when the altercation occurred, Martin left the room, broke the glass out of the door to the sedan, entered it and drove away.

Cooper, Martin and Woodward were jointly indicted for the larceny of the $1,600. On the trial of the case the court gave instruction No. 1 to the jury, as follows:

"If you find from the evidence in this case beyond a reasonable doubt that the defendant Charlie Martin, in the Fort Smith District of Sebastian County, and within three years next before the filing of this indictment, gold, silver and paper money of the United States of the value of more than $10, the property of Ray Sloan, unlawfully and feloniously did steal, take and carry away, or, if you find from the evidence beyond a reasonable doubt that this defendant, within that time, and in the county, district and State aforesaid, was present when another person unlawfully and feloniously did steal, take and carry away, gold, silver and paper money of the United States of the value of more than ten dollars, the property of Ray Sloan, and that this defendant aided, abetted, assisted and encouraged another person to steal, take and carry away the said money, as aforesaid, then you should convict the defendant; otherwise, you should acquit him."

To this instruction the defendant made a general objection, and now urges that the instruction was erroneous in that it failed to state that the money was taken without the consent of Ray Sloan. We do not think that the instruction was erroneous, for the expression, "feloniously did steal, take and carry away," necessarily negatives the consent of the owner, especially when the instruction is read in connection with the instruction No. 3 as follows: "You are instructed that if you find from the evidence that the witness, Ray Sloan, bet money on a game of cards, intending at the time to part with the title and possession of the money, then the taking of the money, if you believe it was taken, regardless of how fraudulent, would not constitute larceny, and you should acquit this defendant." This instruction in effect told the jury that if Sloan voluntarily parted with the money intending to part with the title, then the taking of the same would not be larceny; and therefore the taking, if with his consent under those conditions, would not constitute the offense charged.

The second instruction given by the court, the giving of which is assigned as error, we think is a correct declaration of law and proper under the indictment, for it is never necessary to allege descriptive means by which the offense was committed. It might have been committed by any one of a number of ways. The instruction is as follows: "You are instructed that if you believe from the evidence in this case beyond a reasonable doubt that the defendant, Charlie Martin, obtained possession of the money mentioned in the indictment, of the value of more than ten dollars, and that the possession of said money was obtained by trick or device, with the unlawful and felonious intent, at the time, to steal, take and carry away, and to convert the said money to his own use, and that you further find that at the time said Sloan parted merely with the possession of the money and not with the title of said money, then you should convict this defendant of larceny unless precluded from doing so by other instructions in this case."

In the case of *Coon* v. *State,* 109 Ark. 346, 160 S. W. 226, cited by appellee, under an indictment like the one in the instant case, this court held that where several persons conspire to cheat a man under color of a bet, and he merely deposits his money as a stake with one of them, not meaning thereby to part with the ownership therein, the persons taking the money are guilty of larceny. The proofs of such facts were properly admitted.

The third assignment of error is that the court erred in refusing to give instruction No. 2 requested by the appellant, as follows: "If you believe from the evidence in this case that Mrs. Ray Sloan had possession, custody, or owned this money, and went to the bank and got the same and turned it over to Ray Sloan and Charlie Martin, anything that either one of them did with the money thereafter would not constitute larceny on their part." Since the court had instructed the jury in instruction No. 1 for the appellant that the allegation of ownership was material and must be proved by evidence beyond a

reasonable doubt, and that it was sufficient to allege ownership of the money in the person in whose possession the money was at the time of the alleged larceny, we think that the refusal to grant instruction No. 2, *supra,* was not error.

The most serious question in this case is the sufficiency of the evidence to support the verdict, but, viewing it in the light most favorable to the appellee and giving it its strongest probative value, we think there was substantial evidence to warrant the jury in its verdict.

The judgment is therefore affirmed.

SMITH *v.* BEARD.

Opinion delivered February 10, 1930.

W. O. Young, for appellant.

BUTLER, J. Mrs. Ruban Smith, an aged woman living in Benton County, Arkansas, on the 10th day of January, 1928, being the owner of a tract of land in said county, conveyed by warranty deed twenty acres of the same to her son, Ed Smith. A short time thereafter she died, and her remaining sons and daughters, and their representatives brought suit in the chancery court to can-

cel the deed for lack of mental capacity of the grantor to execute the same, and for undue influence exercised by the grantee in the procurement thereof. After having heard the testimony in the case, the chancellor entered a decree in compliance with the prayer of the complaint cancelling the deed, from which decree this appeal is prosecuted.

The appellant has abstracted only a part of the testimony, dismissing that of Huel Smith with the statement that "his testimony could not be material." As was held in the case of *Power Mfg. Co.* v. *Arkansas Rice Growers Co-Op. Ass'n.,* 170 Ark. 771-6, 281 S. W. 379, the testimony of a witness cannot be ignored because of the mere statement that it is not important in the case, thereby substituting the opinion of counsel for that of the court, and, under the well-established rule, where the appellant has failed to set out all the testimony in his abstract, it will be presumed that the decree is justified by the testimony given. *Grimes* v. *McKee,* 162 Ark. 196, 258 S. W. 134; *Thompson* v. *Buchanan,* 134 Ark. 361, 203 S. W. 1015; *Bramble* v. *College Hill L. & T. Co.,* 149 Ark. 669, 232 S. W. 758.

We have examined the record in this case, and find that the testimony of Huel Smith was to the effect that he was a son of Mrs. Ruban Smith, a very old woman, and that on the 9th of January, 1928, he received a telegram stating that his mother was very ill, and for him to come home; that he reached home sometime in the night of the 10th, and saw his mother early on the morning of the 11th; that at that time she was so ill as to be incapable of recognizing him; that he remained with her until she died a few days later, and that she had only been able to recognize him one time before she passed away. The evidence in the case shows that Mrs. Smith was a very old woman at the time of her death, and that she had been stricken with paralysis about five years before her death, and from that time on her physical condition was very bad, and her mind much affected. She and

her son, Ed Smith, lived in the home together alone for some time after she was stricken—for about a year or a year and a half—when he married, and from that time he and his wife continued to live with Mrs. Ruban Smith until a few months before her death, when she was moved to the home of one of her daughters. She suffered a second stroke just a few days before the execution of the deed in question, and before her death. Her physician who attended her on the 9th of January, the day before the execution of the deed, stated that, while she was not crazy, she was not mentally capable of understanding the nature and effect of her act, and that her mind was as that of a little child.

There was testimony to the effect that Mrs. Smith had been requested to make a deed to her son, Ed, and that she refused to do so on the ground that Ed had not been treating her right. There was considerable evidence also, besides that of the attending physician, to show that Mrs. Smith's mind was so impaired as to render her incapable of transacting any kind of business, and, while the evidence was conflicting on this point, there being other testimony to the effect that she was able to know what she was about and to realize the consequences of her act, and that she had intended to make the deed to Ed, we cannot say that the finding of the chancellor was against the preponderance of the evidence.

We are of the opinion that under the rule as stated in *Kelly's Heirs* v. *McGuire,* 15 Ark. 603, the evidence is sufficient to sustain the holding that the execution of the deed was not the free act of Mrs. Ruban Smith. In that case it was said: "If a person, although not positively *non compos* or insane, is yet of such great weakness of mind as to be unable to guard himself against imposition, or to resist importunity or undue influence, a contract, made by him under such circumstances, will be set aside. And it is not material from what cause such weakness arises. It may be from temporary illness, general mental imbecility, the natural incapacity of early infancy,

the infirmity of extreme old age, or those accidental depressions which result from sudden fear, constitutional despondency, or overwhelming calamities. And, although there is no direct proof that a man is *non compos* or delirious, yet, if he is of weak understanding, and is harassed and uneasy at the time, or if the deed is executed by him *in extremis,* or when he is a paralytic, it cannot be supposed that he had a mind adequate to the business which he was about.''

As we have seen, Mrs. Ruban Smith had been a paralytic for five years, and on or about the 9th of January, 1928, suffered a second stroke which was of such severity as to cause apprehension of the imminence of her death. Her children were sent for, and, while she was lying in a helpless condition with the mind of a little child, her son, Ed Smith, procured the description of her property, and the drafting of the deed which she signed on the 10th of January, 1928, by her mark, and within a few days thereafter she died. Applying the rule above stated to the testimony believed by the chancellor, we think it was sufficient to warrant the conclusion reached. The decree is therefore affirmed.

[redacted]

MURRAY *v.* JACKSON.

Opinion delivered February 17, 1930.

[redacted]

McMillen & Scott, for appellant.

John E. Coates, Jr., for appellee.

HART, C. J., (after stating the facts). It is first contended that the court erred in allowing the wife of W. S. Mitchell to testify. The record shows that, before she commenced to testify, the court told the jury that her testimony could only be considered by it as to the claim of Mrs. Jackson, and could not be considered as to the claim of her husband. W. S. Mitchell and Mrs. Jackson brought suit together against Murray under § 1081 of Crawford & Moses' Digest. When causes of action of a like nature or relative to the same question are pending, the court may consolidate said causes, when it appears reasonable to do so. So it will be seen that, if W. S. Mitchell and Mrs. Jackson had brought separate suits, it would have been proper for the court to have consolidated them for the purpose of trial. The same evidence was necessary for a recovery in each case, and to present the defense to the action. W. S. Mitchell was not financially interested in the recovery by Mrs. Jackson. Their respective interests in the result of the trial were entirely separate, and the court expressly limited the effect of Mrs. Mitchell's testimony to the suit of Mrs. Jackson in recognition of the prohibition by the statute against testifying of the wife for or against her husband. The position of the par-

ties was in no wise different than if separate suits had been brought by W. S. Mitchell and Mrs. Jackson and had been consolidated for trial.

This court has held that the fact that a husband and wife have joint claims in an action does not prevent either of them from testifying in his or her own case, but that the testimony of the wife cannot be considered in the case of the husband, and the testimony of the husband cannot be considered in the case of the wife. *Little Rock Gas & Fuel Co.* v. *Coppage,* 116 Ark. 333, 172 S. W. 885. In *Bush* v. *Brewer,* 136 Ark. 246, 206 S. W. 322, it was held that where two causes of action in behalf of two plaintiffs for personal injuries growing out of the same accident were consolidated, the wife of each plaintiff was not disqualified to testify on behalf of the other plaintiff. Hence, we hold that this assignment of error is not well taken.

The next assignment of error relates to the admission of testimony for the plaintiff Mrs. Jackson. It had been shown in behalf of Mrs. Jackson that her injuries were permanent, and that it was necessary to keep her in the hospital for some time with special nurses and a physician attending her daily. The hospital, nurses' and physician's bills amounted to something over $1,700. The defendant then introduced a physician as a witness who testified that he examined Mrs. Jackson at the hospital, that she could walk about while there, that it was not necessary to keep her there for so long, and that her injuries were not permanent. On cross-examination counsel for the plaintiff asked for whom he made the examination, and he replied that he did not remember, but believed that it was for an insurance company, and stated further that the Southern Insurance Company asked him to make a report on the case.

A reversal of the judgment was asked on account of the admission of this testimony. The claim is made that the cross-examination of the witness as to who employed him was made for the purpose of showing that an insur-

ance company was in reality defending the case, and that the cross-examination of the witness brought the case within the rule announced in *Pekin Stave & Manufacturing Co.* v. *Ramey,* 104 Ark. 1, 147 S. W. 83. We do not agree with counsel in this contention. The testimony of the physician introduced by the defendant tended to contradict the testimony of the physician introduced by Mrs. Jackson as to the character and extent of her injuries and as to the necessity of expending the money that was expended for her for hospital bills and attendance by nurses and a physician. The cross-examination was proper for the purpose of impeaching or contradicting the witness. The jury might have found that the employment of the physician made him biased in favor of the defendant, or at least tended to show the interest of the witness in the case. Because it chanced to show that an insurance company was back of the defendant to the action does not affect its competency. *Caddo Transfer & Warehouse Co.* v. *Perry,* 174 Ark. 1030, 298 S. W. 33; and *Warner* v. *Oriel Glass Co.* (Mo.) 8 S. W. (2d) 846, 60 A. L. R. 448.

The most serious assignment of error is that the judgment should be reversed because the court instructed the jury as follows:

"The court instructs the jury that where two vehicles approach or enter an intersection at approximately the same time, the one on the left shall yield the right-of-way to the vehicle on the right; but, however, where one vehicle has already entered the intersection, and the other vehicle has not, then the former vehicle has the right-of-way over the latter."

It is claimed that this instruction is erroneous in view of an ordinance of the city of Little Rock, § 35, which reads as follows:

"Section 35. When two vehicles approach, or enter an intersection at approximately the same time, the driver of the vehicle on the left shall yield the right-of-way to the vehicle on the right except as otherwise provided in §§ 37, 38 and 39."

It is conceded that §§ 37, 38 and 39 apply to pedestrians, and that only § 35 applies in the case at bar. We do not think this assignment of error is well-taken. In the first place, this court has held that the general rules governing the movement of automobiles, except as changed by statute, are the same as those which regulate the movement of wagons and other vehicles. *Hodges* v. *Smith,* 175 Ark. 101, 298 S. W. 1023. In the absence of a statute or ordinance regulating the matter, it is the general rule that the vehicle entering an intersection of streets first is entitled to the right-of-way, and it is the duty of the driver of the other car to proceed with sufficient care to permit the exercise of such right without danger of collision. Case notes to 21 A. L. R. 974, 37 A. L. R. 494, and 47 A. L. R. 595.

In Berry on Automobiles, 6th ed. vol. 1, § 1045, it is said that an automobile that enters the intersection of two streets first, is, generally speaking, entitled to the right-of-way; and it is the duty of a motorist approaching at right angles to avoid colliding therewith. Again, in the same section, on page 891, the same author says that under a statute or ordinance giving right-of-way at intersections to the vehicle approaching from the right, if the vehicle approaching from the left arrives at the intersection when it is apparent that it can safely cross before the other vehicle arrives, it may proceed to do so; the rule as to right-of-way not applying in such instance.

It is plain that the ordinance was passed to obviate the confusion which would result if there was no rule on the subject where automobiles approach each other at intersecting streets in such a manner that, unless one of them gives way, a collision will result. The ordinance does not give the automobile approaching from the right the right-of-way where the automobile approaching from the left enters the intersecting street first, and proceeds across it before the other automobile reaches the intersection of the street.

According to the testimony of Mrs. Mitchell, she looked up and down the street before starting across Broadway, and had got a part of the way across it before she saw the automobile of the defendant coming north on Broadway at a rapid rate of speed. She was driving her car slowly, and a witness who had stopped his car, as required by ordinance, before starting across Broadway from the east side, testified that the driver of the defendant's car could have avoided striking Mrs. Mitchell's car if he had turned this car as much as two feet. According to this testimony, Mrs. Mitchell was not guilty of contributory negligence, and was not in violation of the ordinance. According to the testimony, she had entered the intersection first, and she had a right to continue across the street, and had the right-of-way over the defendant's automobile. This is in recognition of the general rule on the subject announced above. The instruction as given by the court was not contradictory. The first part of the instruction announces the general rights of the parties under the ordinance, and the other curtails that right upon the finding of certain facts by the jury. In other words, the ordinance gives the right-of-way to the automobile approaching from the right, if the two automobiles approach the intersection at right angles at approximately the same time; but this rule does not govern where the automobile on the left enters the intersection first, and the driver of it, in the exercise of reasonable care, has the right-of-way to continue across the street. Otherwise, he would have to stop in the middle of the street upon any other automobile approaching the intersection from the right. In this view of the matter, the two parts of the instruction supplement one another and do not at all conflict. The instruction, as a whole, submits the respective theories of the parties under the evidence adduced before the jury.

It is contended however that this view of the matter gives the wrong meaning to the word "intersection," as used in the ordinance. The ordinance provides that,

when two vehicles approach or enter an intersection at approximately the same time, the driver in the vehicle on the left shall yield the right-of-way to the vehicle on the right. This does not mean that the intersection is the place or point where the two automobiles would meet if they continued on their course; or, in other words, it does not mean the point where the middle or center line of the two streets would cross each other. The word "intersection," as used in the ordinance, means the space occupied by the two streets at the place where they cross each other. It is the whole space between the lines of the two streets. As said in *Neuman* v. *Apter,* 95 Conn. 695, 112 Atl. 350, 21 A. L. R. 970, the term "intersection," as used in the ordinance, means the space of the street common to both streets.

In *Varley* v. *Columbia Taxicab Co.,* 240 S. W. 218, it was held by the Supreme Court of Missouri that, under an ordinance giving vehicles traveling in an east and west direction the right-of-way, there was no conflict between instructions that, if one defendant was westbound and the other southbound, the first defendant had the right-of-way, and instructions that the ordinance did not apply to one driving at an unlawful rate of speed, and that it did not apply under all circumstances and on all occasions, but that the vehicle reaching the intersection first was entitled to the right-of-way, as the first simply announced the rule, and the others curtailed the general right.

No other errors are urged for a reversal of the judgment, and it will be affirmed.

KIBLER *v.* KIBLER.

Opinion delivered February 17, 1930.

C. M. Wofford, for appellant.
C. R. Starbird, for appellee.

SMITH, J. Mrs. Georgia Kibler brought this suit as the natural guardian and next friend of her infant son, Burl Kibler, to annul his marriage to Harriett Harned Kibler, who was also an infant, and for whom a guardian *ad litem* defended. There is no substantial conflict in the testimony, and it was to the following effect.

Burl Kibler is a minor, and became sixteen years of age on June 5, 1928, and on the 29th of August, 1928, was married to Harriett Harned, a girl of about his own age. Friends and relatives of the girl met the boy in the absence of his mother, or other friends or relatives, and accused him of having seduced the girl, who was about to become a mother, and he was threatened

with prosecution if he did not marry her. He did not deny the charge, and consented to marry, and a marriage license was procured, and the ceremony performed.

The cancellation of the marriage is prayed on account of the alleged duress, and the non-age of the boy, and he has confirmed the action of his mother in bringing this suit, as is evidenced by the testimony which he gave. He testified that he did not want to marry, and only consented to do so because of the threats of prosecution. But this plea is unavailing, as was said in the case of *Jacobs* v. *Jacobs,* 146 Ark. 49, 225 S. W. 22: "This court has held that, if a man seduces a woman, and marries her through fear of the consequences of his crime, the marriage nevertheless will be valid, and the child will be legitimate. *Honnett* v. *Honnett*, 33 Ark. 156; *Marvin* v. *Marvin,* 52 Ark. 425 [12 S. W. 875, 20 Am. St. 191]."

This suit was filed January 11, 1929, at which time a child had been born, but its father was even then under the age of seventeen years, and the court, after finding that there had been no duress, further found that the right of action, if any existed, is personal to the plaintiff, and cannot be maintained by a guardian or next friend.

Section 1111, C. & M. Digest, reads as follows: "The action of an infant must be brought by his guardian or next friend; any person may bring the action of an infant as his next friend; but the court has power to dismiss it if it is not for the benefit of the infant, or to substitute the guardian of the infant, or another person, as the next friend."

This suit was therefore properly brought by the mother of the boy as his natural guardian and next friend, but it is, of course, his suit, and, as we have said, his testimony in the case shows that it was brought with his consent and for his benefit.

Did he have the right to maintain this suit, and must he wait until he has attained full age before doing so?

Answering the last question first, it may be said that there are many cases holding that an infant cannot annul and have his marriage canceled on account of his non-age until he has attained his majority; but we think the better considered cases hold to the contrary. Indeed, we think the correct rule is that he may, after attaining the statutory age at which he may be lawfully married, yet while still a minor, ratify his marriage, and be thereafter estopped to question its validity on account of his minority, but he may, through his guardian or next friend, so long as he is of non-age, require the court having jurisdiction to annul it.

Section 7037, C. & M. Digest, reads as follows: "Every male who shall have arrived at the full age of seventeen years, and every female who shall have arrived at the age of fourteen years, shall be capable in law of contracting marriage; if under those ages their marriages are void."

There are States having similar statutes, in which it is held that a marriage by an infant below the age fixed by the statute at which an infant may be married is void; and, that no sentence or decree of a court is necessary to cancel it; but this is not the case under our statute which we have quoted, because it must be construed in connection with § 7041, C. & M. Digest, which reads as follows: "When either of the parties to a marriage shall be incapable, from want of age or understanding, of consenting to any marriage, or shall be incapable from physical causes of entering into the marriage state, or where the consent of either party shall have been obtained by force or fraud, the marriage shall be void from the time its nullity shall be declared by a court of competent jurisdiction."

When these statutes are read and construed together, as they must be, the word "void," appearing in

§ 7037, C. & M. Digest, must be held to mean "voidable," and the marriage of an infant of non-age creates the relation and imposes the obligations of a husband or a wife until its nullity shall be decreed by a court of competent jurisdiction.

In the case of *Walls* v. *State*, 32 Ark. 565, the facts were that the defendant Walls married at the age of fifteen, and, without being divorced, was married a second time, and was indicted for bigamy on account of this second marriage, and was in his twenty-first year at the time of his trial. He defended upon the ground that his first marriage was void, and that his second marriage was therefore not bigamous; but the court held that the fact that he was within the age of legal consent when his first marriage was contracted was no defense when it was not also shown that it had been annulled by a court of competent jurisdiction.

At § 33 of the chapter on Divorce and Separation in 9 R. C. L., page 273, it is said: "Continued cohabitation of the parties after reaching the age of consent validates the marriage, and it cannot thereafter be annulled. But the fact that the parties cohabited together before the complaining party reached the statutory age is not generally ground for denying a decree of annullment. It is usually recognized that an infant is not concluded by false representations of his age so as to bind him by a contract with him entered into on the faith of such representations. And, according to the better view, an infant incapable for want of age of entering into a valid marriage is incapable also of estopping himself by a fraudulent declaration of his age from asserting its invalidity in an action to annul it brought under a statute with the sole proviso that there must have been no voluntary cohabitation after the attainment of the age of consent. On the question as to when a suit may be brought to annul a marriage for want of legal age on the part of the complainant, there is some support,

especially in the early cases, for the position that the complainant cannot be heard to assert this right until he or she has reached the age of legal consent. According to the prevailing and better view, however, a party marrying before the legal age of consent may disaffirm the marriage before reaching that age, and avoid it *in toto,* and a suit for its annullment may be brought through a guardian before the legal age is attained. On principle, this view seems both logical, and in accord with public policy. The marriage is, so to speak, on condition subsequent, the condition being its disaffirmance by a party thereto, and annullment thereof by the court from the time named. If the plaintiff had capacity to become a party to such imperfect and inchoate or conditional marriage, he or she should have capacity to disaffirm it at any time thereafter, before it has ripened into an absolute marriage, by invoking the authority of the court to annul it."

In the note to the text quoted annotated cases are cited, which themselves cite numerous cases in point which sustain the text.

In the annotator's note to the case of *Hunt* v. *Hunt,* 23 Okla. 490, 100 Pac. 541, 22 L. R. A. (N. S.) 1202, it is said: "And it is generally held that statutes fixing the ages at which persons 'may be joined in marriage' or 'may lawfully marry,' or which prohibit the celebration of a marriage where the parties are under the prescribed ages, do not have the effect of making a marriage contracted without the statutory requisites void, but merely voidable; unless avoided, the relation remains valid. *Koonce* v. *Wallace,* 52 N. C. (7 Jones L.) 194; *Holtz* v. *Dick,* 42 Ohio St. 23, 51 Am. Rep. 791; and *State ex rel. Scott* v. *Lowell,* 78 Minn. 166, 46 L. R. A. 440, 79 Am. St. Rep. 358, 80 N. W. 877."

Now, while the minor has the right to have his marriage annulled, he does not thereby rid himself of his obligations to his child. These continue, and his duty

to this child may be enforced by appropriate orders of court.

Section 3475, C. & M. Digest, reads as follows: "The issue of all marriages deemed null in law, or dissolved by divorce, shall be deemed and considered as legitimate."

In construing the statute just quoted, we held that children of a marriage void because the father had a former wife living are legitimate, and entitled to inherit from their father. *Cooper* v. *McCoy,* 116 Ark. 501, 173 S. W. 412; *Evatt* v. *Miller,* 114 Ark. 84, 169 S. W. 817, L. R. A. 1916C, 759.

So here, we hold that, when this minor contracted a voidable marriage, he assumed the same obligations which the law imposes upon an adult, so far as issue is concerned, and while the law permits him to be relieved of his obligations as a husband, it does not relieve him from those of a father.

A minor who is of sufficient age to be criminally responsible is liable for his torts, and may even be liable for punitive damages as an adult person, and satisfaction thereof may be had out of his estate. And what greater wrong can an infant commit than to seduce another? *Moore* v. *Wilson, ante* p. 41, 20 S. W. (2d) 310.

While the law permits an infant to throw off the obligations of a husband, contracted through a marriage while of non-age, there appears to be no policy which relieves him of his obligations as a father.

It is insisted that the relief prayed should be denied, because the minor has come into court with unclean hands, and that it is inequitable to grant him this relief.

A similar contention was made in the case of *Swenson* v. *Swenson,* 179 Wis. 536, 192 N. W. 70. A child was born in that case of a marriage contracted while the father was under age prescribed by the laws of the State of Wisconsin, and there was an appeal from a decree annulling the marriage, but providing for the maintenance of the child. For the reversal of this decree it was insisted

that the court had erred: "Because the marriage will not be annulled as a matter of right to plaintiff; (b) because plaintiff did not come into court with clean hands; (c) because plaintiff is estopped by his conduct to question the validity of the marriage; and (d) because in divorce actions the State has a substantial, well-recognized interest, and a court cannot lend its assistance in perpetrating a fraud upon a party."

In overruling these contentions the Supreme Court of Wisconsin said: "It is argued on behalf of the defendant that the language of § 2351, 'a marriage may be annulled for any of the following causes,' is permissive; that it therefore vests in the court a discretion to say whether or not a marriage, where one or both of the parties is below the age of consent, should or should not, depending upon the circumstances of the case, be annulled. A moment's consideration is sufficient to establish the invalidity of this contention. The statute is not one conferring jurisdiction upon the court. It is one defining and establishing the rights of parties. If a party plaintiff by sufficient proof establish his right to have his marriage annulled under the provisions of § 2351, and the court refused to grant the relief, the court would be just as much in error, as it would be if it refused to grant a divorce under the provisions of § 2356, assuming that cruel and inhuman treatment was by the finding of the court, duly and properly established. The only condition attached by the statute to the right of a party to have a marriage voidable for non-age of one or both of the parties annulled is that the marriage shall not have been confirmed by the party seeking the relief after arriving at the age of consent, which in the case of the wife is 15 years and in the case of the husband 18 years."

We think our statute should receive a similar construction, and the duty of the court to annul the marriage is plain, because the party asking it was under the age

required by law for contracting a valid marriage when this relief was prayed, and the decree of the court below must be reversed, and the cause will be remanded, with directions to enter a decree conforming to this opinion. We do not ourselves render this decree, because the court may find it necessary to make some provision for the maintenance of the child, and it may be necessary to hear testimony in that behalf.

HART, C. J., dissents.

KENDRICK *v.* STATE.

POST *v.* STATE.

Opinion delivered February 17, 1930.

G. C. Carter and *Dave Partain,* for appellants.

Hal L. Norwood, Attorney General, and *Robert F. Smith,* Assistant for appellee.

SMITH, J. Appellants were separately indicted, tried and convicted for selling intoxicating liquors, but the issues raised on their separate appeals are so nearly identical that a single opinion will suffice to dispose of both cases.

A motion was filed in each case for a change of venue, and the supporting affidavits appear to have been made by the same affiants in each case. There were sixteen of these affidavits, but only ten of the affiants were examined on the hearing of the petitions. These affiants gave testimony to the following effect. The death of the sheriff made a special election necessary to select his successor. Mack Ledgerwood, who was one of the candidates for the office, secured the nomination, and was elected, and it was currently stated during the campaign preceding the primary that if Ledgerwood were elected he would send

both defendants to the penitentiary. This statement was repeated all over the county, and with such frequency that it became one of the principal issues in the campaign.

Most of this testimony related to the state of the public mind in the townships of White Oak, Hogan and Alix, but it was shown that all the cities and towns of the Ozark District of the county (in which the venue was laid) were in these three townships, and that they were the most populous townships in the county, and contained about half the population of that district of the county. The testimony was not confined, however, to these three townships. One of the affiants lived in Watalula township; another in Middle township; another in Wallace; and still another in Mulberry township, and all these affiants testified that the talk was general all over the county that if Ledgerwood were elected sheriff he would send both defendants to the penitentiary, and for this reason they were of the opinion that defendants could not obtain a fair and impartial trial in that county.

In the recent case of *Mills* v. *State,* 168 Ark. 1009, 272 S. W. 671, it was said: "The rule by which the trial court should be governed in passing upon an application for a change of venue in a criminal case was restated by this court in the recent case of *Spurgeon* v. *State,* 160 Ark. 112, 254 S. W. 376, where we quoted from the case of *Whitehead* v. *State,* 121 Ark. 390, 181 S. W. 154, as follows: 'The trial court exercises a judicial discretion in passing upon the credibility of the affiants, but its discretion is limited to that question. When the petition for change of venue is properly made and supported, the court has no discretion about granting the prayer thereof, whatever the opinion of the court may be as to its truthfulness. The statute provides no method by which the court may determine the credibility of the affiants, but leaves the question to the court. A number of cases, however, have approved the practice of calling the affiants and examining them as to the source and extent of their information, for the purpose of ascertaining whether or

not they have sworn falsely or recklessly without sufficient information as to the state of mind of the inhabitants of the county as to the accused. But the cases also hold that the statute on this subject does not contemplate that the truth or falsity of the affidavits shall be inquired into, and that the only question for the determination of the court is whether or not the affiants are credible persons, and that all inquiry must be confined to that question.' "

Applying this test to the testimony of the affiants, we think the court was not warranted in finding that they had sworn so recklessly, or had so little foundation upon which to base their opinion as not to be credible persons. If their opinions were correct, and they gave a plausible basis upon which they were founded, the public mind was so inflamed against the defendants, and this inflammation was so wide spread, that the affiants were not open to the charge of having sworn so recklessly as to be unworthy of belief.

It follows, therefore, that the venue should have been changed in each case. See, also, *Sisson* v. *State,* 168 Ark. 783, 272 S. W. 674.

In the case of appellant, Post, the facts were that the trial judge had directed the sheriff to deny bail, and when formal application for bail was made it was refused. In justification of this action the court held, that Post was in contempt of court, in that he had boasted to the sheriff, in a tone that could be heard by the court, that he could make bond up to fifty thousand dollars, and further that it was common talk around the court, and the court offices, that Post had stated that he would make bail, but would not be present when his case was called for trial.

It was not improper for the court to investigate the report that Post had stated that he would abscond and forfeit his bail, but the purpose of this inquiry should have been to ascertain what amount of bail should be required if the report was found to be true, and, if found to be true, the court might have fixed bail in a larger sum

than would have otherwise been required. But, even so, the offense charged was a felony, punishable only by imprisonment in the penitentiary, and the accused had the legal right to give bond for his appearance, and the denial of this right was not conducive to securing a fair trial.

After the jury in the Kendrick case had been considering of their verdict for some time, they returned into court and stated that the jury had stood six to six, but were then divided seven to five, and one of the jurors stated that "It don't look like we can ever agree." Thereupon, over the objection of defendant Kendrick, the court charged the jury as follows: "Gentlemen, I held one jury one time here six days, and they agreed. I have never started out with a jury that they didn't agree. I have discharged juries because I thought something was wrong. I discharged one awhile ago, because I thought there was something wrong, and I am going to have a hearing to see about it."

We have many times held that the trial court had the right to give cautionary instructions on the duty and necessity of juries agreeing upon verdicts, and have not reversed in such cases unless it appeared, that the instruction was coercive in its character. The instruction set out above appears to be of that character, for its purport was that no jury would be discharged until a verdict was returned, unless the court, "thought something was wrong." The jury was therefore confronted with the alternative of being kept together indefinitely or of being investigated if a verdict was not returned, and the instruction was therefore calculated to induce the jurors to make such concessions as were necessary to arrive at a verdict, and the instruction was therefore erroneous. *Stockton* v. *State,* 174 Ark. 472, 295 S. W. 397.

The jury in the Post case also disagreed, and the juries in both cases were brought into open court, whereupon the court charged the juries orally in the presence of each other over the objections of both defendants, as follows: "Gentlemen of the jury, these are two of the

most important cases that have been tried in this court; this is a crucial time; the law enforcement of Franklin County depends on the outcome of these two trials. You can go out and convict them or acquit them, whichever you see fit. I hope you can get a verdict."

We think, under the circumstances, this instruction was erroneous, and prejudicial in both cases. There was no connection between these cases except that the offense charged in each indictment was the same. The jurors were no doubt familiar with the proceedings, which had previously occurred in the court, and the statement that "the law enforcement of Franklin County depends on the outcome of these two trials" appears to be not only a charge upon the facts, but also to carry an intimation that a verdict of guilty should be returned. The language quoted is followed by the statement that "You can go out and convict them or acquit them, whichever you see fit," but that qualification must be construed in connection with the strong language which preceded it. The instruction recognized the power of the jury to acquit or convict, but it told the jury that the exercise of that power was crucial, in that upon the proper exercise of the power depended the enforcement of the law in that county. The import of the language appears to be too plain to be mistaken. The implication is that if the jurors were good citizens, and favored law enforcement, they would return a verdict of guilty. We are sure the learned trial judge was actuated by the laudable motive of attempting to enforce the law, but we think his zeal in this behalf led him to overstep the bounds. Trial judges are not permitted to express an opinion upon questions of fact, or to indicate to juries what in their opinion the verdict should be. However great the exasperation of the trial judge may be that juries do not return the verdict which the law and the testimony would seem to require, they must restrain themselves, and refrain from giving any instruction which contains a charge upon the weight of the testimony. Section 23, Article 7, Constitution.

The instruction which we have just criticized does not appear in the bill of exceptions approved by the court, but does appear in the bill of exceptions made by bystanders, and as there is no controverting affidavit it must be said, as was said of a similar record in the case of *Rebecca* v. *State,* 158 Ark. 265, 250 S. W. 513, that "we are therefore compelled, under the statute, to accept them as a correct statement of the language used by the court. *Wingfield* v. *State,* 95 Ark. 71, 128 S. W. 562." See also *Cox* v. *Cooley,* 88 Ark. 350, 114 S. W. 929; *Boone* v. *Holder,* 87 Ark. 461, 112 S. W. 1081, 15 Ann. Cas. 735.

In the Kendrick case it is insisted that the testimony is insufficient to support the verdict, in that it shows only what the testimony of the prosecuting witness was before the grand jury. We do not so understand the testimony. The witness was an unwilling one, and most of his examination related to his testimony before the grand jury, but we understand the purport of the testimony at the trial from which this appeal comes to be that the testimony which the witness had given before the grand jury, to the effect that he had bought liquor from appellant, was true. The truth of the testimony of this witness at the trial was, of course, a question for the jury.

Certain other errors are assigned and discussed, but as they relate to matters which are not likely to recur, we do not discuss them, but for the errors indicated the judgments must be reversed in both cases, and it is so ordered.

HART, C. J., concurs upon the ground, that the instructions were erroneous and prejudicial.

KIRBY, J., dissents.